

MINUTES

COMMISSION ON STATE MANDATES

State Capitol, Room 447

Sacramento, California

July 31, 2009

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

Absent: Member Sarah Olsen
Public Member

CALL TO ORDER AND ROLL CALL

Chairperson Sheehy called the meeting to order at 9:35 a.m. Executive Director Paula Higashi called the roll and noted that Member Olsen was absent and Member Chivaro would be late.

APPROVAL OF MINUTES

Item 1 May 29, 2009

The May 29, 2009 hearing minutes were adopted by a vote of 4-0. Member Bryant abstained.

PROPOSED CONSENT CALENDAR

INFORMATIONAL HEARING ON PARAMETERS AND GUIDELINES AND
PARAMETERS AND GUIDELINES AMENDMENTS PURSUANT TO CALIFORNIA
CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

PROPOSED AMENDMENTS TO PARAMETERS AND GUIDELINES

Item 15* *Pesticide Use Reports*, 06-PGA-02 (CSM-4420)
Food and Agricultural Code Section 12979
Statutes 1989, Chapter 1200 (AB 2161)
California Code of Regulations, Title 3, Sections 6000, 6393(c), 6562,
6568, 6619, 6622, 6623, 6624, 6626, 6627, 6627.1, 6628
Department of Pesticide Regulation, Requestor

Item 16* *Law Enforcement Sexual Harassment Complaint Procedures and
Training*, 05-PGA-08 (97-TC-07)
Penal Code Section 13519.7
Statutes 1993, Chapter 126 (SB 459)
Department of Finance, Requestor

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

- Item 17* *CalSTRS Service Credit*, 02-TC-19
Education Code Sections 22455.5, Subdivision (b), 22460, 22509, Subdivision (a), 22718, Subdivision (a)(1)(A), 22724, and 22852, Subdivision (e)
Statutes 1994, Chapter 603 (AB 2554), Statutes 1996, Chapters 383 (AB 3221), 634 (SB 2041), and 680 (SB 1877), Statutes 1997, Chapter 838 (SB 227), Statutes 1998, Chapters 965 (AB 2765), Statutes 1999, Chapter 939 (SB 1074), Statutes 2000, Chapter 1021 (AB 2700)
Santa Monica Community College District, Claimant
- Item 18* *Fifteen-Day Close of Voter Registration*, 01-TC-15
Elections Code Section 13303
Statutes 2000, Chapter 899 (AB 1094)
County of Orange, Claimant
- Item 19* *In-Home Supportive Services II*, 00-TC-23
Welfare and Institutions Code Sections 12301.3, 12301.4 and 12302.25
Statutes 1999, Chapter 90 (AB 1682); Statutes 2000, Chapter 445 (SB 288)
County of San Bernardino, Claimant

HEARING ON COURT-ORDERED SET ASIDE AND PROPOSED AMENDMENTS TO STATEMENT OF DECISION ON RECONSIDERATION AND AMENDED PARAMETERS AND GUIDELINES PURSUANT TO GOVERNMENT CODE SECTION 17559 AND CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLES 6 AND 7 (*Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355; Judgment and Writ issued May 8, 2009, by the Sacramento County Superior Court, Case No. 07CS00079) (action)

- Item 20* *Peace Officer Procedural Bill of Rights* 05-RL-4499-01 (CSM-4499)
Government Code Sections 3300 through 3310
As Added and Amended by Statutes 1976, Chapter 465 (AB 301); Statutes 1978, Chapters 775 (AB 2916), 1173 (AB 2443), 1174 (AB 2696), and 1178 (SB 1726); Statutes 1979, Chapter 405 (AB 1807); Statutes 1980, Chapter 1367 (AB 2977); Statutes 1982, Chapter 994 (AB 2397); Statutes 1983, Chapter 964 (AB 1216); Statutes 1989, Chapter 1165 (SB 353); and Statutes 1990, Chapter 675 (AB 389)
Reconsideration Directed by Government Code Section 3313 (Stats. 2005, Ch. 72, § 6 (AB 138), eff. July 19, 2005)

Member Worthley made a motion to adopt items 15, 16, 17, 18, 19 and 20 on the consent calendar. With a second by Member Glaab, the consent calendar was adopted by a vote of 5-0.

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.

**HEARINGS AND DECISIONS ON TEST CLAIMS, PURSUANT TO CALIFORNIA
CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (Gov. Code, §§ 17551
and 17559) (action)**

Paula Higashi, Executive Director, swore in the parties and witnesses participating in the hearing.

TEST CLAIMS

- Item 3 *Municipal Storm Water and Urban Runoff Discharges*, 03-TC-04,
03-TC-19, 03-TC-20, and 03-TC-21
Los Angeles Regional Quality Control Board Order No. 01-182
Permit CAS004001, Parts 4C2a., 4C2b, 4E & 4Fc3
County of Los Angeles, Cities of Artesia, Beverly Hills, Carson,
Norwalk, Rancho Palos Verdes, Westlake Village, Azusa, Commerce,
Vernon, Bellflower, Covina, Downey, Monterey Park, Signal Hill,
Co-Claimants

Chairperson Sheehy stated and Ms. Higashi confirmed that 20 minute time limits were allotted for the claimants, their attorneys and their witnesses; and 20 minutes for the state agencies.

Eric Feller, Senior Commission Counsel presented this item. Mr. Feller stated that in this test claim, the claimants allege various activities in a permit issued by the Los Angeles Regional Water Quality Control Board. The activities include placement and maintenance of trash receptacles at transit stops, and inspections of restaurants, automotive service facilities, retail gasoline outlets, automotive dealerships, Phase I industrial facilities as defined in the permit, and construction sites to reduce stormwater pollution in compliance with the permit.

There are three issues in dispute:

- 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, and indeed exceed federal law.
- Whether the claimants have fee authority to place and maintain trash receptacles at transit stops. Staff finds that the claimants do not have fee authority to do so.
- Whether the claimants have fee authority to inspect construction and industrial sites already inspected under statewide industrial or construction permits. Staff finds that they do have fee authority for these inspections.

Therefore, staff recommended that the test claim be approved only for the placement and maintenance of trash receptacles at transit stops, but denied for the inspection activities as stated in the analysis.

Parties were represented as follows: Leonard Kaye and Judith Fries, County of Los Angeles; Howard Gest, on behalf of the claimant cities; Michael Lauffer, Los Angeles Water Board and the State Water Resources Control Board; Carla Castaneda and Susan Geanacou, Department of Finance and Geoff Brosseau, Bay Area Stormwater Management Agencies Association (BASMAA).

Leonard Kaye, County of Los Angeles stated that this particular test claim is limited to the Los Angeles Regional Water Quality Control Board Order No. 01-182, Part 4C2a, Inspection of Certain Commercial Facilities; Part 4C2b, Inspection of Industrial Facilities; Part 4E, Inspection of Construction Sites; and Part 4F5c3, Installation and Maintenance of Transit Trash Receptacles at Transit Stops, and defines the permittees as the County of Los Angeles and the 84 incorporated cities within the Los Angeles County Flood Control District.

(Mr. Chivaro entered the meeting room.)

Mr. Kaye concurred with the staff analysis on the following issues: (1) the duty to apply for an NPDES permit is not within the claimant's discretion and that the state freely chose to impose transit trash receptacle requirements on the permittees because neither the federal statute nor the regulations require it; and (2) the county has no fee authority to charge either the bus operators or the bus riders a fee.

Mr. Kaye explained that the county believes it has insufficient fee authority to conduct inspections on all of the items it is required to inspect. He said they have found instances where the inspection activity comes under Proposition 218, and cited Attorney General Opinion No. 97-1104, that distinguishes two systems. One is the sanitary water system and the other is the stormwater management system. The county believes that the stormwater management system is not exempt from the requirements of Proposition 218, and believes the Attorney General opinion concurs with their position.

Mr. Kaye stated that the Legislature also concurs that there is insufficient fee authority to conduct inspections. SCA 18, for example, seeks to add stormwater and urban runoff management to the three other areas that are exempt from Proposition 218. Currently, sewer and water systems and refuse collection services are exempt from Proposition 218; but stormwater and urban runoff management is not.

Mr. Kaye cited Commission staff's argument that the whole area of the fee authority for inspections is a case of first impression. He reviewed staff's finding that certain types of code sections are clearly legally insufficient, particularly Health and Safety Code section 5471, which makes no mention of inspecting commercial or industrial facilities. Rather, the fee revenues are used for maintenance and operation of storm drainage facilities.

Mr. Kaye concluded by reviewing staff's analysis that they cannot find that the claimants have statutory fee authority sufficient to pay for the mandated program because operation and maintenance of storm drainage facilities does not encompass the state-mandated inspections of the facilities or construction sites specified in the permit.

Mr. Howard Gest, representing the city claimants, concurred with Mr. Kaye's statements. He agreed that the trash receptacle obligation is a state mandate and that the cities do not have the authority to impose fees to meet that obligation. Statutes provide that the metropolitan transit districts have exclusive fee authority, and cities cannot impose fees on transit riders.

Mr. Gest addressed the issue of "state permitted" or "Phase 1 facilities" facilities that hold a stormwater permit issued by the State Water Resources Control Board. The staff analysis stated that the obligation to inspect these facilities is a mandate imposed upon the cities because the state chose to do that. In fact, the state could inspect those facilities themselves. However, staff found that the cities could assess a fee to inspect those facilities.

Mr. Gest argue that industrial facilities or construction sites that are obligated to get a permit from the State Water Resources Control Board or the local Regional Water Quality Control Board pay a fee to the state. The Legislature has specifically stated that a portion of that fee is meant to be used to implement an inspection program. It is the cities' position that the state has preempted the cities from assessing a fee for that obligation. If the cities assessed a fee, these permitted facilities would be paying once to the state and once to the city. This is a classic case where the state is taking money from the private party but not providing the service. The state is shifting that service obligation to the cities that bear the cost but do not get the revenue, but not sharing the fees with local government.

The inspections were only imposed in 2001. There was a stormwater permit issued to the cities in 1991, 1996, and 2001. In 1991 and 1996, none of these inspection obligations were in the permits. Neither was the trash receptacle obligation. Only in 2001 was it imposed. That shows that it is not a federal mandate. If it was a federal mandate, it would have been imposed starting in 1991.

Judith Fries, Principal Deputy County Counsel stated that the comments made by Mr. Gest apply equally to the county as well as to the cities.

Michael Lauffer, Chief Counsel for the State Water Resources Control Board, stated that he has lived this round of permitting since the 2001 permit was adopted. It has been litigated through the courts of appeal to the California Supreme Court.

Mr. Lauffer commented that Commission staff has done a very good job embracing a fairly complicated body of law that courts routinely recognize as some of the most difficult issues that come before the courts. The staff analysis does a very good job understanding the interplay of federal and state permitting. However, the Water Board has significant concerns with the fundamental conclusion in the staff analysis, and urges rejection of staff's conclusion that these are state mandates as opposed to federal mandates.

The primary issue is that the test claim requirements on the 84 municipalities emanates exclusively from federal law. It is a requirement of federal law that these municipalities reduce the pollutant discharges and their municipal stormwater discharges to the maximum extent practicable.

Commission staff looked at case law and concluded, in a very oversimplified way, that because the federal law itself does not specify the permit requirements, that span a 72-page permit and an administrative record that spans tens of thousands of pages, they are not federal mandates. Federal law establishes a standard that all municipalities of the size of the County of Los Angeles must meet. Then federal law establishes an obligation on the permitting entity, which is the Los Angeles Water Board, to take this general federal requirement, known as the "*maximum extent practicable*" standard, and convert it into real programs and real requirements. Federal law requires this of the permitting agencies. Mr. Lauffer stated that this two-step process maintains this permit as a federal mandate, and does not make it subject to subvention under Article XIII B, section 6 of the Constitution. A secondary issue is that the analysis discusses prior litigation involving this particular permit, and makes some statements that are incorrect.

With respect to trash receptacles, the final staff analysis reverses a prior conclusion of staff that was in the draft analysis, and finds that there is no fee authority. Mr. Lauffer said he was provided with insufficient time (20 days) to consider that particular issue. The Water Board has not had an opportunity to consider the interface between the Metropolitan Transit Agency (MTA), which actually operates most of the transit facilities, and the municipalities. He said he believes that there is statutory authority for the county and the municipality, or the other municipalities, to recoup some of those costs through the MTA.

Mr. Lauffer repeated that the fact that the water boards have an obligation under federal law to convert a general federal requirement into specific requirements does not strip the requirements of their federal character. Mr. Lauffer noted that this issue is very novel and there is no analogue in mandate case law. He stressed the importance of the commissioners and their designees to think very carefully about what is being decided.

Under federal law, municipalities have to reduce pollutants in their stormwater discharges to the maximum extent practicable. Mr. Lauffer made reference to a handout with a provision that shows the relevant Clean Water Act section. That section also states what the stormwater

discharge permits must contain. So there is an abstract federal standard; reduce pollutants to the maximum extent practicable, followed by a requirement that the permits that actually reflect that standard contain the controls.

Mr. Lauffer commented that Commission staff is doing a yeoman's job trying to find the right paradigm by which to analyze these test claims. What staff has turned to is the *Long Beach Unified School District* case. This is a desegregation case where the state required all district, whether or not they had a history of segregation, to undertake a number of activities to desegregate, and to study and analyze whether they needed to desegregate. The decision states that because the requirements go beyond the general desegregation requirement, they created a state mandate. Mr. Lauffer said the *Long Beach* case is not on point because there was no federal requirement on the state to desegregate its districts.

Here, there is a federal law that requires all of the permitted municipalities to reduce pollutants to the maximum extent practicable. There is essentially a second federal mandate on the permitting agencies. The Los Angeles Regional Water Quality Control Board is to take this abstract concept of "maximum extent practicable," and convert it into specific requirements and specific pollutant-reduction measures so that the federal standard can be met.

Mr. Lauffer commented that staff missed the importance of that final step. These are particularized permits that have to be developed by a highly technical staff at the Water Board. If the Water Board was not doing it, U.S. EPA would be going through the same exercise. They would be receiving an application. In this case, the application from the municipalities was more than 100 pages. They would then have to look at the programs that are proposed and develop them into a permit. In this case, the permit was over 70 pages. The administrative record was tens of thousands of pages. The fact sheet was 50 pages. Bridging the gap by taking this federal mandate and making it explicit and specific is what the water boards were doing; and they were doing it as a matter of federal law.

Mr. Lauffer conceded that the permit requirements are more specific than what appears in the federal Clean Water Act. He explained, however, that is because of the Board's responsibility to translate that federal principle of "maximum extent practicable" into specific programs and permit requirements that will reduce pollutants. This is a highly technical inquiry. It involves balancing a number of factors in order to determine what is the maximum extent practicable.

For example, it may be practicable for the municipalities to install trash receptacles at transit stops as opposed to achieving a comparable level of pollutant reduction by putting treatment devices into a storm drain to try to remove all the trash.

The Board made specific findings when it adopted this permit that it was designed to implement the federal "maximum extent practicable" standard. It did that in three different places in the permit. That issue was the subject of litigation in both the trial court and court of appeal. In no instance did the courts find or construe any of the permit provisions to exceed the "maximum extent practicable" standard.

Mr. Lauffer reviewed how pollution permitting works in California because there is a federal law that says there is the maximum extent practicable reduction from stormwater discharges. This is designed to implement a broader prohibition within the Clean Water Act that persons, including municipalities, cannot discharge pollutants without a permit. In California, the way to get this federal permit is to come to one of the California water boards. California water boards have historically issued these permits to all persons; individuals, corporations, municipalities, state agencies.

In California, it is the water board's responsibility to translate these federal requirements. All of the federal regulations are the board's own regulations that they follow and implement and have incorporated into law.

From municipal stormwater permits, U.S. EPA made a call when they developed their regulations that it is too variable. A more specified program was needed but it needed to be developed on a municipality-by-municipality basis. Rather than creating general standards, they said, "municipalities, you go to your permitting agency." And these regulations that U.S. EPA adopted go on to say that it will be the permitting agency's responsibility to ensure that the application and the programs described by the municipalities actually reflect the federal minimum standard of "maximum extent practicable."

A number of environmental groups challenged those regulations. The courts upheld them because they bought U.S. EPA's argument that these regulations have to be developed on a customized basis, and that ultimately, the permitting agencies will have to ensure that the permits and the programs that either are proposed by the municipalities or that are proposed and then modified by the permitting agencies, actually reflect that "maximum extent practicable" standard. That is the *NRDC* decision that is cited on the next page of the handout. The water boards have been trying to make this clear to the staff since the outset of this test claim. It was in the April 2008 submittal and it was really a key issue in our most recent submittal back in June. And yet this decision is never once cited by the staff analysis.

California courts have looked at this issue in the *City of Rancho Cucamonga* decision that is also on page 2 of the handout. They made it crystal clear that it is the permitting agency's responsibility and discretion to decide the practices, techniques, and other provisions that are appropriate and necessary to control the discharge of pollutants. That is a facet of federal law that the regional board must comply with requiring detailed conditions for the NPDES permits.

The Los Angeles Water Board received a 100-page application from the municipalities; went through an intensive public process to figure out whether or not that application reflects the federal minimum requirements; then issued a permit, after extensive public hearings and a mammoth administrative record that reflects the "maximum extent practicable" standard. They then explicitly said that that is what they're trying to do; that the permit and all of its programs collectively, including the programs developed by the municipalities, are designed to reflect this. And yet now the courts agree with the water boards, never finding that there's evidence that the permit exceeds the federal standards.

Mr. Lauffer said the municipalities have argued that the permit exceeds the federal minimum standards. They've done that to try to require the boards to make additional findings and to undertake additional activities. The courts have rejected that. The water board has rejected it. U.S. EPA has said the permit doesn't exceed the "maximum extent practicable" standard. And yet here we are eight years later, making the same arguments.

Staff says that the permit exceeds the federal requirements because of its specificity. The problem with that is, as a matter of federal law, the permits are required to be specific. That makes them enforceable. That ensures that we can actually see the pollutant reduction that federal law requires.

If specifying the controls reflecting a federal standard becomes a state mandate, then the water board has huge issues with respect to all of its municipal stormwater permits because the federal regulations simply require an application from the municipalities. They do not spell out what is required to meet the "maximum extent practicable" standard.

So, for all of the municipalities that are required to have municipal stormwater permits in California, the staff's finding here is essentially that a federal requirement does not mean a thing because the specificity is coming from the water boards. Therefore, it is converting these federal requirements into a state mandate that is potentially subject to subvention.

Mr. Lauffer cited to page 28 of the final staff analysis, for staff's characterization of some of the prior litigation on this case. One of the issues in the staff analysis is the plaintiffs' challenges to the permit was that the regional board was required to consider economic effects in issuing the permit. By not doing so, the plaintiff alleged the permit imposed conditions more stringent than required by the federal Clean Water Act.

Mr. Lauffer asserted that characterization was the exact opposite of what was being litigated in that case. The argument was that the permit did exceed the federal minimum standards. The Courts did not believe that there was a showing that it exceeded the federal standards, and, therefore, there was no need for the water boards theoretically to do a separate independent economic analysis, although the Court found that it did. So that is clearly an error in the staff analysis that needs to be corrected. In Part 4J of that opinion, the issue of inspections was specifically litigated, and the Court of Appeals specifically upheld the regional board's imposition of inspection requirements.

With respect to the transit stops, Mr. Lauffer's preliminary analysis is that the Public Utilities Code, specifically section 30702, under the *County of Fresno* decision would allow an alternative non-tax basis for the municipalities to get the fees for trash receptacle placement. However, the Water Board has not had sufficient opportunity to address this issue carefully.

Carla Castañeda, the Department of Finance, stated that Finance agrees with the staff analysis that police power authority for fees does not apply to the transit trash receptacles. Along with the Water Board, Finance looked for specific authority elsewhere for the transit trash receptacles and had been looking for something similar to this. Finance has not looked at the code section cited by Mr. Lauffer.

Also, along with the Water Board, Finance disagrees with the staff conclusion that the permits, since they are issued by the state, are mandates. These are federal requirements to issue permits. It is only when the activities within the permit exceed trying to do the maximum extent practicable, that there is a reimbursable mandate. Finance has not seen that here.

Mr. Gest stated that the staff analysis addresses the arguments made by counsel for the State Board extensively. The argument is not that the permit obligations exceed federal requirements because it is so specific. The argument is that the Regional Board and the State Board went beyond what federal law required in imposing certain specific obligations. That is a different argument.

Out of the 70-page permit, many, many obligations were not appealed to this Commission. The Cities did not argue that there were obligations that required a subvention of funds. However, these particular obligations; the inspection obligations and the trash receptacle obligations, did exceed what was required by federal law. This is not just a question of whether or not this is a federal program. The question is whether or not it exceeds federal requirements. Did the state freely choose to impose these requirements on the cities or the county, as opposed to keeping it for themselves? The staff analysis goes into this extensively and the facts prove that it is not federally required.

Mr. Gest cites a regulation that specifically identifies what type of facilities should be inspected. These commercial establishments such as restaurants and auto shops are not the facilities that the federal regulation requires to be inspected.

Mr. Gest pointed out that the State Board and the Regional Board have, throughout this whole permitting process, argued and asserted that they have the authority to go beyond federal law and impose additional requirements. The California Supreme Court, in *City of Burbank*, recognized that in an NPDES permit like this, it cannot only impose federal requirements, but it can exceed federal requirements.

Under the law, if the permit exceeds federal requirements then it can be a mandate. And so the cities pointed out that for both of those reasons, these specific requirements are not federally required. The evidence is in the record.

If the permit requirements were federally required, they would be in a federal permit issued by EPA. As counsel for the State Board noted, EPA could be issuing stormwater permits. They have issued stormwater permits to other municipalities, and they have not required the installation of trash receptacles or the inspection of these facilities. That information is set forth, on page 2479 of the administrative record, in a declaration made by Julie Quinn who surveyed these different EPA-issued permits. So if EPA is not requiring it, obviously the State decided to go beyond what the federal law requires.

In addition, if the state chooses to shift the obligation to the cities, even if it comes out of the federal program and it's federally required, if the state is choosing between itself doing the inspections or having the cities or the county do it, then it still can be a mandate. The question is, given the facts, is this required by the Clean Water Act? Can you find it in the statute? Can you find it in the regulations? If not, then the Regional Board may have the authority to impose it, and that's what the court cases said in the litigation referred to in the past, that it wasn't unlawful to impose it, but those courts specifically said, "We are not deciding whether it is entitled to a subvention of funds."

In fact, in the case, *County of Los Angeles v. the Commission*, the Court said, "That is an obligation of this Commission first, in the first instance, to make that analysis and make that determination." Mr. Gest asked the Commission adopt the staff recommendation, except for the provision that holds the general industrial and general construction stormwater permits are not mandated.

Chairperson Sheehy asked why the requirement for the trash receptacles was placed on cities and counties instead of directly on the transit agencies who clearly have the authority to levy fees.

Mr. Lauffer responded that this was done to ensure that those municipalities who were not subject to the separate federal requirement known as a TMDL or "total maximum daily load," requirement would be making progress to remove trash. Transit stops were identified as a high source of trash emanating into the municipal storm sewer system. The permits in this particular instance are specific to these municipalities. The transit agencies were not named historically on the permits. Perhaps it is something that the Water Board may look at in the future.

Mr. Lauffer stated that nothing would prevent the municipalities from working with the MTA to either cooperatively implement or to have the MTA carry out the primary obligation for meeting it.

Chairperson Sheehy asked who, under current practice, is required to do the maintenance of those facilities: MTA, or cities and counties. Mr. Lauffer stated that he could not speak to that question but believed generally that public agencies and the MTA may work collaboratively and establish agreements.

Ms. Fries stated that she believes that the facilities are maintained by the transit agencies. The trash receptacles themselves, however, because they've been placed by the county or the cities, are maintained by the agencies that have placed them.

Chairperson Sheehy clarified that the trash receptacles were placed there by the counties and cities because the counties and cities were directed to do that. Ms. Fries confirmed they were directed through this permit.

Chairperson Sheehy commented to Mr. Lauffer that it seemed to make sense that when that permit was done to have the transit agencies be responsible, at least at a minimum, for the design and the installation and the upkeep of those receptacles. The actual emptying of them could have continued to be part of the regular refuse-collection process for that jurisdiction.

Member Worthley asked if the fees charged to Phase 1 facilities by the Regional Water Quality Control boards, 50 percent of which is to be allocated to inspection, are set by statute or do the Regional Water Quality Control boards set their own fees for this purpose.

Mr. Lauffer responded by saying that the fee is actually established by the State Water Resources Control Board based on the legislative appropriation for the boards to carry out their responsibilities. That money is expended for inspections and for stormwater-related activities at Phase I facilities. That money is expended fully by the regional boards and the State Water Board for that specific purpose.

These particular facilities have been identified, within the Los Angeles region as part of the permit application process, as a significant and critical source of pollution and subject to additional permit requirements as the Board carried out its responsibilities under federal law.

Member Worthley asked if the fees are set by local jurisdictions based upon the costs of providing the service.

Mr. Lauffer responded that, for this particular fee program, it is not a fee-for-service approach. Instead, the fees are set with a rough nexus to the overall effort that the water boards will expend. In a particular year, a facility may not be subject to inspections. In subsequent years, they may. The actual costs in those years may exceed the fee collected during that year. The fees have a nexus, but it is not a pure fee-for-service approach.

Member Glaab asked Mr. Gest to clarify his earlier comment with regards to cities being required to do inspections but not getting the fee because they do not have the ability. Mr. Gest responded that Phase I facilities, facilities that hold a permit issued by the State Water Resources Control Board, are required by law to apply to the State Board for a general permit from the Regional Board. As stated by its own counsel, the State Board estimates how much in fees to collect from these facilities in order to run that program. They assess the fees and the facilities pay the fees to the state. There is legislation that says that a portion of the fees is meant to be used for inspection.

In 2001, the Regional Board put the obligation of inspection on the cities and the county, but continued to assess the fees which precluded the city from then assessing a second fee on that facility for the same activity

Mr. Lauffer countered that the Los Angeles Water Board did not abdicate its responsibility to do inspections in the Los Angeles area for these facilities. Those inspections in that program continue.

Mr. Lauffer said the court rejected the arguments by the counties and some of the cities that the State Board and the Regional Board have to do the inspection requirements and the municipalities cannot. These facilities were identified as key sources of pollution. The municipalities were required by the permit and essentially by federal law, to establish ordinances to deal with these pollution sources. The inspections are designed to assure compliance with those local municipal ordinances.

Chairperson Sheehy asked to hear from staff on the issue of the State preempting the locals from charging a fee.

Mr. Feller referred to pages 64 to 70 of the staff analysis. The courts have laid out the standards for preemption. The first thing that a court looks to is whether the Legislature has expressly manifested its intent to occupy the field. There is no such legislative intent in the fee statute for the Water Board inspections.

The court then looks to implied preemption, and those standards are in that second full paragraph on page 65. The first is "Whether the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern..." Staff did not see that on the face of this statute. The second is "The subject matter has been partially covered by general law, couched in such terms as to indicate clearly that a paramount state concern will not tolerate further additional local action." The third is "Where the subject matter has been partially covered by general law and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality."

Mr. Feller stated that staff did not see that any of those applied to this state statute. They did not find that it preempted the fee authority for the local agencies.

Mr. Feller also explained that while the local agency's argument is that because the state inspections and now local inspections are required, local entities are being double-charged. However, it is staff's position that these are actually two programs, a state program and a local program. Under the general permit, the facilities pay the state; whereas under the Regional Water Board permit, the municipalities pay for the inspections. So, they are paying two different entities, and these are two different programs.

Chairperson Sheehy asked if part of the fee that the state levies on the permittees is necessary for covering inspection costs. Mr. Lauffer replied that part of the permit fee is to go to the State Board and the Regional Board's budgets for inspections. The Legislature wanted to ensure that the State Board and the Regional Water Quality Control Boards were getting out and inspecting the facilities.

Chairperson Sheehy asked if some of that local fee is coming back to the State Board and who sets the fee. Mr. Lauffer responded that the fee is set by the State Water Resources Control Board. The State Water Resources Control Board provides all of the fee and the administrative support services for the regional boards. The State Board sets the fees and collects the fees. Then, subject to the appropriations limitations by the Legislature, the Board is responsible for handling the budgets for the Regional boards. The Board has processes in place to ensure that the Regional boards get their allocation and they are carrying out their inspections.

Chairperson Sheehy asked if state inspectors inspect each one of the permittees. Mr. Lauffer stated that the inspectors are state employees. Whether they are state or regional Water Board employees, they use a team approach to inspect the facilities. There may be a period of time between inspections at individual facilities, and they certainly do not inspect each facility each year. If the State inspected one of these facilities within a period of the last year or last three years, the municipalities do not have to perform their own inspection under their program.

Chairperson Sheehy asked Mr. Gest if the cities inspect a facility that has already been inspected by the state. Mr. Gest responded that the state does not inspect all of the facilities. If they were inspecting all the facilities, they would not have imposed this obligation on the cities. The permit says that if the State has not inspected this facility that holds this state permit, the cities or the county are legally obligated under the permit to do that inspection. The city or the county is

doing an inspection that the State has taken money for from the permittees. The city or the county is doing the inspection and incurring the cost of the inspector.

Chairperson Sheehy asked Mr. Lauffer if they are collecting inspection fees as part of the permit fee for facilities that they do not inspect. Mr. Lauffer responded that the facilities are ultimately inspected.

Chairperson Sheehy again asked if the State Board is collecting money, as part of its permit fee, for inspections for facilities for which it does not do, and then, defaulting to the city or county jurisdiction to do it. Mr. Lauffer stated that ultimately the State will inspect them

Chairperson Sheehy asked what the federal law requires for frequency of inspections.

Mr. Lauffer stated that there are tens of thousands of permittees subject to that permit, and no independent federal requirement as to how often the State Board or a Regional Water Quality Control board has to conduct inspections at those facilities.

The Water Board receives annual reports from those facilities and review those reports, both at the State Board and primarily at the Regional Board levels. The inspections are something that is part of our Compliance Assurance and Enforcement Program, and there are work plans that each of the regions develop. The Los Angeles region has its own work plan. At times, it works with the county and the other municipalities in that region so that the state and regional boards are hitting all of the facilities in an orderly and efficient way. But the region has its own work plan where it ultimately tries to work through every single one of its facilities.

Chairperson Sheehy asked what percentage of the permitted facilities the State inspects in any one calendar year. Mr. Lauffer did not have that information.

Mr. Kaye pointed out that, on page 67 of the Commission staff analysis, California's 1994 Water Quality Inventory Report states that stormwater and urban runoffs are leading sources of pollution in California estuaries and ocean waters. Proponents argue that noncompliance is rampant, with approximately 10,000 industries in the Los Angeles area alonethat were required but have failed to obtain stormwater permits. Further, the proponents point out that the Los Angeles Regional Water Quality Control Board has only two staff to contact, educate, and control each site, and question whether adequate revenues are returned to the regional boards for this program.

Member Worthley stated that 50 percent of the funds collected go towards regulatory compliance.

Chairperson Sheehy stated that it does not necessarily mean inspection.

Member Worthley stated that regulatory compliance is all about inspection. The expectation is that when someone pays that fee, that facility is going to be inspected. That is what they are paying for. If the county or municipality claims that they did not get around to inspecting this year, so they are going to charge an additional fee, the owner could think he is paying double.

If there is not adequate funding generated from the State then that is the State's fault. They may have not adequately done their analysis in determining how much money they should be charging people to do these fees They have just simply failed perhaps to get enough money to do the job correctly. They cannot push that burden on the local government by charging to have another inspection. The State has occupied the field. It should not be pushed back on local government.

Chairperson Sheehy asked if there is a significant or fundamental difference in the type of inspections that are done, whether it is the state or local government doing the inspection.

Mr. Lauffer responded that, at this point in time, the municipal ordinances are basically duplicating. The municipalities, while they have identified these particular classes of facilities as a significant critical source of pollution to their municipal stormwater systems, have not taken the next step. These permits are iterative. Each iteration gets more stringent as the Board identifies what the sources of the pollution are, and as agencies recognize that they are not doing the job that needs to be done to reduce pollutants to the maximum extent practicable.

Municipal ordinances are largely replicating the state requirements. However, the permit requires them to develop their own ordinances in order to assure that the discharges from these critical sources are controlled.

Chairperson Sheehy asked staff if the federal requirement requires a state and a local inspection or does it just require one inspection.

Mr. Feller stated that federal regulations do not say whether the state or local agencies have to conduct inspections. The locals do not need to inspect it if the State already has. This only applies to industrial facilities. The permit does not say that about construction sites. As far as the federal law that was quoted in the analysis, it only calls for inspections of construction sites. It does not call for inspections in the regulations of industrial facilities.

Member Glaab commented that given our limited resources and that the job is not getting done, somebody should figure out a way to divide this up so that the business or job site gets at least one inspection and the state is billed for that inspection. For example, the Department of Housing and Community Development relinquished their ability to do building inspections and the city gets to collect the fee directly. It seems to be a system that works fairly well.

Member Bryant clarified that the permit standard is to develop, achieve, and implement a timely, comprehensive, cost-effective stormwater pollution control program to the maximum extent practicable. Every condition that is in the permit is part of that permit.

Mr. Lauffer confirmed that that is a correct and simplified way to look at it.

Mr. Gest stated that there is a significant disagreement about Member Bryant's statement. It is the State Water Board's argument that everything in the permit complies with the "maximum extent practicable" standard. However, it is the county's and the cities' argument that the permit goes beyond what the federal regulations require. In particular, it goes beyond the MEP standard.

Member Bryant asked once the permit is issued, how one protests that the state has gone too far.

Mr. Gest stated the State Board has vigorously argued and the courts have upheld that the State has the authority to impose, in an NPDES permit, requirements that exceed federal law.

The challenges to all of these obligations, both originally and in state court that sought subvention of funds were immediately dismissed. The court said that issue has to go before the Commission on State Mandates. So this whole specific issue of, whether it exceeds federal law and is entitled to a subvention of funds really is, for the first instance, before the proper forum, which is this Commission.

As to whether it exceeds federal law, the State Board argued that they have the right to impose obligations that go beyond federal law. And that was litigated. We would say that the courts held in the litigation that the State had the authority to impose these obligations. It was not inconsistent or in violation of federal law, but they did not address whether it was within federal law or exceeded it. That is our position.

Mr. Lauffer stated there are three different permit findings that indicate that the permit, taken as a whole, is designed to reflect the "maximum extent practicable" standard. In other words, not that it is relying on any reserved authority to exceed it. The permit taken as a whole, including trash receptacles, reflects the "maximum extent practicable" standard.

Mr. Gest's client in the prior litigation was solely the County of Los Angeles. Many of the cities who he is now representing in this particular claim also litigated the permit. The permit went before the State Board, and then it went to superior court. The issue of whether or not it exceeded the "maximum extent practicable" standard was a core issue of that litigation.

Now, in many respects, the courts were finding that, indeed, the Board had the authority to go beyond MEP, if it wanted to. Mr. Lauffer did not disagree with Mr. Gest's characterization that the California Supreme Court and the trial courts have said the boards could impose state requirements that are more stringent than federal law. This matter was aggressively litigated. One of the core issues in the motion for new trial was that it was more stringent than federal law; that it went beyond the federal "maximum extent practicable" standard. Because under California Supreme Court jurisprudence not related to subvention, there is a whole host of other obligations that would kick in with respect to what kind of analysis the water boards would have to do if they exceeded the federal requirements.

The courts found that they did not, and that the permit does reflect the "maximum extent practicable" standard. Mr. Lauffer agreed with Mr. Gest about the import of the Court's findings. They change how the boards analyze their responsibilities under the state water quality laws. The court findings also affect subvention because if the board is not going more stringent than the "maximum extent practicable" standard, then the permit is still a federal mandate. The permit findings state intent to reflect that federal standard.

Ms. Shelton stated that, in all those prior cases and prior litigation, none of the cases dealt with any mandates law. They did not deal with the *Hayes* case or *Long Beach Unified School District* and the standards that have been established for mandates law. Under *Hayes*, the Court established how the Commission is required to analyze whether there is a federal mandate or a state mandate and whether the state has really imposed any costs on a local agency.

The *Long Beach Unified School District* case was a situation where existing federal and state law prevented racial discrimination in the schools or desegregation in the schools. The courts did not explain to or tell the school districts how to do that. The State stepped in and issued an executive order specifically requiring the schools to take specific steps.

The Second District Court of Appeal did find that those specific steps were reimbursable when compared to existing decisions of the court interpreting federal law. So those are the mandate issues that have not specifically been addressed, and specifically not addressed in this litigation which has been occurring for ten years.

Chairperson Sheehy clarified that there is a staff recommendation which is a partial approval of the test claim and a partial rejection with staff approving the part of the test claim dealing with the trash receptacles.

Ms. Castaneda stated that Finance only agreed that the police-power fee authority does not apply. They had not had a chance to look at the Public Utilities Code reference to see if there was other fee authority.

Ms. Shelton clarified that today is the first time staff has heard of the Public Utilities Code reference.

Member Worthley moved the staff recommendation with the modification as it relates to Phase I projects, that the field has been fully occupied by the State relative to the charging of fees for those inspection purposes and would, therefore, find that any additional costs incurred by local jurisdictions would be a reimbursable mandate.

Mr. Feller clarified that the motion was specifically speaking to Phase I facilities that are covered under a general statewide permit. Member Worthley confirmed that statement. Chairperson Sheehy asked which ones that would not cover. Mr. Feller stated that staff does not have that information in the record as to facilities that are or are not covered under the Phase I permits.

Chairperson Sheehy asked the parties to speak to the issue so that Mr. Worthley's motion, as stated, would be to approve the staff recommendation and then go beyond it.

Mr. Gest responded that with respect to a facility that has to apply to the State Board for a General Industrial Activities permit, or a General Construction Stormwater permit, the cities or the county cannot assess a fee for that, and they would be entitled to a subvention of funds. That is to distinguish them from the other commercial facilities, such as restaurants, retail gas outlets and automotive dealerships which, as Member Worthley pointed out, acknowledge that they have the ability to charge fees.

Chairperson Sheehy asked that in the situation where the State has levied a fee, are locals prevented from levying a fee or do they just not want to double-charge their constituents. Mr. Gest replied that their argument is that if it is fully preempted; they are legally prevented.

Chairperson Sheehy asked why it is fully preempted. Member Worthley restated his reasoning for it because specifically, the State is required to charge people for those applications for purposes of inspection. It is already part of the statutory framework. The fact that they are not charging enough is their problem.

Chairperson Sheehy asked that if the cities and county do an inspection, why they cannot charge a fee. Member Worthley replied it was because it has been preempted by the State. If they have been preempted by the State, local governments are prevented from that.

Chairperson Sheehy asked if the locals are asserting that it is preempted, or is it legally preempted. Ms. Shelton responded that it has not been decided by the court. The cities are making an argument that it has been preempted.

Chairperson Sheehy asked the claimants that, if they inspect a facility that has not been inspected in three years; and the State has already collected a permit fee, some portion of which has been ostensibly collected for doing an inspection, are they legally barred from trying to collect a fee also. Ms. Fries stated that they certainly have not tried to impose a fee that they believe they are not legally authorized to impose. If the county or the cities were doing an inspection for some reason that was not required by this permit, then naturally, they would believe they had the authority to impose a fee for that. However, for the inspections that they are doing solely because they are required under this permit and the fee has been collected by the state, they believe they do not have the authority. Their ordinance, which does impose fees for other types of inspections, specifically does not require fees for these inspections.

Chairperson Sheehy asked staff how the issue of the preemption gets resolved legally and does it get resolved through this process. Mr. Feller stated that if the locals did try to impose a fee, then a party could bring it to court and it would be judicially decided whether or not that was preempted by the state law. Or, it would be a double-fee imposed on them by the State and the local agencies, and, therefore, it would be a special tax subject to a vote under Proposition 13.

Ms. Shelton added that the Commission has the authority to make the decision whether or not the claimants have fee authority. It is a difficult analysis because it is not stemming from a statutory fee authority but rather from the Constitution, and it is within their police power. The other issues presented by the claimants are that they do not have the police power to impose a fee authority because that fee authority is preempted by the State.

Member Worthley specified his motion that local jurisdictions do not have the authority under these circumstances to assess a fee.

Ms. Shelton concurred that that would be the appropriate motion to approve reimbursement for the inspection of the Phase I facilities that the cities and counties have to inspect only if the State did not inspect them.

Ms. Higashi clarified that these are only the facilities that would have paid that state fee.

Mr. Feller stated that there is also a statewide fee for construction sites; a statewide permit that the landowner pays when there is construction on the property. So there are two statewide general permits and the motion is only for the industrial.

Chairperson Sheehy asked the reason why, in the motion, that construction was excluded.

Member Worthley stated that normally, in a construction project, there are inspections. So if the State is charging an inspection fee for construction, they are doing the inspections. Therefore, in construction, it is a non-issue for the claimants.

Mr. Gest responded that, indeed, it is an issue. The inspector for the State Board, who is inspecting that construction site is only inspecting for compliance with the state-issued permit, and not for other matters. A local city has inspectors there for many different reasons. However, this permit imposes an obligation to inspect not only for compliance with municipal law such as construction or grading issues, but also for a determination as to whether that construction site is complying with the stormwater permit issued by the State.

This, of course, creates an incremental cost. There is an additional cost on the city inspector. The State's only function is to inspect for compliance with the stormwater permit.

Member Worthley asked then if the Regional Board is charging a fee for inspection.

Mr. Lauffer replied that there is an annual fee. There is also a new permit fee that construction sites that are subject to this general permit have to pay. These funds all get aggregated and 50 percent of the funds are to be used by the water boards for inspections and compliance. Field inspections are just one component of Compliance Assurance.

Member Worthley clarified his motion to include both construction and industrial facilities.

Member Glaab seconded that motion.

Chairperson Sheehy expressed a concern revolving around the State collecting an inspection fee and the issue of preemption.

Member Lujano asked how Mr. Worthley's motion is different compared to the staff recommendation. Mr. Feller replied that the staff recommendation in the last part of the analysis is that these inspections are not preempted by the State fee. So the finding would be basically for the claimants in the fact that these inspection costs would be reimbursable for facilities covered under the statewide general construction permit and the statewide general industrial permit.

Staff found that the claimants have fee authority, even though they are paying a state fee. The reasoning for that is because the courts have described preemption. Staff did not see the factors that they listed as applying to the state statute that allowed the State to impose a fee.

The other argument that the claimants made was that because the state and cities are double-charging, the fee is going to exceed the cost of the regulation and, therefore, going to violate Prop. 13. They would have to call it a special tax and it would be subject to a vote.

The reason that the staff disagreed with that is because staff did not see it as a single program but rather as a local program and a state program subject to two separate fees, even though they are essentially inspecting for the same compliance issues.

Chairperson Sheehy stated that, in order for the question of whether it is a fee or a tax to be litigated, the amount of revenue being collected and the amount of money required to cover an inspection must be considered.

Chairperson Sheehy asked what the federal law says about the preemption and if staff based the findings on federal criteria. Mr. Feller replied that it is not a federal issue. It is strictly a state statutory issue as to whether that fee would be preempted. It is a California Water Code statute that allows the State Board to charge that fee. The locals are arguing that they do not have fee authority because the State does. The statute itself says nothing about express preemption. The Legislature did not say that because of this fee, the local agencies would have no authority to charge fees.

The factors on implied preemption then say: "Where the subject matter has been so fully and completely covered by general law as to clearly indicate it's become exclusively a matter of state concern, or the subject matter has been partially covered by general law, couched in such terms as to indicate, clearly, that a paramount state concern will not further tolerate additional local action; or, third, the subject matter has been partially covered by the general law and the subject is of such a nature that the adverse effects of local ordinance on the transient citizens of the state outweighs the possible benefit to the locality."

In order to make a preemption finding, the Water Code's fee statute must fit within one of those criteria. They did not. The claimants argued, in the comments on the draft analysis, that because of the specificity of the fee statute, the State preempted this issue. Staff disagreed with that in the analysis.

Member Worthley contended that, because part of the permit application is a fee for inspection and it is set by statute that not less than 50 percent is for inspection purposes, the state has occupied the field.

Chairperson Sheehy asked how much permits cost and how often the money is collected. Mr. Lauffer replied that the fees vary, depending on the size and the type of the facility. It is an annual fee with basic reports actually submitted to the water boards on a regular basis with fees that range around \$1,000 a year.

Chairperson Sheehy asked if the inspections ever take more than a day.

Mr. Lauffer stated that compliance, which can involve actual enforcement actions, takes a lot more, but a facility-specific inspection at one of these facilities, would never take more than a day. There are follow-up inspections to correct activities, which require regular revisiting to the sites to ensure that construction best management practices are being implemented.

Mr. Lauffer expressed concern on the issue that the fees are not set, and that there is not an inspection component to the fees. What the Legislature said was that when the boards collect these fees, and it is an important distinction from a legal perspective, the fees are set to cover the cost of the program. But once the boards have recovered these fees and they have their appropriation, 50 percent of the money has to be spent by the water boards on compliance assurance and inspection.

Again, the boards are going to prioritize based on threats to water quality. Individual facilities may get a lot of attention in a particular year. In subsequent years that they have cleaned up their act, they may not get as much attention.

The idea that the fee is being paid for an inspection is not something that is supportable under the Water Code. Staff has done a very good job of explaining why, as a matter of law, there is no preemption.

Mr. Lauffer stated that Member Worthley raised an interesting policy issue as to whether or not they should be preempted. But, again, staff has laid out a clear analysis of what is legally necessary for preemption. In this case, neither the water boards, Finance nor staff sees that the legal requirements for preemption have been met.

Member Bryant asked what federal law says about inspections in the context of permitting. Mr. Lauffer stated that there are certain facilities that have to be inspected. The ones that are the subject of the discussion here, federal law does not have specificity. Federal law does say that the municipalities have to identify an inspection and compliance program for critical sources. In this particular case, these were critical sources identified within the Los Angeles area. So the implication is clearly under federal law and under our requirements to make the federal law more specific. Federal law essentially requires inspections of these facilities. That will change over time as the different facilities or critical sources of pollution are identified within a municipality.

Mr. Feller stated that Mr. Lauffer is correct. Certain facilities like hazardous waste facilities and landfills do require inspection. The federal regulations do not say that the Phase I facilities in this permit, industrial facilities, have to be inspected. They do say there has to be inspections of construction sites over five acres. But they do not specify whether the state or the local agency has to conduct those inspections. They just have to be inspected. The analysis said these could easily enough be inspected under the general statewide permits.

Chairperson Sheehy stated that the staff recommendation is finding in favor of the claimants on the trash receptacle issue. This may ultimately go on to the courts and have more litigation. But if they ultimately prevail on that, there is going to be a mandated local reimbursement.

Chairperson Sheehy asked Finance if that money has to come out of the General Fund.

Ms. Castaneda stated that there are mandates that exist that are currently funded out of other funds besides the General Fund. Chairperson Sheehy stated that they could always look to the recycling fund. Another concern is the inspection issue. When the Water Board levies a fee, that money goes to the Waste Discharge Permit Fund, which is a special fund. So they are collecting a fee, a component of which is to run the whole program. Then if they prevail on their test claim and want reimbursement because they say they have been preempted on the fees, it is the State General Fund that is on the hook, essentially, to pay that, even though there is a special fund that is collecting the fees.

Member Worthley stated that the staff analysis really focused on the adequacy of the fee being charged and the services being provided. That is not the appropriate analysis. The analysis is not whether or not they are doing an adequate job. The analysis should have focused on the fact they are being charged a fee for this purpose.

Member Lujano clarified that the staff analysis is saying that the claimant has fee authority for both construction and industrial sites under the statewide permit but that they do not need reimbursement.

Member Worthley stated that the burden is being pushed by the Regional boards or the State to the local agencies to do this because they can charge a fee for this inspection and, therefore, not entitled to reimbursement. Mr. Worthley does not believe locals have the ability to charge a fee because the applicants already paid a fee for this purpose.

Member Lujano clarified that the staff analysis says locals do have the authority. Mr. Feller confirmed that the legal standard for implied preemption would have to fit into one of these three categories. The general law would clearly indicate that it has become exclusively a matter of state concern or the subject matter has been partially covered and couched in such terms as to indicate clearly the paramount state concern will not tolerate further additional local action.

Chairperson Sheehy stated that there is a motion and a second. The motion has two parts. Part one was to approve the staff recommendation on the partial approval of the claim; part two had to do with the fee-preemption issue.

Member Bryant requested a brief recess.

Chairperson Sheehy recessed the Commission on State Mandates meeting for ten minutes.

(Recess from 11:21 a.m. to 11:33 a.m.)

Chairperson Sheehy stated that there is a motion by Member Worthley and a second by Member Glaab.

Mr. Lauffer stated that California Code of Regulations, Title 23, section 2200 specifies the fees that Phase I facilities are subject to under the State Water Board's annual fee structure for construction and industrial stormwater permits. The annual fee for industrial facilities is \$833. It is a variable fee for construction facilities. It starts at \$238, plus \$24 per acre with a cap of \$2,600. So very large facilities, very large construction projects would be subject to a larger fee than potentially \$1,000, but it is only \$2,600.

Mr. Brosseau, Executive Director for the Bay Area Stormwater Management Agencies Association (BASMAA) stated that BASMAA is an association of the 96 agencies in the Bay Area that have stormwater permits, the Phase I cities primarily, about 84 cities in seven counties.

Mr. Brosseau stated that this is a matter of broad implication for the stormwater permits in California. The Bay Area Stormwater Agencies strongly support the conclusion in the proposed decision that all stormwater permit requirements at issue are new programs and/or higher levels of service resulting from the State's exercise of discretion, and the conclusion that the municipalities do not have adequate fee authority for the transit trash activities. He urged the Commission to approve the staff recommendation.

Member Bryant stated that this activity of the trash cans is part of this overall permit. The federal Clean Water Act seems to require the Regional Water Quality Control Board, as the permitting agency, to come up with ways and means to reach this standard that is in federal law.

However, in this question of the fee, there does seem to be this notion of preemption and a higher level of service. Federal law is not specific on how many inspections to have. And it seems that the State is going out and trying to get more inspections than would necessarily have to be done under federal law.

Member Bryant suggested the motion be split on the trash receptacle question and on the second half. Member Worthley had no objection to splitting it into two separate motions.

Member Bryant disagreed with the staff recommendation on the trash receptacles based on whether or not you can distinguish *Long Beach*. In the instance of *Long Beach*, it says not to discriminate in schools. Then the State did an executive order and came up with a lot of ways to keep our schools from discriminating which created higher levels of service and a mandate.

However, the regional boards, as permitting agencies, are coming up with methods and means and ways to prevent stormwater pollution. Now, they could have not imposed the trash receptacle activities, and instead required treatment facilities or requirements. The trash receptacles may have actually been a more cost-effective method of doing it. In the regional board's expertise and judgment at the time of issuing the permit, they did it that way.

Chairperson Sheehy stated that the trash receptacle part of the staff finding was appropriate, but he is not convinced about the preemption issue on the fees. The fees are low. \$838 for a big industrial facility would not cover the cost of somebody doing a full day inspection. There is room under the fee structure that Mr. Lauffer has talked about for additional fees to be imposed. So it would not be unreasonable to the regulated community.

Member Bryant stated that this permit is 100 pages long of terms and conditions. This is the one issue that the claimants brought forward as a potential mandate. There are a lot of other activities they are doing besides the trash at the transit stations.

Member Worthley, in the interest of time, withdrew the original motion and remade the motion on the issue of preemption.

Chairperson Sheehy restated the motion to find in favor of the claimants on the preemption issue for both the industrial and the construction permits.

Member Worthley moved to find in favor of the claimants that local fee authority is preempted by the state fee authority. With a second by Member Glaab, the motion failed with a vote of 3-3 with Chairperson Sheehy, Member Chivaro and Member Lujano voting no.

With a motion by Member Lujano and a second by Member Worthley, the staff recommendation to accept the staff analysis was adopted by a vote of 4-2 with Member Bryant and Member Worthley voting no.

Item 4 Proposed Statement of Decision: *Municipal Storm Water and Urban Runoff Discharges*, 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21
[Item 3 above.]

Mr. Feller presented this item. Staff recommended the Commission adopt the proposed Statement of Decision which accurately reflects the Commission's decision on Item 3 to partially approve the test claim. Staff also recommended the Commission allow minor changes to be made to the proposed decision reflecting the witnesses, hearing testimony, and the vote count that will be included in the final Statement of Decision.

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

Ms. Higashi asked the Commission if there were any objections to a request to take Item 13 *Academic Performance Index* out of order because witnesses were in from out of town.

Item 13 *Academic Performance Index, 01-TC-22*
Education Code Sections 44650-44654, 52050-52055.51, 52056-52057, 52058 Statutes 1999-2000x1, Chapter 3; Statutes 1999, Chapter 52 (AB 1114); Statutes 2000, Chapters 71 (SB 1667), 190 (AB 2162) and 695 (SB 1552); Statutes 2001, Chapters 159 (SB 662), 745 (SB 1191), 749 (AB 961), and 887 (AB 1295)
California Code of Regulations, Title 5, Sections 1031-1039
Register 00, No. 52 (Dec. 28, 2000); Register 01, No. 4 (Jan. 26, 2001); Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002)
San Juan Unified School District, Claimant

Eric Feller, Senior Commission Counsel presented this item. Mr. Feller stated that this test claim consists of the Public Schools Accountability Act and the Certificated Performance Incentive Act and related regulations. The Public Schools Accountability Act consists of three programs: The Academic Performance Index, the Governor's High Achieving/Improving Schools Program, and the Intermediate Intervention/Underperforming Schools Program.

Staff found that nearly all the test claim statutes and regulations do not constitute a reimbursable state-mandated program because they are either voluntary or downstream of a voluntary activity. Claimants argue that they are practically compelled to participate in the Intermediate Intervention/Underperforming Schools Program and other programs in the test claim. Staff disagrees for the reasons stated in the analysis.

Staff found only one statute to be reimbursable: require the district governing board to discuss the results of its annual ranking at the next regularly scheduled meeting following the annual publication of the Academic Performance Index and State Superintendent of Public Instruction school rankings.

Staff recommended the Commission adopt the analysis to partially approve the test claim for this activity.

Parties were represented as follows: Art Palkowitz on behalf of the claimants, Jeanie Oropeza and Donna Ferebee for the Department of Finance.

Mr. Palkowitz focused on two issues regarding the staff analysis.

- Intermediate Intervention/Underperforming Schools Program, which he referred to as "USP.

According to Mr. Palkowitz, this is a program that school districts are invited by the state to participate in when their performance on the STAR is below the 50th percentile. If the schools do not make substantial performance in this program, the potential consequences are that the Superintendent of Public Instruction will assume the rights and duties of the school, and could reorganized or close the school.

Mr. Palkowitz stated that it is the claimant's position that this is practical compulsion. The closing of the school is a severe and a certain consequence, and based on the *Kern* case, this would qualify as practical compulsion. And as a result, the activities that fall underneath this program should be activities that are reimbursable.

- School districts are to notify CDE and the publisher of errors in the STAR testing and demographic data.

Next Mr. Palkowitz raised the activity: the local education agency must notify the department and the test publisher in writing whether there are errors in the STAR testing or demographic data. The local education agency's notification must be received by the department. He pointed out that the local education agency must submit all data corrections to the publisher in writing or e-mail.

He indicated that there are several sentences containing the word "must," which is as mandatory as the word "shall." However, staff found that this activity was not a mandate. The basis for the staff finding is that the underlying program, the Governor's Performance Award, is a voluntary program so these activities are, therefore, not required as downstream activities.

Mr. Palkowitz stated that there is case law that indicates that even though the initial program might be voluntary, if you participate, the related downstream activities are mandatory.

Thus, on the two aforementioned items, Mr. Palkowitz requested that the Commission to deny the staff recommendation.

Ms. Ferebee concurred with the final staff analysis on behalf of Finance.

Ms. Oropeza pointed out that there are 800 schools per decile in the IIUSP program and that there are five deciles, and they all applied voluntarily. So it was not out of fear that they would be shut down. Rather, they could not all be funded. Finance funded less than 400 of those total schools.

Member Worthley clarified that it is a discretionary act to enroll. Then if that discretionary act is done, there are mandatory things that must be done after engaging in the discretionary act.

Mr. Palkowitz confirmed that the downstream activities were mandatory and that it is a discretionary program. However, there is some precedent that even though a program is discretionary, once there is participation in that program, mandatory downstream activities are then reimbursable activities.

Member Worthley stated that it seemed inconsistent with what is normally done. If something is discretionary to begin with then that relieves the Commission from, in fact forbids the Commission, from finding that those downstream items are state-reimbursable mandates.

Mr. Palkowitz said that is probably the way that the Commission has ruled in the past.

Member Bryant moved to adopt the staff recommendation. With a second by Member Chivaro, the staff recommendation was adopted by a vote of 6-0.

Item 14 *Proposed Statement of Decision*
 [Item 13 above]

Mr. Feller recommended that the Commission adopt the proposed Statement of Decision, which accurately reflects the Commission decision on Item 13 to partially approve the test claim. Staff also recommended that the Commission allow minor changes to be made to the proposed decision, including reflecting the witnesses, hearing testimony, and the vote count that will be included in the final decision.

Member Worthley moved to adopt the staff recommendation. With a second by Member Chivaro, the Statement of Decision was adopted by a vote of 6-0.

Item 5 *Re-Districting Senate and Congressional Districts, 02-TC-50*
Elections Code, Division 21, Chapter 2 (§ 21100 et seq.), and Chapter 5
(§21400 et. seq.)
Statutes 2001, Chapter 348 (AB 632)
Senate's Election and Reapportionment Committee Instructions (Dated
September 24, 2001)
County of Los Angeles, Claimant

Commission Counsel Kenny Louie presented this item. Mr. Louie stated that this test claim addresses the methodology used for redistricting of Senate and congressional districts. Under Article XXI of the California Constitution, which was added by California voters, the Legislature is required to adjust the boundary lines of the Senate, Assembly, Board of Equalization, and congressional districts.

In the year after the national decennial census was taken, the test claim statute pled by the claimant is the Legislature's adjustment to the boundary lines of the Senate and congressional districts as required by Article XXI.

There are two issues still in dispute by the claimant. The claimant argues that the first two sections require the claimant to engage in a variety of activities, including the establishment of precinct boundaries and printing and providing ballots to voters. However, the plain language of the first two sections only set forth the Senate and congressional boundary lines and does not require any activities of the claimants.

In addition, the claimant disagrees with the application of the ballot initiative except the ballot initiative exception of Government Code section 17556. However, as discussed in the staff analysis, a portion of the test claim statute is necessary to implement a ballot initiative. Staff also notes that it has received a late filing on behalf of the claimant. The filing has raised issues for the first time that staff has not had time to fully analyze. As a result, staff recommends the Commission adopt the staff analysis and deny the test claim.

Parties were represented as follows: Leonard Kaye and Kenneth Bennett, County of Los Angeles, Deborah Caplan representing the California School Boards Association (CSBA) and Allan Burdick on behalf of the CSAC SB-90 Service.

Mr. Kaye referred to a handout which illustrates several of the factual matters in this test claim, and stated there are three basic issues.

- The claimed redistricting activities are not necessary to implement the redistricting ballot initiative and, therefore, are not subject to the ballot initiative funding disclaimer.
- The county election officials have no discretion in performing redistricting as set forth in sections 1 and 2 of the test claim statute and are, therefore, mandated to do so. These are valid state-mandated programs.
- The redistricting activities detailed in the County's claim are new. As a consequence, the test claim statute meets the new program, or higher level of service test required for reimbursement.

The county believes that this is a factually based test claim. Connie B. McCormack, their registered recorder at the time, submitted a very detailed, fact-based declaration as to what caused the increased costs which Commission staff feels is a substantial new program. So they are not just claiming the increased cost. It is a new program of benefit to the electorate.

The 1990 redistricting was done according to census tracts and also had nested two Assembly districts in each state Senate district. This was a fairly easy task.

When the 2000 redistricting was done by the Legislature and the Governor, the County received the data two days before the legal deadline. They did not nest two Assembly districts to each Senate district. Most importantly, they did not follow census-tract lines. They used census blocks instead of the census tracts, which makes it very difficult to do these analyses.

Commission staff finds that section 4 is invoked if the boundary lines are ambiguous. We go on to say that regardless of whether the boundary lines are ambiguous or not, we still have to follow the same boundary lines as set forth in sections 1 and 2. So that is equally mandated.

The county had no discretion to vary the Senate and congressional district boundaries as specified in the test claim statute.

Mr. Kaye stated that the public ballot initiative disclaimer is that to the extent the amended statute provides that the state need not reimburse local governments for imposing duties that are expressly included or necessary to implement a ballot measure, the most recent court case found that the statute is consistent with Article XIII B, section 6. However, any duty not expressly included in or necessary to implement the ballot measure gives rise to a reimbursable state mandate, even if the duty is reasonably within the scope of the measure.

Kenneth Bennett, with the County of Los Angeles, stated that the handout provides a description of the technical mechanics of why the decisions made by the state in their 2001 reapportionment represented a new mandated increased level of service. It did it in two ways already expressed by Mr. Kaye. One was the decision to use census blocks, and the other was to eliminate the past practice of nesting state Assembly districts within the state Senate district boundaries.

Mr. Bennett referred to Figure 1, which showed how district lines would look using census tracts to draw the boundary lines. It is much simpler. However using blocks and choosing blocks that are a much smaller geographic area creates lines that are much more complex to implement.

The county's election system is not able to support the ability to store census block boundaries in the system. The county is required to relate its precincts to census tracts. It is not required to relate it to census blocks. And so that makes the process of implementing those lines based upon census blocks very difficult, because the county does not have that data in its system.

Mr. Bennett offered this as a matter of scale. Los Angeles County, which is one of the largest election jurisdictions, maintains 700 jurisdictional boundaries for jurisdictions for which it conducts elections. To implement census blocks would require it to implement 69,000 blocks..

The county does record the census tract in its system, about 2,000 of them. That enables it to comply with the California Elections Code, which says it needs to relate precincts to census tracts. It also allows the county to prepare for upcoming reapportionments. The decision to use blocks, though, made it impossible for the county to use the data in its system.

Mr. Bennett referred to Figure 2 which is an illustration of the past practice of the state to nest two Assembly districts within one state Senate district. The decision in 2001 to draw the Assembly district boundaries independent of the state Senate boundaries required Los Angeles County to draw many more lines than it would normally have to as pictured in Figure 3.

All that is required to create the Assembly district boundaries when they are nested is to identify a single boundary, which splits the state Senate district boundary. Simply implementing a state Senate district boundary and then splitting it. It is a very simple operation.

So the first impact of elimination of nesting is an increase in district boundary lines. The second impact is an increase in the number of precincts. Figure 4, according to California Elections Code section 12222, prohibited the county from creating precinct boundary lines that cross major district boundaries, and that includes the state Senate and state Assembly districts. So by effectively having more separate boundary lines, the county is required to have more precincts. And having more precincts has a downstream impact on its precinct consolidation process, which it has to do for every single election.

Mr. Bennett continued that more precincts as a result of this decision not to nest results in an increase in ballot groups. Figure 5 shows that when the Assembly districts are nested within the state Senate districts, there are only four ballot groups. He further explained that a ballot group is a unique set of active contests in an election.

The development of election materials, the distribution of materials, and the publication of materials is all organized around ballot groups. Therefore, separate ballot groups essentially increase the volume and the cost of producing those materials.

Mr. Bennett concluded by saying that making these decisions about how to reapportion the districts in 2001 resulted in expanded data and process complexity, higher levels of service, and increased costs on the part of the county in the administration of elections. This same result, or this same consequence, will be realized if the State makes the same decision in the upcoming 2001 reapportionment. This is not unique to Los Angeles County. All the counties have to implement the data in the same way.

Allan Burdick, on behalf of CSAC SB-90 Service stated that CSAC, the League of California Cities, and CSBA have been working together on the related issues that come out of the AB 138 lawsuit. This is the first claim the Commission has had to address with the new language related to which statutes are reimbursable or are not reimbursable due to ballot measures. Mr. Burdick introduced Deborah Caplan, representing CSBA, to present the position which fairly represents all local government.

Ms. Caplan stated that she was counsel in the *CSBA vs. State* case in which the decision came out of the Third District Court of Appeal, and approved the language in section 17556 (f). Now duties which are necessary to implement a ballot measure are non-reimbursable. Staff has relied on that language to some extent in analyzing this particular claim.

On behalf of CSBA, she apologized for the lateness of the letter she filed this morning which makes the point that this issue of how to interpret the language of what is necessary to implement a ballot measure is an issue that is likely to recur in many of the Commission's cases.

The letter suggests that the Commission may want to take this opportunity and look at the language and the court decision to interpret the language and decide what that actually means; what level of proof will be needed, whose burden will it be to produce proof or evidence on this point and how should the burden of proof be allocated in these proceedings, before trying to apply it in a particular case, which was the reason for submitting the letter today.

Lorena Romero stated that while the Department of Finance has not had the opportunity to review some of the newly provided information and would like to continue to concur with the staff analysis to deny the test claim.

Chairperson Sheehy asked if Finance agrees with the staff analysis on the test claim without having had a chance to review some information. Ms. Romero confirmed that decision and stated that there was information that was newly provided to the Commission.

Member Lujano proposed holding this over and giving staff time to actually look at the new information and then respond to it.

Ms. Shelton stated that staff has not had an opportunity to review Ms. Caplan's letter at all. There is a major disagreement about what the findings are with respect to the County of Los Angeles claim. The activity that has been found to be a state-mandated new program or higher level of service is an activity that really has not been requested for reimbursement by the claimant. So there is a difference of opinion about the scope of the mandated activities that even get into the discussion of 17556 (f).

Chairperson Sheehy asked what the downside is of putting this over. Ms. Higashi explained that if the Commission were to be responsive to Ms. Caplan's letter, the matter would be put over and further briefing on the letter would be allowed.

Mr. Kaye commented that not only are there important issues within the current staff analysis, but also some substantial issues in applying this AB 138 litigation which is capable of repetition.

Chairperson Sheehy, without prejudice and hearing no objections, put this item over to a future hearing.

Item 7 *Crime Statistics Reports for the Department of Justice, 07-TC-10*
(Amendment to 02-TC-04 and 02-TC-11)
Penal Code Sections 12025, 12031, 13012, 13014, 13020, 13021, 13023
and 13730
Statutes 1955, Chapter 1128; Statutes 1965, Chapters 238 and 1965;
Statutes 1967, Chapter 1157; Statutes 1971, Chapter 1203; Statutes
1972, Chapter 1377; Statutes 1979, Chapter 255 and 860; Statutes 1980,
Chapter 1340 (SB 1447); Statutes 1982, Resolution Chapter 147
(SCR 64); Statutes 1984, Chapter 1609 (SB 1472); Statutes 1989,
Chapter 1172 (SB 202); Statutes 1992, Chapter 1338 (SB 1184);
Statutes 1993, Chapter 1230 (AB 2250); Statutes 1995, Chapters 803
and 965 (AB 488 and SB 132); Statutes 1996, Chapter 872 (AB 3472);
Statutes 1998, Chapter 933 (AB 1999); Statutes 1999, Chapter 571
(AB 491); Statutes 2000, Chapter 626 (AB 715); Statutes 2001,
Chapters 468 and 483 (SB 314 and AB 469); Statutes 2004, Chapters
405 and 700 (SB 1796 and SB 1234) and California Department of
Justice, Criminal Justice Statistics Center, Criminal Statistics Reporting
Requirements and Requirements Spreadsheet, March 2000
City of Newport Beach and County of Sacramento, Claimants

Mr. Feller presented this item. Mr. Feller stated that test claim alleges activities related to crime statistics reporting by local law enforcement agencies. It was originally filed as an amendment to test claim 02-TC-04 and 02-TC-11, which the Commission determined imposed a reimbursable mandate on June 26, 2008.

For reasons in the analysis, staff finds that the claim is a reimbursable mandate on local law enforcement agencies to report hate-crime information in a manner prescribed by the Attorney General and specified in the analysis.

Both the co-claimants and the Department of Finance have submitted comments concurring with the draft staff analysis which is reflected in the final analysis.

Thus, staff recommended the test claim be partially approved for the activities specified in the analysis and the remainder of the statutes and chapters pled be denied.

The parties were represented as follows: Hortensia Mato, City of Newport Beach; Juliana Gmur, City of Newport Beach and the County of Sacramento; Susan Geanacou and Lorena Romero, Department of Finance.

Ms. Gmur stated that the test claimants support the staff analysis.

Chairperson Sheehy asked if Ms. Mato wanted to add anything. Ms. Mata stated concurrence.

Ms. Romero also stated that Finance concurred with the staff analysis.

With a motion by Member Worthley to adopt the staff recommendation, and a second by Member Bryant, the staff recommendation to partially approved the test claim was adopted by a vote of 6-0.

Item 8 *Proposed Statement of Decision*
 [Item 7 above]

Mr. Feller recommended that the Commission adopt the proposed Statement of Decision which accurately reflects the Commission's decision on Item 7 to partially approve the test claim.

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

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

Item 9 *Extended Opportunity Programs and Services, 02-TC-29*
Education Code Sections 69640, 69641, 69641.5, 69643, 69648, 69649, 69652, 69655 and 69656 as amended by Statutes 1984, Chapter 1178 (AB 3775); Statutes 1985, Chapter 1586 (AB 1114); Statutes 1990, Chapter 1352 (AB 2912); Statutes 1990, Chapter 1455 (SB 2374) California Code of Regulations, Title 5, Sections 56200, 56201, 56202, 56204, 56206, 56208, 56210, 56220, 56222, 56224, 56226, 56230, 56232, 56234, 56236, 56238, 56240, 56252, 56254, 56256, 56258, 56260, 56262, 56264, 56270, 56272, 56274, 56276, 56278, 56280, 56290, 56292, 56293, 56295, 56296, and 56298 (As added or amended by Register 76, No. 41, Register 77, No. 34, Register 79, No. 32, Register 80, No. 06, Register 81, Nos. 03 & 19, Register 83, No. 18, Register 87, No. 40, Register 90, No. 49, Register 91, No. 29, and Register 97, No 46
EOPS Implementing Guidelines, Chancellor of the California Community Colleges (January 2002)
West Kern Community College District, Claimant

Heather Halsey, Commission Counsel, presented this item. Ms. Halsey stated that this test claim addresses the *Extended Opportunities Programs and Services or EOPS* program. EOPS provides academic and financial support to community college students whose educational, socio-economic backgrounds might otherwise prevent them from successfully attending college. The community college districts are encouraged to participate in EOPS by legislative intent language and state funding provided specifically for EOPS.

In exchange for the state funding, the district must meet minimum standards that are specified in the test claim statutes and executive orders. However, the requirement to perform the activities required by the statutes and executive orders pled by the claimant is triggered by the district's

discretionary decisions to establish the EOPS program and to apply to the Board of Governors for a state grant to fund all or a portion of the costs of establishing and operating an EOPS program. Based on the holding in *Kern* that downstream activities triggered by an underlying discretionary decision of a district are not state-mandated activities, staff finds that these claim statutes and executive orders do not impose state-mandated activities and are thus not reimbursable. Staff recommended denial of this test claim.

The parties were represented as follows: Keith Petersen, representing the test claimant and Donna Ferebee, Department of Finance.

Mr. Petersen stated that the Commission staff is asserting that all of the test claim activities are downstream from the voluntary decision to participate in the EOPS program. After a great deal of briefing, what this boils down to is the effect of Title V, section 56210. It is quoted on page 19 of the final staff analysis and reads as follows:

Beginning with the 1987-88 academic year and every year thereafter, the college shall maintain the same dollar level of services supported with non-EOPS funds, as the average reported in its final budget report in the previous three academic years."

Mr. Petersen asserted that because colleges can no longer withdraw, they are committed to continue their participation. The final staff analysis' reliance upon *Kern* is misplaced.

The court found in *Kern* that certain ostensibly volunteer school-site councils were later charged with requirement to prepare agendas. The finding in that court case was that the school districts could stop voluntarily conducting or holding these school-site councils and avoid the expense of the agendas.

In the case of the EOPS program, whether it is ostensibly voluntary or not, as of 1987-1988, they are required to continue. And that makes *Kern* irrelevant.

Ms. Ferebee stated that the Department of Finance concurs with the final staff analysis.

Member Worthley noted that there is nothing in the regulatory history to indicate that anyone thought that section 56210 would make the EOPS program mandatory. Member Worthley asked if there was anybody who has actually tested this to determine whether or not it will.

Ms. Halsey stated that, to staff's knowledge, there has not been a single community college that has attempted to discontinue its EOPS program. The Chancellor's office takes the position that it is a voluntary program. That is the office that would approve the establishment of the EOPS program.

Member Worthley asked if someone who is under the program were to withdraw, would they be excused from the requirement of maintaining the same dollar level of services supported.

Ms. Halsey replied that the interpretation is that this requirement is one of the many requirements of having an EOPS program. But if you no longer have the EOPS program, then this requirement would no longer exist. There has been no attempt by anyone to withdraw from the program, so it has not been tested.

Mr. Petersen objected to the secondhand statement by the Chancellor's office that districts can withdraw as that has not been certified under penalty of perjury.

Furthermore, even if that is the opinion of the Chancellor's office, that is not reflected by any regulation. That is an artificial construct saying, "Yes, go ahead and withdraw." There is nothing in the regulations that allows them to withdraw. The regulation says, "You must

continue your funding commitment.” It does not say, “if you want to” and it does not say “it’s conditioned on further participation.” The regulation says, “you must continue your funding commitment.”

There is no evidence or regulatory support for the fact that the Chancellor thinks that they can pull out of the program.

Ms. Shelton responded by saying that the regulation on page 22 cannot be read in isolation. It must be read within the entire statutory scheme. The statutory scheme makes it clear that compliance with the requirements of the statutes and regulations is a condition of receiving funding.

Chairperson Sheehy confirmed that the compliance with the statute is a condition of receiving funding. Therefore they are not compelled to comply but can choose to comply and then receive the funding. Then the regulations flow from the statute. So if they choose not to receive the money, then they do not have to implement the flow of the program.

Mr. Petersen agreed that receipt of the funding is conditioned on participation but did not agree that that mitigates the significance of 56210, which says they have to continue participating in the program. They are two separate issues.

Ms. Shelton stated that then there would be regulations that are not consistent with statute, and the regulations would not prevail. The statutes create a voluntary program as a condition over the receipt of funds.

Chairperson Sheehy stated that it is a discretionary act for a college to voluntarily opt into the program and then follow the regulations that are in the program.

Mr. Petersen said that it is the intent of the Legislature that colleges participate and that \$100 million is attached to that intent in this case. Colleges are not statutorily compelled to participate in the program but rather regulatorily compelled not to withdraw. That is different from the *Kern* case, and the *Kern* analysis should not be used.

Member Bryant moved to adopt the staff recommendation. With a second by Member Chivaro, the staff recommendation was adopted by a vote of 6-0.

Item 10 *Proposed Statement of Decision*
 [Item 9 above]

Ms. Halsey recommended that the Commission adopt the proposed Statement of Decision. The sole issue before the Commission is whether the proposed Statement of Decision accurately reflects the decision of the Commission on Item 9. Minor changes to reflect the vote count will be included in the final Statement of Decision.

Member Glaab moved to adopt the staff recommendation. With a second by Member Chivaro, the Statement of Decision was adopted by a vote of 6-0.

Item 11 *Child Abuse & Neglect Reporting, 01-TC-21*
 Consolidated with *Interagency Child Abuse and Neglect (ICAN)*
 Investigative Report, 00-TC-22
 Penal Code Sections 273a, 11164, 11165, 11165.1, 11165.2, 11165.3,
 11165.4, 11165.5, 11165.6, 11165.7, 11165.9, 11165.12, 11165.14,
 11166, 11166.2, 11166.5, 11168, 11169, 11170, and 11174.3, Including
 Former Penal Code Sections 11161.5, 11161.6, 11161.7
 Statutes 1975, Chapter 226 (AB 1063), Statutes 1976, Chapters 242
 (AB 2641) and 1139 (SB 42), Statutes 1977, Chapter 958 (AB 1058),
 Statutes 1978, Chapter 136 (AB 2238), Statutes 1979, Chapter 373

Item 11

(continued)

(SB 925), Statutes 1980, Chapters 855 (AB 2497), 1071 (SB 781), and 1117 (SB 1877), Statutes 1981, Chapters 29 (SB 322) and 435 (AB 518), Statutes 1982, Chapters 162 (AB 2303) and 905 (SB 1848), Statutes 1984, Chapters 1170 (AB 2702), 1391 (SB 1124), 1423 (SB 1899), 1613 (AB 2709), and 1718 (AB 2710), Statutes 1985, Chapters 189 (AB 701), 464 (SB 254), 1068 (AB 366), 1420 (AB 442), 1528 (SB 1306), 1572 (SB 1358), and 1598 (AB 505), Statutes 1986, Chapters 248 (SB 245), 1289 (AB 1981), and 1496 (AB 3608), Statutes 1987 Chapters 82 (AB 80), 531 (AB 1632), 640 (AB 285), 1020 (SB 691), 1418 (AB 1359), 1444 (SB 646), and 1459 (SB1219) Statutes 1988, Chapters 39 (AB 1241), 269 (AB 3022), 1497 (SB 2457), and 1580 (AB 4584), Statutes 1989, Chapter 153 (AB 627), Statutes 1990, Chapters 650 (SB 2423), 931 (AB 3521), 1330 (SB 2788), 1363 (AB 3532), and 1603 (SB 2669), Statutes 1991, Chapters 132 (AB 1133) and 1102 (AB 2232), Statutes 1992, Chapter 459 (SB 1695), Statutes 1993, Chapters 219(A1500), 346 (AB 331), 510 (SB 665), and 1253 (AB 897), Statutes 1994, Chapter 1263 (AB 1328), Statutes 1996, Chapters 1080 (AB 295), 1081 (AB 3354), and 1090 (AB 3215), Statutes 1997, Chapters 83 (AB 327), 134 (AB 273), 842 (SB 644), 843 (AB 753), and 844 (AB 1065), Statutes 1998, Chapter 311 (SB 933), Statutes 1999, Chapters 475 (SB 654) and 1012 (SB 525), Statutes 2000, Chapters 287 (SB 1955), and 916 (AB 1241), Statutes 2001, Chapters 133 (AB 102) and 754 (AB 1697)

San Bernardino Community College District, Claimant)

Ms. Shelton presented this item. This test claim addressed amendments to the child abuse reporting laws as they apply to school districts and community college districts.

The claimant, San Bernardino Community College, alleges that statutes imposing investigation and reporting requirements on the police and security departments of all local law enforcement agencies mandate a new program or higher level of service on school district and community-college police departments. The claimant further requests reimbursement for other activities imposed on school district employees to report, train, and assist law enforcement in their investigation.

Ms. Shelton stated that staff finds that the state has not mandated school district or community college district police or security departments or their law enforcement agencies to comply with the child abuse reporting requirements imposed on the law enforcement agencies of cities and counties.

Staff further finds that the two test claim statutes listed in the executive summary impose reimbursable mandated duties on K-12 school districts to report to the Department of Education the reasons why training is not provided, and to inform a staff person selected by a suspected victim of child abuse or neglect to be present during an interview during school hours of a staff person's presence in the interview and a confidentiality requirement. Staff recommends that the Commission adopt the staff analysis to partially approve the test claim.

Parties were represented as follows: Keith Petersen, SixTen and Associates, representing the test claimant, and Donna Ferebee, Department of Finance.

Mr. Petersen stated that he would stand on his written submissions. Ms. Ferebee stated that Finance concurred with the staff analysis. Member Worthley moved to adopt the staff analysis.

With a second by Member Chivaro, the staff analysis to partially approve the test claim was adopted by a vote of 6-0.

Item 12 *Proposed Statement of Decision*
See Item 11 above

Ms. Shelton recommended that the Commission adopt the proposed Statement of Decision for item 11. Member Glaab moved adoption of the staff recommendation. With a second by Member Bryant, the staff recommendation to adopt the Statement of Decision was approved by a vote of 6-0.

STAFF REPORTS

Item 22 Chief Legal Counsel's Report (info)

Ms. Shelton stated there was nothing new to report this month.

Item 23 Executive Director's Report (info)

Ms. Higashi reported that there were three issues that required Commission action.

- Audit by the Bureau of State Audits (BSA)

Ms. Higashi explained that once BSA issues its final draft report, the Commission will have only five days to respond. Therefore she recommended the Commission form a two-member subcommittee that can work with staff to review and respond to the draft report. Ms. Higashi also recommended that the Commission schedule closed session for the September 25 meeting to discuss the audit report, and assuming the final report is issued in October, schedule time on the public agenda to discuss the report at either the Commission's October or December meeting.

Chairperson Sheehy suggested that he sit on the subcommittee. Member Worthley agreed and nominated Chairperson Sheehy as a subcommittee member. Member Lujano volunteered to act as the other member of the subcommittee. Member Worthley moved to adopt Ms. Higashi's recommendations. With a second by Member Bryant, the recommendations to form a subcommittee consisting of Chairperson Sheehy and Member Lujano; schedule time to discuss the draft report in closed session at the September 25, 2009 Commission meeting, and schedule time to discuss the final audit report in open session at the October or December Commission meetings were approved by a vote of 6-0.

- 2009 Meeting Calendar

Because of the complexity of most of the items heard at this hearing, and consideration of furlough days, some of the items tentatively set for September are not ready to be issued. Therefore Ms. Higashi recommended that an October 30, 2009 meeting be set. In addition, the December 4 Commission meeting now falls on a furlough date, so Ms. Higashi recommended that that date be moved, possibly, to December 3, 2009. Chairperson Sheehy agreed that the December meeting should be moved to the third, but asked Ms. Higashi to check with absent members to ensure that December 3 is possible for all members. The members agreed to set the October 30 meeting.

- 2010 Meeting Calendar

Ms. Higashi asked members to approve the tentative 2010 calendar. Chairperson Sheehy asked that the tentative date for July 2010 be moved to August, when the Legislature is out of session. Mr. Keith Petersen, SixTen and Associates, informed the members that Commission meetings have traditionally not been held in August because school district employees take their vacations in August. Chairperson Sheehy continued to propose that the meeting be held at the end of

August. Ms. Higashi clarified that it would be held on the last Friday in August. Ms. Higashi stated that she would propose a tentative revised calendar for 2010 and bring it back for the September 25, 2009 hearing.

PUBLIC COMMENT

Chairperson Sheehy asked for public comment. Ms. Susan Geanacou, Department of Finance, asked for clarification regarding the September 2009 hearing. Ms. Higashi clarified that there is a Commission meeting scheduled for September 25, 2009.

Chairperson Sheehy acknowledged staff for the tremendous amount of work completed at this hearing, and stated that Commission staff, like all state employees are now facing three furlough days per month. He said the Governor appreciates the fact that state employees are helping with the budget solution

CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 and 17526 (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):

1. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01432, [Behavioral Intervention Plans]
2. *California School Boards Association, Education Legal Alliance; County of Fresno; City of Newport Beach; Sweetwater Union High School District and County of Los Angeles v. State of California, Commission on State Mandates and Steve Westly, in his capacity as State Controller*, Third District Court of Appeal, Case No. C055700, Sacramento County Superior Court Case Number 06CS01335; [AB 138; Open Meetings Act, Brown Act Reform, Mandate Reimbursement Process I and II; and School Accountability Report Cards (SARC) I and II]
3. *California School Boards Association, Education Legal Alliance, and Sweetwater Union High School Dist. v. State of California, Commission on State Mandates, and John Chiang, in his capacity as State Controller*, Sacramento County Superior Court, Case No. 07CS01399, [School Accountability Report Cards, SARC]

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) and 17526.

- Report of the Personnel Subcommittee.

Hearing no further comments, Chairperson Sheehy 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 listed on the published notice and agenda; and Government Code sections 11126, subdivision (a), and 17526, to confer on personnel matters listed on the published notice and agenda.

REPORT FROM CLOSED EXECUTIVE SESSION

At 1:05 p.m., Chairperson Sheehy 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 published notice and agenda, and pursuant to Government Code sections 11126, subdivision (a), and 17526, to confer on personnel matters listed on the published notice and agenda.

ADJOURNMENT

Hearing no further business, Chairperson Sheehy adjourned the meeting at 1:06 p.m.


PAULA HIGASHI
Executive Director

PUBLIC HEARING
COMMISSION ON STATE MANDATES



TIME: 9:30 a.m.
DATE: Friday, July 31, 2009
PLACE: Department of Finance
915 L Street, Redwood Room
Sacramento, California



REPORTER'S TRANSCRIPT OF PROCEEDINGS



Reported by:
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California Certified Shorthand Reporter #6949
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A P P E A R A N C E S

COMMISSIONERS PRESENT

TOM SHEEHY
(Commission Chair)
Representative for MICHAEL GENEST
Director, State Department of Finance

CYNTHIA BRYANT
Director, Office of Planning & Research

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

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



COMMISSION STAFF PRESENT

PAULA HIGASHI
Executive Director
(Item 23)

ERIC FELLER
Commission Counsel
(Items 3, 4, 7, and 13)

HEATHER HALSEY
Commission Counsel
(Items 9 and 10)

A P P E A R A N C E S

COMMISSION STAFF PRESENT

Continued

KENNY LOUIE
Commission Counsel
(Items 5 and 6)

NANCY PATTON
Assistant Executive Director

CAMILLE SHELTON
Chief Legal Counsel
(Item 11, 12, and 22)



PUBLIC TESTIMONY

Appearing Re Items 3 & 4 (Municipal Storm Water):

For County of Los Angeles:

LEONARD KAYE
County of Los Angeles
Department of Auditor-Controller
500 West Temple Street, Suite 603
Los Angeles, California 90012

JUDITH FRIES
County of Los Angeles
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A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Items 3 & 4 (Municipal Storm Water):
continued

For Los Angeles Water Board and State Water Resources
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A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Items 5 & 6 (Redistricting Senate and Congressional Districts):

For County of Los Angeles:

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A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Items 7 & 8 (Crime Statistics Reports):

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Appearing Re Items 9 & 10 (EOPS):

For Claimant West Kern Community College District:

KEITH B. PETERSEN
President
SixTen and Associates
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San Diego, California 92117

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Items 9 & 10 (EOPS):

For Department of Finance

DONNA FEREBEE
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Appearing Re Items 11 & 12 (Child-Abuse and Neglect Reporting):

For Claimant San Bernardino Community College:

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For Department of Finance

DONNA FEREBEE
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Appearing Re Item 13 and Item 14 (Academic Performance Index):

For Claimant:

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San Diego, California 92103-2682

A P P E A R A N C E S

PUBLIC TESTIMONY

Appearing Re Item 13 and Item 14 (Academic Performance Index):

For Department of Finance

JEANNIE OROPEZA
Department of Finance
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Sacramento, California 95814

DONNA FEREBEE
Staff Counsel III
Department of Finance

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Commission on State Mandates – July 31, 2009

1 BE IT REMEMBERED that on Friday, July 31, 2009,
2 commencing at the hour of 9:35 a.m., thereof, at the
3 State Capitol, Room 447, Sacramento, California, before
4 me, DANIEL P. FELDHAUS, CSR #6949, RDR and CRR, the
5 following proceedings were held:

6 --oOo--

7 CHAIR SHEEHY: Ladies and gentlemen, we're
8 going to go ahead and get started. We do have a working
9 quorum. I believe Ms. Olsen is not going to be with us
10 today. Mr. Chivaro will. He is going to be a few
11 minutes late.

12 But can we go ahead and call the roll so we can
13 establish our quorum?

14 MS. HIGASHI: Ms. Bryant?

15 MEMBER BRYANT: Here.

16 MS. HIGASHI: Mr. Chivaro will be late.

17 Mr. Glaab?

18 MEMBER GLAAB: Present.

19 MS. HIGASHI: Mr. Lujano?

20 MEMBER LUJANO: Here.

21 MS. HIGASHI: Mr. Worthley?

22 MEMBER WORTHLEY: Here.

23 MS. HIGASHI: Mr. Sheehy?

24 CHAIR SHEEHY: I'm here.

25 Okay, so a quorum being present, let's go right

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1 into the minutes.

2 Are there any questions or comments, objections
3 or corrections to the minutes from our last meeting,
4 which was May 29th?

5 *(No response)*

6 CHAIR SHEEHY: Hearing no comments from the
7 Board members, is there any public comment on that item?

8 *(No response)*

9 CHAIR SHEEHY: Seeing none, is there a motion
10 to approve our minutes of May 29th?

11 MEMBER LUJANO: I move approval.

12 MEMBER GLAAB: Second.

13 CHAIR SHEEHY: We have a motion and a second.

14 All in favor?

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

16 CHAIR SHEEHY: The minutes are approved.

17 MEMBER BRYANT: I'm abstaining.

18 CHAIR SHEEHY: Let the record show Ms. Bryant
19 abstained on the vote on the minutes.

20 Okay, so we've got that done. Now, we're going
21 to go to our Consent Calendar.

22 Do any members of the Commission on State
23 Mandates here today have any objections or comments or
24 any requests to pull any of the items on the Consent
25 Calendar?

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1 MS. HIGASHI: It's the blue sheet.
2 Briefly, it's Items 15, 16, 17, 18, 19, and 20.
3 *(No response)*
4 CHAIR SHEEHY: Okay, seeing no objection, is
5 there a motion?
6 MEMBER WORTHLEY: Move approval, Mr. Chairman.
7 MEMBER GLAAB: Second.
8 CHAIR SHEEHY: We have a motion and a second.
9 All in favor?
10 *(A chorus of "ayes" was heard.)*
11 CHAIR SHEEHY: The Consent Calendar has been
12 approved.
13 Now, we're going to move on to Item 3.
14 Paula?
15 MS. HIGASHI: This brings us to the hearing
16 portion of our meeting. As is customary at our hearings,
17 what we do is we have all of the parties and witnesses
18 who intend to participate in the hearing on any of our
19 agenda items go through a swearing-in of witnesses and
20 parties.
21 So would you please stand if you intend to be
22 before the Commission today?
23 *(Several persons stood up.)*
24 MS. HIGASHI: Do you solemnly swear or affirm
25 that the testimony which you are about to give is

1 correct, based upon your own personal knowledge,
2 information, or belief?

3 *(Chorus of "I do's" was heard.)*

4 MS. HIGASHI: Thank you very much.

5 Will the parties and witnesses for Item 3
6 please come forward?

7 Item 3 will be presented by Senior Commission
8 Counsel Eric Feller.

9 CHAIR SHEEHY: Before we get into the item,
10 did you want to discuss publicly what we've agreed to as
11 far as our time limits for comments for, in support, and
12 in opposition to the staff recommendation on this item,
13 Paula?

14 MS. HIGASHI: Certainly. I'd just like to
15 confirm that staff has been in contact with all of the
16 parties who are at the table, I believe. And we have
17 agreed to allot a combined total of 20 minutes for each
18 side. So that will be 20 minutes for the statements to
19 be made by the claimants, their attorneys, their
20 witnesses; and then 20 minutes for the State agencies.

21 And we have a timer. And if you'd like, we can
22 notify you when you have one minute left or halfway
23 through.

24 CHAIR SHEEHY: Well, if we're going to do
25 20 minutes, we should probably give them a five-minute

1 warning and then a one-minute warning, I think. That
2 would be, I think, reasonable and appropriate.

3 So, Eric, do you want to go ahead then and set
4 the table for us here on Item 3?

5 MR. FELLER: Sure. Good morning.

6 In this claim, the claimants allege various
7 activities in a permit issued by the Los Angeles Regional
8 Water Quality Control Board. The activities include
9 placement and maintenance of trash receptacles at transit
10 stops, and inspections of restaurants, automotive service
11 facilities, retail gasoline outlets, automotive
12 dealerships, Phase I industrial facilities as defined in
13 the permit, and construction sites to reduce stormwater
14 pollution in compliance with the permit.

15 The following issues are in dispute:

16 First, whether the permit activities in the
17 test claim constitute a federal mandate on local agencies
18 under the Clean Water Act. Staff finds that the
19 activities in the permit are not mandated by federal law.

20 In considering the State Board's handout, let
21 me clarify, that staff finds that the specificity in the
22 permit indeed exceeds federal law.

23 Second, whether the claimants have fee
24 authority to place and maintain trash receptacles at
25 transit stops. Staff finds that the claimants do not

1 have fee authority to do this.

2 And third, whether the claimants have fee
3 authority to inspect construction and industrial sites
4 already inspected under statewide industrial or
5 construction permits. Staff finds that they do not have
6 fee authority -- excuse me, staff finds that they do have
7 fee authority for these inspections.

8 Thus, staff recommends that the test claim be
9 approved only for the placement and maintenance of trash
10 receptacles at transit stops but denied for the
11 inspection activities as stated in the analysis.

12 Would the parties and witnesses please state
13 your name for the record?

14 MR. BROSSEAU: I'm actually an "other" speaker.
15 So I think I should be at the big-person's table, but...

16 Geoff Brosseau. I'm the executive director for
17 the Bay Area Stormwater Management Agencies Association,
18 or BASMAA.

19 MR. KAYE: Leonard Kaye, County of Los Angeles.

20 MR. GEST: Howard Gest, Burhenn & Gest, on
21 behalf of the claimant cities.

22 MS. FRIES: Judith Fries, County of
23 Los Angeles.

24 CHAIR SHEEHY: Okay, thank you, Mr. Kaye,
25 Mr. Gest, Ms. Fries. And then Mr. --

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1 MR. BROSSEAU: Brosseau.

2 CHAIR SHEEHY: -- Brosseau, are you going to be
3 speaking along with the claimants or --

4 MR. BROSSEAU: No. Later.

5 CHAIR SHEEHY: Okay, very good.

6 So why don't we go ahead and start the
7 20-minute clock? And Mr. Kaye, Mr. Gest, Ms. Fries, who
8 would like to start?

9 MR. KAYE: Leonard Kaye, County of Los Angeles.

10 Yes, in the subject test claim, as was
11 mentioned by Mr. Feller of the Commission, this
12 particular item is limited -- this particular test claim
13 is limited to the Los Angeles Regional Water Quality
14 Control Board Order No. 01-182, Part 4C2a, Inspection of
15 Certain Commercial Facilities; Part 4C2b, Inspection of
16 Industrial Facilities; Part 4E, Inspection of
17 Construction Sites; and Part 4F5c3, Installation and
18 Maintenance of Transit Trash Receptacles at Transit
19 Stops.

20 *(Mr. Chivaro entered the meeting room.)*

21 MR. KAYE: I think it's very good to just
22 quickly indicate that this permit was found to be an
23 executive order within the meaning of Article XIII B,
24 section 6, and Government Code section 17516, that the
25 duty to apply for an NPDES permit is not within the

1 claimant's discretion, that the State freely chose to
2 impose transit trash-receptacle requirements on the
3 permittees because neither the federal statute nor the
4 regulations require it.

5 This has all been concluded by Commission
6 staff; and in these regards, we're certainly in full
7 agreement.

8 Further, staff finds, which we also are in
9 agreement, that the permit activities constitute a
10 program within the meaning of Article XIII B, section 6,
11 and that the permitted activities are limited to local
12 government entities.

13 And I would point out that the permit defines
14 the permittees as the County of Los Angeles and the
15 84 incorporated cities within the Los Angeles County
16 Flood Control District.

17 I'd like to then just go on to the fact that
18 they found, in the Commission staff's latest analysis,
19 that we have no fee authority to charge either the bus
20 operators or the bus riders a fee. And without dwelling
21 upon this, we feel that this is -- we're in complete
22 agreement that we have no fee authority in this matter.

23 Moving on, we feel that -- I should say, the
24 County of Los Angeles feels that we have insufficient
25 fee authority to conduct inspections. And that goes for

1 all the items that we're required to inspect.

2 We feel that we have found instances where the
3 inspection activity comes under Prop. 218. We found,
4 and we've offered particulars concerning an Attorney
5 General opinion, Attorney General Opinion No. 97-1104,
6 that distinguishes two systems. One is the sanitary
7 water system, and the other is the stormwater management
8 system.

9 And we feel that the stormwater management
10 system is not exempt from the requirements of Prop. 218;
11 and we've detailed the reasons why and cited this
12 particular opinion, which concurs with our position.

13 Also, we've cited where the Legislature is
14 troubled that we don't have sufficient fee authority to
15 conduct inspections. And primarily, among that, is
16 SCA 18, which seeks to add stormwater and urban runoff
17 management to the three other areas that are exempt from
18 Prop. 218. Right now, as I speak, sewer and water
19 systems and refuse collection services are exempt from
20 Prop. 218; but stormwater and urban runoff management is
21 not.

22 In other regards, we note that Commission
23 staff feel that the whole area of the fee authority for
24 inspections is a novel one, a case of first impression;
25 and they indicate that certain types of code sections are

1 clearly legally insufficient, particularly Health and
2 Safety Code section 5471, which makes no mention of
3 inspecting commercial or industrial facilities. Rather,
4 the fee revenues are used for maintenance and operation
5 of storm drainage facilities.

6 And Commission staff indicate that staff cannot
7 find that the claimants have statutory fee authority
8 sufficient to pay for the mandated program because
9 operation and maintenance of storm drainage facilities
10 does not encompass the state-mandated inspections of the
11 facilities or construction sites specified in the permit.
12 And that's Commission staff.

13 With that, I'd like to turn it over to Howard.

14 Thank you.

15 MR. GEST: Thank you, Members of the
16 Commission. Howard Gest on behalf of the City claimants.

17 And with your permission, I'd like to reserve
18 about five minutes of my time to respond to statements
19 that might be made by the representatives of the Regional
20 Board or State Board.

21 CHAIR SHEEHY: So you'd like us then to only go
22 15 minutes, is that right, and then stop?

23 MR. GEST: Yes, or let's say 17 minutes and
24 give us -- yes, 15 minutes, and stop at 15 minutes, if
25 that's appropriate.

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1 CHAIR SHEEHY: Okay, Nancy, can you make a note
2 of that then?

3 Thank you.

4 Please continue.

5 MR. GEST: First of all, the City claimants
6 join in the statements and presentation made by the
7 representative of the County in the Flood Control
8 District. We agree completely with everything that was
9 said. And for that reason, I won't address those issues.

10 I'd like -- we do agree with the staff's
11 analysis that the trash-receptacle obligation is a state
12 mandate and that the cities do not have fee authority in
13 order to raise fees to meet that obligation. In fact,
14 the statutes provide that the metropolitan transit
15 districts have exclusive authority, and cities cannot
16 seek fees with respect to those transit riders. And,
17 therefore, there is no way to raise fees with respect to
18 that. We do agree with that.

19 I'd like to address briefly the issue of the
20 inspection of facilities that hold what I call state
21 permits. They are state-permitted facilities. These are
22 sometimes what are referred to in the permit and the
23 staff analysis as "*Phase I facilities*." These are
24 facilities that hold a stormwater permit that is issued
25 by the State Water Resources Control Board.

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1 The staff's analysis is that the obligation to
2 inspect these facilities is a mandate imposed upon the
3 cities because the State chose to do that. In fact, the
4 State could inspect those facilities themselves.
5 However, the staff found that the cities could assess a
6 fee to inspect those facilities.

7 And here, I am distinguishing from facilities
8 that do not hold state permits. I'm not talking about
9 the restaurants or the commercial establishments. I'm
10 talking about industrial facilities or construction sites
11 that are obligated to get a permit from the State Water
12 Resources Control Board or the local Regional Water
13 Quality Control Board.

14 With respect to that, they pay a fee to the
15 State. And the Legislature has specifically stated that
16 a portion of that fee is meant to be used to implement
17 an inspection program. It is the Cities' position that
18 the State has preempted the Cities from assessing a fee
19 for that obligation. And that is because if the Cities
20 assessed a fee, we'd be basically charging these
21 permitted facilities twice. And, in essence, they'd be
22 paying for a service that they were not getting: Once to
23 the state and once to the city.

24 In our view, this is a classic case for which
25 this Commission is supposed to address: A situation

1 where the State is taking money from the private party
2 but they're not providing the service. They are shifting
3 that service to the local cities, so that the cities bear
4 the cost but don't get the revenue.

5 And we submit that, in fact, the State
6 Legislature has preempted this area. The Cities cannot
7 assess an additional fee because they'll essentially be
8 charging these people twice.

9 If the State Board, which had the ability to
10 do so, shared those fees with the local governments,
11 then the local governments would be willing to assist and
12 perform that. But we are in a situation where they have
13 shifted the obligation but prevented us from raising the
14 fee.

15 Let me say that with respect to these
16 inspections, they were only imposed in 2001. There was
17 a stormwater permit issued to the cities in 1991, one
18 in 1996, and then the third one in 2001.

19 In 1991 and 1996, these inspection obligations
20 were not in the permits. None of the inspection
21 obligations. Not only the ones from the permitted
22 facilities but the others. Nor was the trash-receptacle
23 obligation. Only in 2001 was it imposed. And that shows
24 that it's not required, not a federal mandate. Because
25 if it was a federal mandate, it would have been imposed

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1 starting in 1991.

2 That is evidence itself that it's not a federal
3 mandate and that the State chose to do it. And, in fact,
4 the State Water Resources Control Board, in the order,
5 setting up the permitted --

6 MS. PATTON: You have five minutes.

7 MR. GEST: Okay, thank you -- originally put
8 that obligation on the Regional Board.

9 Thank you. And with that, I'll stop here.

10 MS. FRIES: Good morning, Commissioners.
11 Judith Fries, Principal Deputy County Counsel here for
12 the County of Los Angeles. I have nothing further to add
13 except to point out that, of course, the comments made
14 by Mr. Gest apply equally to the County as well as to the
15 Cities. And I am here, I'm available for any questions
16 you may have.

17 CHAIR SHEEHY: You've got another four and a
18 half minutes and then you still have your five-minute
19 set aside. So you've still got some more time if you'd
20 like to continue.

21 MR. GEST: No.

22 CHAIR SHEEHY: I'm sorry about the microphone.
23 I think the witnesses here heard me; right?

24 MR. GEST: Yes.

25 CHAIR SHEEHY: You have some more time, you can

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1 reserve all that for responses, or you can --

2 MR. KAYE: We'd like to reserve all of that for
3 responses.

4 CHAIR SHEEHY: Okay, Nancy, how much time do
5 they have left?

6 MS. PATTON: Six minutes.

7 CHAIR SHEEHY: Six minutes?

8 Why don't we give them seven, since I talked
9 for a minute.

10 Okay, so we'll reserve that time for rebuttal,
11 okay?

12 Thank you very much.

13 Now, we're going to want to go to the next set
14 of witnesses, I believe.

15 MR. LAUFFER: Michael Lauffer, Chief Counsel
16 for the State Water Resources Control Board, representing
17 the Los Angeles Water Board and the State Water Resources
18 Control Board.

19 CHAIR SHEEHY: Okay, Mr. Lauffer.

20 MS. CASTAÑEDA: Carla Castañeda, Department of
21 Finance.

22 CHAIR SHEEHY: Thank you, Ms. Castañeda.

23 MS. GEANACOU: Susan Geanacou, Department of
24 Finance.

25 CHAIR SHEEHY: Okay, great.

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1 Who would like to go first?

2 MR. LAUFFER: I will go first, Mr. Sheehy.

3 Thank you very much.

4 CHAIR SHEEHY: Thank you.

5 MR. LAUFFER: Good morning, Commissioners.

6 As I indicated, I'm Michael Lauffer. I'm the chief
7 counsel for the State Water Resources Control Board. And
8 I have lived this round of permitting since the 2001
9 permit was adopted, and has been litigated up through the
10 courts of appeals and the Cities challenged that to the
11 California Supreme Court.

12 And I really applaud your staff. They have
13 done a very good job embracing a fairly complicated body
14 of law, a body of law that courts routinely recognize as
15 some of the most difficult issues they challenge or that
16 come before the courts. And I think that, in general,
17 the staff report does a very good job understanding the
18 interplay of federal and state permitting. However, we
19 have significant concerns with the fundamental conclusion
20 in the staff report, and urge you to reject the staff
21 report's conclusion that these are state mandates as
22 opposed to federal mandates. This is an overarching
23 issue that cuts across every single one of the Commission
24 staff's draft findings.

25 The primary issue we have is that the

1 requirement on these 84 municipalities that are the
2 subject of this test claim emanates exclusively from
3 federal law. It is a requirement of federal law that
4 these municipalities reduce the pollutant discharges and
5 their municipal stormwater discharges to the maximum
6 extent practicable.

7 And what has happened is, your staff has looked
8 at case law, construing the interplay of general
9 requirements and specific requirements, and concluded,
10 we think in a very oversimplified way, that because the
11 federal law itself doesn't specify the permit
12 requirements that span a 72-page permit and an
13 administrative record that spans tens of thousands of
14 pages, that, therefore, because those requirements are
15 not specifically in federal law, that they are not
16 federal mandates. And in our view, it is the fact that
17 the federal law establishes a standard that all
18 municipalities of the size of the County of Los Angeles
19 must meet, and then federal law establishes an obligation
20 on the permitting entity -- in this case, it is the
21 Los Angeles Water Board -- to take this general federal
22 requirement, what is known as the "*maximum extent*
23 *practical*" standard, and convert it into real programs
24 and real requirements. That is a requirement of federal
25 law that the permitting agencies do this.

1 We think that two-step process maintains this
2 permit as a federal mandate, and does not make it subject
3 to subvention under Article XIII B, section 6 of the
4 Constitution.

5 We have a secondary issue with respect to the
6 final staff analysis which we received less than 20 days
7 ago. It has some discussion of prior litigation
8 involving this particular permit and some statements
9 concerning that litigation that are simply wrong. And
10 I'll highlight those towards the tail end of my
11 presentation.

12 And then with respect to trash receptacles, the
13 staff -- final staff analysis reverses a prior conclusion
14 of staff that was in the draft analysis, and finds that
15 there is no fee authority. And we feel that there needs
16 to be further time to consider that particular issue.

17 Given the limited time, we haven't had an
18 opportunity to consider the interface between the
19 Metropolitan Transit Agency, which actually operates most
20 of the transit facilities, and the municipalities.

21 We believe that there is statutory authority
22 for the county and the municipality, or the other
23 municipalities, to recoup some of those costs through the
24 Metropolitan Transit Association.

25 So as I indicated, our overarching concern is

1 that these provisions are federal mandates. And the fact
2 that the water boards have an obligation under federal
3 law to convert a general federal requirement into
4 specific requirements does not strip the requirements of
5 their federal character.

6 Why do I think your staff has missed a key
7 issue here?

8 And I will say, it is very novel. I mean, if
9 you look at the case law on mandates, there is no
10 analogue to this case. And that's why it's very
11 important that the commissioners and their designates
12 think very carefully about what's being decided here.

13 What is happening is, as a matter of federal
14 law, municipalities have to reduce pollutants in their
15 stormwater discharges to the maximum extent practicable.
16 If you look at the handout that I provided beforehand,
17 there is a provision that -- the first page shows the
18 relevant Clean Water Act section.

19 That section also says that permits that govern
20 these types of municipal stormwater discharges must
21 contain -- they shall require the controls. So there is
22 an abstract federal standard -- reduce pollutants to the
23 maximum extent practicable -- followed by a requirement
24 that the permits that actually reflect that rich
25 standard contain the controls.

1 And your staff is doing a yeomen's job trying
2 to find the right paradigm by which to analyze these test
3 claims. And what they have turned to is the *Long Beach*
4 *Unified School District* case, a desegregation case where
5 the state government issued an executive order that
6 required all districts, if they either had a history of
7 segregation or there was concern or a possibility that
8 they've had segregation, to undertake a number of
9 specific activities to desegregate and to study and
10 analyze whether they needed to desegregate.

11 And there is language in that decision that
12 talks about, because the executive order and guidelines
13 are requiring a higher level of service because of their
14 specificity, that they have now gone beyond this general
15 desegregation requirement and actually created a state
16 mandate, a new program of higher level of service.

17 Well, the reason that falls apart in this
18 particular case is, there was no federal requirement on
19 the state government in the *Long Beach* case to
20 desegregate its districts. The districts that had been
21 the subject of segregation had an independent
22 constitutional obligation. And as you all know, courts
23 are in the remedy business. They don't go out and issue
24 general rules to say, "This is how every district in the
25 state or in the nation needs to desegregate." They deal

1 with things that come up on a case-by-case basis.

2 And so what happened was, the State of
3 California stepped in, through an executive order, issued
4 requirements that applied to all districts, and then put
5 in a bunch of specificity where no federal law, no
6 federal court was telling them they needed to do that.
7 And that doesn't work in this particular case.

8 In this particular case, you have a federal law
9 that requires municipalities -- all of the municipalities
10 that are the subject of this permit -- to reduce
11 pollutants to the maximum extent practicable. And then
12 you have a second federal mandate, essentially. A
13 mandate on the permitting agencies -- in this case, the
14 Los Angeles Regional Water Quality Control Board -- to
15 take this abstract concept of "maximum extent
16 practicable," and convert it into specific requirements
17 and specific pollutant-reduction measures and to specify
18 them so they'll be enforceable so that water quality will
19 be improved, and so that this federal standard can be
20 met.

21 And it's really -- with all due respect to
22 staff, I think staff missed the importance of that final
23 step. These are particularized permits that have to be
24 developed by a highly technical staff, at a water board
25 in the state of California. If the Water Board was not

1 doing it, U.S. EPA would be going through the same
2 exercise. They would be receiving an application. In
3 this case, the application from the municipalities was
4 more than 100 pages. They would then have to look at the
5 programs that are proposed and develop them into a
6 permit. In this case, the permit was over 70 pages. The
7 administrative record was tens of thousands of pages.
8 There is a separate fact sheet to the permit explaining
9 what's going on. That fact sheet is 50 pages.

10 And so doing the bridging of the gap, taking
11 this federal mandate and making it explicit and specific,
12 is what the water boards were doing; and they were doing
13 it as a matter of federal law.

14 Now, what is important is, the staff analysis
15 does not in any way explain how the permit requirements
16 that are the subject of the test claim actually exceed
17 the "maximum extent practicable" standard. In other
18 words, how they, themselves, actually exceed federal law.

19 I will concede, they are more specific than
20 what appears in the federal Clean Water Act, but that is
21 because that is the board's responsibility. It is the
22 board's responsibility to translate that federal
23 principle of "maximum extent practicable" into specific
24 programs and permit requirements that will reduce
25 pollutants.

1 This is a highly technical inquiry. It
2 involves balancing a number of factors in order to
3 determine what the maximum extent practicable is.

4 And importantly, you don't necessarily do it
5 with each individual permit requirement because it may
6 be practicable for the municipalities to install trash
7 receptacles at transit stops as opposed to achieving a
8 comparable level of pollutant reduction by putting
9 treatment devices. In other words, putting physical,
10 constructed solutions into a storm drain to try to remove
11 all the trash. And that is the kind of calculus that the
12 water boards have to go through when they develop these
13 specific requirements. And they're balancing all of
14 these across the different elements of the permit.

15 And the Board made specific findings when it
16 adopted this permit that it was designed to implement
17 the federal "maximum extent practicable" standard. It
18 did that in three different places in the permit. And,
19 frankly, you know, that issue was the subject of
20 litigation in both trial court and court of appeal. And
21 in no instance, did the courts find or construe any of
22 the permit provisions to exceed the "maximum extent
23 practicable" standard.

24 But essentially, what Mr. Feller said at the
25 start of this meeting was that its specificity exceeds

1 federal law. And I think that is a difference without
2 a distinction. What is important is, if the permit
3 reflects the federal standard, regardless of whether the
4 permit is specific, it is a federal mandate.

5 Now, I want to just give you a little bit of
6 background on the -- at the great danger of boring you
7 extremely -- of how pollution permitting works in
8 California. Because what we have is a federal law that
9 says you have the maximum extent practicable reduction
10 from stormwater discharges. And this is designed to
11 implement a broader prohibition within the Clean Water
12 Act that persons, including municipalities, cannot
13 discharge pollutants without a permit. And in
14 California, the way that you get this federal permit is,
15 you come to one of the California water boards. And
16 the California water boards historically have issued
17 these permits to all persons -- individuals,
18 corporations, municipalities, state agencies. The state
19 agencies such as Caltrans are subject to a similar
20 municipal stormwater permit.

21 And in California, it's the water board's
22 responsibility to translate these federal requirements.
23 All of the federal regulations are our own regulations.
24 We follow them, we implement them, they have been
25 incorporated into our laws.

1 Municipality stormwater permits are a little
2 bit different because the other permits -- for example,
3 wastewater treatment plants, your sewage, refineries --
4 they're very specific requirements, generalized
5 requirements that are embedded in federal law. Specific
6 numbers that have to be met, what are known as water
7 quality standards or technology standards for some of
8 these facilities.

9 From municipal stormwater permits, U.S. EPA
10 made a call when they developed their regulations -- and
11 this is what you see on the bottom of page 1 of that
12 handout -- that they would actually -- it's too variable.
13 You need a specified program, but it needs to be
14 developed on a municipality-by-municipality basis. And
15 so what they did is, rather than creating general
16 standards, they went ahead and said, "Municipalities,
17 you go to your permitting agency" -- again, in California
18 this is the water boards -- "with an application" -- and
19 the federal regulations essentially only have application
20 requirements -- "tell the city what they need to do to
21 describe their program and request a permit from the
22 water boards."

23 And these regulations that U.S. EPA adopted go
24 on to say that it will be the permitting agency's
25 responsibility to ensure that that application and the

1 programs described by the municipalities actually reflect
2 the federal minimum standard of "maximum extent
3 practicable."

4 U.S. EPA was challenged on this approach
5 because it's a little bit counterintuitive. Regulations
6 normally implement statutes. They make them more
7 specific.

8 In this case, U.S. EPA said, "Give us your
9 application and describe what you're going to do to get
10 to the maximum extent practicable."

11 A number of environmental groups challenged
12 those regulations, and the courts upheld them. And the
13 reason they upheld them was, they bought U.S. EPA's
14 argument that these have to be developed on a customized
15 basis, and that ultimately, the permitting agencies will
16 have to ensure that the permits and the programs that
17 either are proposed by the municipalities or that are
18 proposed and then been modified by the permitting
19 agencies, actually reflect that "maximum extent
20 practicable" standard. That's the NRDC decision that's
21 cited on the next page of the handout I gave you. And
22 this is something that the water boards have been trying
23 to make clear to the staff since the outset of this test
24 claim. It was in our April 2008 submittal, and it was
25 really a key issue in our most recent submittal back in

1 June. And yet this decision is never once cited by the
2 staff analysis.

3 And California courts have looked at this
4 issue, and that's the *City of Rancho Cucamonga* decision
5 that's also on page 2 and 3 -- page 2 of the handout.
6 And they have made it crystal clear that it is the
7 permitting agency's responsibility and discretion to
8 decide the practices, techniques, and other provisions
9 that are appropriate and necessary to control the
10 discharge of pollutants -- and, again, that's as a facet
11 of federal law -- and that the regional board must comply
12 with the federal law requiring detailed conditions for
13 the NPDES permits.

14 And so you have a very different character
15 here. It's not like the desegregation cases. It's a
16 case where federal regulations require the permitting
17 agencies to go through and develop these requirements.

18 California courts have repeatedly acknowledged
19 in challenges to these permits that it's the obligation
20 of the water boards to develop these specific
21 requirements to reflect the "maximum extent practicable"
22 standard.

23 And so what is essentially going on here is,
24 you have the Los Angeles Water Board receiving a 100-page
25 application from the municipalities; going through an

1 intensive public process to figure out whether or not
2 that application reflects the federal minimum
3 requirements, what is required to be -- the pollutant
4 reduction required by federal law. And then issuing a
5 permit, after extensive public hearings and a mammoth
6 administrative record that reflects the "maximum extent
7 practicable" standard, they explicitly say that that's
8 what they're trying to do; that the permit and all of its
9 programs collectively, including the programs developed
10 by the municipalities, are designed to reflect this.
11 And yet now, what we have -- and then that being
12 challenged, the courts agreeing with the water boards,
13 never finding that there's evidence --

14 MS. PATTON: You have five minutes.

15 MR. LAUFFER: Thank you very much -- that the
16 permit exceeds the federal standards. And yet here we
17 are again --

18 CHAIR SHEEHY: Excuse me, just one second. I
19 do want to make sure we leave some time for Finance to
20 comment. So you do have five more minutes.

21 But Finance, how much time do you think you
22 need?

23 MS. CASTAÑEDA: We need very little time.

24 CHAIR SHEEHY: Okay, please continue.

25 MR. LAUFFER: And so what we have is almost

1 an element of Groundhog Day. Because repeatedly, the
2 municipalities have argued that the permit exceeds the
3 federal minimum standards. They've done that to try to
4 require the boards to make additional findings and to
5 undertake additional activities. The courts have
6 rejected that. The water board has rejected it.
7 U.S. EPA has said the permit doesn't exceed the "maximum
8 extent practicable" standard.

9 And yet here we are again, eight years later,
10 making the same arguments and going over the same issues
11 again.

12 Your staff says that it exceeds the federal
13 requirements because of its specificity. The problem
14 with that is, as a matter of federal law, the permits are
15 required to be specific. That makes them enforceable.
16 That ensures that we can actually see the pollutant
17 reduction that federal law requires.

18 And if specifying the controls reflecting a
19 federal standard becomes a state mandate, then we have
20 huge issues with respect to all of our municipal
21 stormwater permits. Because as I showed you and as
22 I've said, the federal regulations simply require an
23 application from the municipalities. They don't spell
24 out what's required to meet the "maximum extent
25 practicable" standard.

1 So for all of the municipalities that are
2 required to have municipal stormwater permits in
3 California, the staff's findings here is essentially that
4 that federal requirement doesn't mean a thing because the
5 specificity is coming from the water boards and,
6 therefore, it's been converting these federal
7 requirements into a state mandate that's potentially
8 subject to subvention.

9 My final technical issues just have to do
10 with page 28 of the final staff analysis and its
11 characterization of some of the prior litigation on this
12 case.

13 One of the issues in the staff analysis is that
14 it -- again, this is on page 28 -- it says that one of
15 the plaintiffs' -- that means the municipalities --
16 challenges to the permit was that the regional board was
17 required to consider economic effects in issuing the
18 permit. By not doing so, the plaintiff alleged the
19 permit imposed conditions more stringent than required by
20 the federal Clean Water Act.

21 In fact, that's the exact opposite of what was
22 being litigated in that case. The argument was that the
23 permit did exceed the federal minimum standards. The
24 Courts did not believe that there was a showing that it
25 exceeded the federal standards, and, therefore, there was

1 no need for the water boards theoretically to do a
2 separate independent economic analysis, although the
3 Court found that it did. So that's clearly an error in
4 the staff analysis that needs to be corrected.

5 And then there's another issue on page 28 with
6 respect to its characterization of that case, finding
7 that the case is actually silent on the test-claim
8 issues. In fact, if you look at Part 4J of that opinion,
9 the issue of inspections was specifically litigated, and
10 the Court of Appeals specifically upheld the regional
11 board's imposition of fee requirement -- or imposition of
12 inspection requirements.

13 With respect to the transit stops, we've had
14 very little time to analyze that. It's come out less
15 than 20 days ago. We do have some -- our preliminary
16 analysis is that the Public Utilities Code, specifically
17 section 30702, under the *County of Fresno* decision, would
18 allow an alternative non-tax basis for the municipalities
19 to get recruitment for fees for trash-receptacle
20 placement. But that is an issue we have not had an
21 opportunity to address carefully.

22 MS. CASTAÑEDA: Carla Castañeda, the Department
23 of Finance.

24 We agree with the staff analysis that the
25 police power authority for fees does not apply to the

1 transit trash receptacles. But along with the Water
2 Board, we also were looking to see if there was specific
3 authority elsewhere for the transit trash receptacles and
4 had been looking for something similar to this. We have
5 not looked at this code section.

6 Also, along with the Water Board, we disagree
7 with the staff conclusion that the permits, since they
8 are issued by the State, are mandates. We think that it
9 needs to go back a little farther. These are federal
10 requirements to issue permits. And it's only when the
11 activities within the permit exceed trying to do these --

12 MS. PATTON: One minute.

13 MS. CASTAÑEDA: -- maximum extent practicable,
14 that you would have a reimbursable mandate, and we have
15 not seen that here.

16 CHAIR SHEEHY: Thanks, Carla.

17 Ms. Geanacou, did you want to add anything?

18 MS. GEANACOU: Nothing further, Commission
19 Members. Thank you.

20 CHAIR SHEEHY: Okay, so as we previously
21 agreed, the claimants have another seven minutes to
22 respond.

23 Please, identify yourself for the record again.

24 MR. GEST: Howard Gest on behalf of the city
25 claimants.

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1 CHAIR SHEEHY: Thank you, Mr. Gest.

2 MR. GEST: The staff analysis addresses the
3 arguments made by counsel for the State Board
4 extensively. And we commend that analysis to this
5 Commission.

6 The argument is not that the permit obligations
7 exceed federal requirements because it's so specific; the
8 argument is that the Regional Board and the State Board
9 went beyond what federal law required in imposing certain
10 specific obligations. And that's a different argument.

11 And, in fact, you'll note that out of the
12 70-page permit, many, many obligations were not appealed
13 to this Commission. We did not argue that there were
14 obligations that required a subvention of funds.
15 However, these particular obligations -- the inspection
16 obligations and the trash-receptacle obligations -- did
17 exceed what was required by federal law. And it's
18 important to note that it's not just a question of, is
19 this a federal program? -- as I'm sure the Commission is
20 knowledgeable about with respect to other matters.

21 The question is, does it exceed federal
22 requirements, or did the State freely choose to impose
23 these requirements on the cities or the county, as
24 opposed to keeping it for themselves? And here, the
25 staff analysis goes into this extensively. And the facts

1 prove that it is not federally required.

2 As the staff looked at in their analysis,
3 there's a regulation that specifically identifies what
4 type of facilities should be inspected. And these
5 commercial establishments -- restaurants, auto shops --
6 are not the facilities that the federal regulation
7 requires to be inspected. These general industrial
8 facilities and the construction sites are not sites that
9 the federal regulations require to be inspected.

10 Now, the State Board and the Regional Board
11 have, throughout this whole permitting process, argued
12 and asserted that they have the authority to go beyond
13 federal law and impose additional requirements. And the
14 California Supreme Court, in *City of Burbank*, recognized
15 that in an NPDES permit like this can have, not only
16 federal requirements, but can exceed federal
17 requirements.

18 And, again, under the law that applies to these
19 matters --

20 MS. PATTON: Five minutes.

21 MR. GEST: -- if it exceeds federal
22 requirements, then it can be a mandate.

23 You're okay?

24 MR. KAYE: Yes.

25 MR. GEST: And so we point out that for both

1 of those reasons, these specific requirements are not
2 federally required. And the evidence is in the record.

3 If they were federally required, they'd be in
4 a federal permit issued by EPA. As counsel for the State
5 Board noted, EPA could be issuing stormwater permits.
6 Well, they've issued stormwater permits to other
7 municipalities, and they have not required the
8 installation of trash receptacles, they have not required
9 the inspection of these facilities. And that information
10 is set forth in a declaration on page 2479 in the
11 administrative record, which is a declaration of a woman
12 by the name of Julie Quinn, who surveyed these different
13 EPA-issued permits. So if EPA is not requiring it,
14 obviously the State here decided to go beyond what the
15 federal law requires.

16 In addition, the State, if it chooses to shift
17 the obligation to the cities, then it also, even if it
18 comes out of the federal program and it's federally
19 required, if the state is choosing between itself doing
20 the inspections or having the cities or the county do it,
21 then again it still can be a mandate.

22 So it's not enough to just say, "Oh, there's
23 this general federal program that requires us to reduce
24 pollutants." The question is, given the facts, is this
25 required by the Clean Water Act? Can you find it in the

1 statute? Can you find it in the regulations? If not, if
2 you can't, then the Regional Board may have the authority
3 to impose it, and that's what the court cases said in
4 the litigation referred to in the past, that it wasn't
5 unlawful to impose it, but those courts specifically
6 said, "We are not deciding whether it is entitled to a
7 subvention of funds."

8 In fact, in the case *County of Los Angeles v.*
9 *the Commission*, the Court said, "That is an obligation of
10 this Commission first, in the first instance, to make
11 that analysis and make that determination."

12 And we commend, too, to the Commission the
13 staff's analysis on these issues; and we ask that you
14 adopt it, except with the one provision that we believe
15 that with regard to state-permitted facilities, the ones
16 that hold the general industrial and general construction
17 stormwater permits, that's an obligation that the Cities
18 and the County are entitled to subvention of funds also.

19 Thank you very much.

20 CHAIR SHEEHY: Mr. Kaye or Ms. Fries, do you
21 have additional comments that you want to add?

22 MR. KAYE: Not at this time.

23 MS. FRIES: No, I do not.

24 CHAIR SHEEHY: Okay, at this point then, we can
25 open it up to questions from Commission members.

1 (No response)

2 CHAIR SHEEHY: I'd like to kick it off then.
3 I have a question for the Water Board.

4 Why was the requirement for the trash
5 receptacles placed on cities and counties? Why didn't
6 you just place it directly on the transit agencies? It
7 seems like there would have a been more logical and
8 direct connection there. They clearly had the
9 authority -- have the authority to levy fees, and you
10 could have avoided -- I think it's, you know, a
11 significant part of this claim that ultimately came
12 forward.

13 MR. LAUFFER: There were a variety of reasons
14 why the permit requirement was specified the way it is.
15 It's actually an alternative permit requirement. Because
16 in certain jurisdictions, there would not even be a
17 requirement to comply with the transit-receptacle
18 replacement. Instead, there's a more generic standard
19 of ultimately zero trash flowing into the river from the
20 municipal stormwater permit that will displace some of
21 these requirements.

22 And so this was, in the first instance, an
23 effort by the Board to ensure that those municipalities
24 who weren't subject to the separate federal requirement,
25 something known as a TMDL, "total maximum daily load,"

1 requirement, would be making progress to remove trash.

2 Transit stops were identified as a high source
3 of trash emanating into the municipal storm sewer system.
4 The permits in this particular instance are specific to
5 these municipalities. The transit agencies were not
6 named historically on the permits. Perhaps it's
7 something that the Water Board may look at in the future.

8 But the issue was, these were public facilities, which
9 is the nomenclature used under the federal regulations;
10 and the Board, at the time it established the
11 requirements, thought it was appropriate to place them on
12 the municipalities.

13 Nothing would prevent the municipalities from
14 working with the MTA to either cooperatively implement
15 or to have the MTA carry out the primary obligation for
16 meeting it. But the permit was on these facilities;
17 these were sources identified as part of a source-control
18 study that were a source of pollution. And it was a
19 public facility, which is the language that is used by
20 the federal regulations and so that was why the permit
21 included the specific requirements.

22 CHAIR SHEEHY: Under current practice, who is
23 required to do the maintenance of those facilities? Is
24 it the MTA, or is it the city and counties?

25 MR. LAUFFER: I can't speak to that.

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1 I know the Public Utilities Code generally,
2 when it's talking about the MTA, indicates that local
3 agencies -- public agencies and the MTA may work
4 collaboratively and establish agreements. But I imagine
5 the county would be in a much better position --

6 CHAIR SHEEHY: Maybe the claimants could
7 address that question, Mr. Lauffer.

8 The transit facilities, who is required to
9 maintain them, do the maintenance on them? Like, if a
10 bench needs to be replaced or something like that, is
11 that done by the transit agency or is that done by the
12 city or county jurisdiction that it sits in?

13 MS. FRIES: I believe those are maintained by
14 the transit agencies.

15 The trash receptacles themselves, because
16 they've been placed by the county or the cities, are
17 maintained by the agencies that have placed them there.
18 But the other facilities are maintained by the transit
19 agencies.

20 CHAIR SHEEHY: Right. But the trash
21 receptacles were placed there by the counties and cities
22 because you were directed to do that.

23 MR. FRIES: Through this permit, exactly.

24 CHAIR SHEEHY: Right, right. But the rest of
25 the facilities are taken care of, as far as you know, by

1 the transit agencies.

2 It just seems that it would stand to make
3 sense, Mr. Lauffer, that when that permit was done,
4 that it would have made more sense to have the transit
5 agencies be responsible, at least at a minimum, for the
6 design and the installation and the upkeep of those
7 receptacles, perhaps the actual emptying of them would
8 have continued -- you know, would be part of the regular
9 refuse-collection process for that jurisdiction. But it
10 just seems odd that the permit would have mandated the
11 cities and counties to do that. It's just my feeling. I
12 don't know how other members feel. It's not the central
13 part of this claim, but it was a question that was
14 bothering me.

15 Other questions or comments?

16 Yes, Steve?

17 MEMBER WORTHLEY: I have a question, and I'm
18 not sure who to address this to, whoever can respond to
19 it, I suppose.

20 But this has to do with the issue raised by the
21 claimants regarding the occupancy of the -- fully
22 occupying the issue of inspections because of fees that
23 are charged by the Regional Water Quality Control boards,
24 50 percent of which is to be allocated -- I'm sorry,
25 everyone heard what I said, I think -- 50 percent of what

1 used to be allocated to inspection.

2 Is the fee set by statute or do the Regional
3 Water Quality Control boards set their own fees for this
4 purpose?

5 MR. LAUFFER: I'll answer that question for
6 you, Mr. Worthley and Commissioners.

7 The fee is actually established by the State
8 Water Resources Control Board. And it is a fee that is
9 set based on the legislative appropriation for the boards
10 to carry out their responsibilities. And so that money
11 is expended for inspections and for stormwater-related
12 activities at these, what are known as the Phase I
13 facilities. That money is expended fully by the Regional
14 boards and the State Water Board for that specific
15 purpose.

16 And so the fees float on an annual basis. The
17 board establishes a fee schedule annually based on the
18 appropriation that's given to the Legislature. And the
19 boards continue to carry out their inspection and
20 enforcement responsibility and oversight responsibility
21 with respect to those Phase I facilities.

22 The issue here was, these particular facilities
23 have been identified within the Los Angeles region as
24 part of the permit application process as a
25 significant -- a critical source of pollution. And so

1 we're subject to additional permit requirements within
2 the Los Angeles region by this permit, as the board
3 carried out its responsibilities under federal law.

4 MEMBER WORTHLEY: Well, what I was trying to
5 get to is, when we think about fees, fees are set by
6 local jurisdictions based upon the costs of providing
7 service.

8 Is that a similar type of process that is gone
9 through to determine what the amount of these fees are?
10 In other words, if I'm saying, I'm going to inspect these
11 Phase I facilities, I'm going to go through a process to
12 determine what does it cost me to do that inspection.
13 And when I've done that, then I set a fee.

14 MR. LAUFFER: At the state level, for this
15 particular fee program, it's not -- what you're
16 describing is essentially a fee-for-service approach.

17 It's not -- you know, there's not a line
18 item for each particular permittee in terms of we know
19 in any particular year this level of effort will be
20 expended on that permittee.

21 Instead, the fees are set with a rough nexus
22 to the overall effort that the water boards will expend.
23 And in a particular year, you know, a facility may not be
24 subject to inspections. You know, in subsequent years,
25 they may. And the actual costs in those years may exceed

1 the fee collected during that year. But the fees have a
2 nexus, but it's not a pure fee-for-service approach.

3 MEMBER WORTHLEY: Thank you.

4 CHAIR SHEEHY: Did you have any other questions
5 at this time, Mr. Worthley?

6 MEMBER WORTHLEY: No.

7 CHAIR SHEEHY: Mr. Glaab?

8 MEMBER GLAAB: Yes, thank you, Mr. Chairman and
9 Members.

10 Mr. Gest, I'd like you to return to something
11 that you had said earlier with regards to cities being
12 required to do inspections but they did not get the fee
13 because they don't have the ability.

14 Could you clarify that just a little bit?

15 MR. GEST: Yes, this is what I was trying to
16 say: First of all, the cities can see that they have
17 certain -- the right or ability to assess certain fees
18 to provide certain services. And, therefore, I did not
19 address the issue of inspecting a restaurant or a retail
20 gas outlet because the cities do have the ability to
21 assess a fee on that restaurant or for a particular
22 license. However, with respect to these facilities that
23 hold a permit issued by the State Water Resources Control
24 Board -- and that's what we call these Phase I
25 facilities -- that facility, by law, is required to apply

1 to the State board for a general permit, what they
2 call "general permit," or a specific permit from the
3 Regional board.

4 As counsel for the State Board just said, the
5 State Board estimates how many fees they have to collect
6 from these facilities in order to run that program. And
7 they assess those facilities those fees. And that
8 facility has to pay that fee to the state. And then
9 there is legislation that says that a portion of that
10 fee is meant to be used for inspection. And the
11 Legislature specifically calls out inspection of those
12 facilities.

13 Now, what has happened is that the Regional
14 Board, in 2001, came in and said, "You know what? We're
15 going to put this obligation on the Cities and the
16 County." In other words, "We won't have to incur the
17 cost of doing that." Because they had that obligation,
18 and they were inspecting those facilities before, so it
19 wasn't as if these inspections were not occurring.

20 So what my argument is and what I was trying to
21 say, is that when the State Legislature passed that
22 legislation, saying that the State Board could assess
23 that fee and have it to be used specifically for the
24 inspection of these Phase I facilities or these
25 facilities that hold a permit issued by the State Board,

1 that precluded the City from then assessing a second fee
2 on that facility for the same activity that the State
3 Board has already assessed a fee.

4 That is my argument. And that is because the
5 legislation preempted the ability. Because the City
6 would then be assessing a fee and the facility would be
7 paying more than what the cost of it was because they'd
8 be paying it twice.

9 CHAIR SHEEHY: Thank you.

10 I'd like to -- yes, Mr. Lauffer?

11 MR. LAUFFER: If I may, Mr. Sheehy. I just
12 wanted to address one issue raised by Mr. Gest's answer
13 there. And there is the insinuation that the Water
14 Board -- the Los Angeles Water Board, when it established
15 this requirement, abdicated its responsibility to do
16 inspections in the Los Angeles area for these facilities,
17 and that's not the case. Those inspections in that
18 program continue.

19 The Water Board -- you know, this is a very --
20 this is a flip argument to the one that the counties --
21 or some of the cities made when they challenged the
22 permit in the first instance, basically saying that these
23 permit requirements -- the inspection requirements could
24 never be put onto the municipalities. They're basically
25 saying, "Well, no, because the State board has to do it

1 and the Regional Board has to do it, the municipalities
2 can't." And the court rejected those arguments.

3 And the important thing is, as that issue was
4 argued in the courts, we were looking at what the key
5 sources of pollution were within these municipalities.
6 And these were facilities that were identified as a key
7 source of pollution. They were required -- "they," being
8 the municipalities -- were required by the permit and
9 essentially by federal law, to establish ordinances to
10 deal with these sources.

11 And so what we have consistently said is, the
12 inspections are designed to assure compliance with those
13 local municipal ordinances.

14 And we do ask that they look and make sure that
15 when they're there, that they have a permit from the
16 state, but they're not responsible for inspecting and
17 carrying out the State's obligation. The State still
18 continues to do that and collects fees to do that.

19 CHAIR SHEEHY: Thank you, Mr. Lauffer.

20 I'm wondering, Camille, can we hear from
21 counsel on this issue of the State preempting the locals
22 from charging a fee?

23 MS. SHELTON: Yes, I believe Mr. Feller has
24 prepared that analysis, and he is prepared to provide
25 that information.

1 CHAIR SHEEHY: Mr. Feller, would you please
2 walk us through the staff's analysis on that issue?

3 MR. FELLER: Yes, that's on pages 64 to 70.
4 And the courts have laid out the standards for
5 preemption. Obviously, the first thing that a court
6 looks to is whether it is expressly -- the Legislature
7 has expressly manifested its intent to occupy the field.
8 And there is no such legislative intent in the fee
9 statute for the Water Board inspections.

10 And then they look to implied preemption, and
11 those standards are in that second full paragraph on
12 page 65.

13 One, "Whether the subject matter has been so
14 fully and completely covered by general law as to clearly
15 indicate that it has become exclusively a matter of state
16 concern..." We didn't see that on the face of this
17 statute.

18 Second, "The subject matter has been partially
19 covered by general law, couched in such terms as to
20 indicate clearly that a paramount state concern will not
21 tolerate further additional local action."

22 Or third, "Where the subject matter has been
23 partially covered by general law and the subject is of
24 such a nature that the adverse effect of a local
25 ordinance on the transient citizens of the state

1 outweighs the possible benefit to the locality.”

2 We didn't see that any of those applied to this
3 state statute. And so we didn't find that it preempted
4 the fee authority for the local agencies.

5 I just wanted to say one more thing on this.
6 And I know the local agency's argument is that because
7 the state inspections, and now local inspections are
8 required, that the local entities are being
9 double-charged. But, in fact, it's staff's position
10 that these are actually two programs, a state program
11 and a local program, and that under the general permit,
12 the facilities pay the State; whereas under the Regional
13 Water Board permit, it's the municipalities who pay for
14 the inspections there. So they are paying two different
15 entities, and so we feel these are two different
16 programs.

17 CHAIR SHEEHY: Okay, Mr. Lauffer, if I get this
18 wrong, please correct me. The claimants are asserting
19 that part of the fee -- not the whole fee, but part of
20 the fee -- that the State levies on the permittees is
21 necessary for covering inspection costs.

22 Is that true? Part of the fee -- part of the
23 permit fee for inspection costs?

24 MR. LAUFFER: Part of the permit fee is to go
25 to the State board and the Regional Board's budgets for

1 inspections.

2 Basically, the Legislature wanted to ensure
3 that the State Board and the Regional Water Quality
4 Control boards were getting out and inspecting the
5 facilities.

6 CHAIR SHEEHY: Some of that local fee is coming
7 back to the State Board?

8 MR. LAUFFER: Well, what happens is -- when you
9 say "local fee," you're talking about within the
10 Los Angeles region.

11 CHAIR SHEEHY: Oh, okay. So who is issuing --
12 who sets the fee? Is it the Regional Board or is it set
13 by the State --

14 MR. LAUFFER: The fee is set by the State Water
15 Resources Control Board.

16 CHAIR SHEEHY: All right.

17 MR. LAUFFER: And so the State Water Resources
18 Control Board provides all of the fee and the
19 administrative support services for the Regional boards.
20 So we set the fees, we collect the fees; and then, you
21 know, subject to the appropriations limitations by the
22 Legislature, the Board is responsible for handling the
23 budgets for the Regional boards.

24 And we have in place processes to ensure that
25 the Regional boards get their allocation and they're

1 carrying out their inspections.

2 CHAIR SHEEHY: And then are there inspectors,
3 State inspectors, that inspect each one of the
4 permittees?

5 MR. LAUFFER: They are State employees.
6 Whether they are State Water Board employees or Regional
7 Water Board employees, we use a team approach.

8 CHAIRY SHEEHY: Right.

9 MR. LAUFFER: They go out, they inspect the
10 facilities.

11 Again, there may be a period of time between
12 inspections at individual facilities. We certainly do
13 not hit every one of them each year. And, in fact, the
14 permit requirement, we actually -- because we were
15 sensitive to the concerns from the municipalities. If
16 the State has actually inspected one of these facilities
17 within, I believe, a period of the last year, the
18 municipalities do not -- or last three years -- the
19 municipalities do not have to perform their own
20 inspection, under their program.

21 CHAIR SHEEHY: So, Mr. Gest, if the State has
22 inspected a facility, then you don't have to?

23 MR. GEST: That's correct. But the State does
24 not inspect all the facilities. Because if they were
25 inspecting all the facilities, they would not have

1 imposed this obligation on the cities.

2 The permit says that if the State has not
3 inspected this facility that holds this state permit,
4 then the Cities or the County are legally obligated under
5 the permit to do that inspection. And so they are doing
6 an inspection that the State has taken money for from the
7 permittees, but the city or the county is doing the
8 inspection and incurring the cost of the inspector.

9 Now, I would like to --

10 CHAIR SHEEHY: I want to just follow up with
11 Mr. Lauffer.

12 So is that true? Are you collecting inspection
13 fees as part of your permit fee for facilities that you
14 don't inspect?

15 MR. LAUFFER: They are ultimately inspected.

16 What happens is, all the money --

17 CHAIR SHEEHY: Hold on. Don't give me "They
18 are ultimately inspected."

19 MR. LAUFFER: No, no.

20 CHAIR SHEEHY: Yes, somebody is going to
21 inspect them ultimately. But what I wanted to know is,
22 is the State Board collecting, as part of its permit fee,
23 is it collecting money for inspections for facilities for
24 which it doesn't do, and then, therefore, it defaults to
25 the city or county jurisdiction to do?

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1 MR. LAUFFER: Whether the -- there isn't an
2 easy answer to the question, Mr. Sheehy. I'm not trying
3 to be --

4 CHAIR SHEEHY: It's a very direct question.
5 Please don't make the answer any more complicated than
6 you have to, okay?

7 MR. LAUFFER: The issue is, ultimately the
8 State will inspect them. It's just in a particular year,
9 a State or a Regional board will not get to particular
10 facilities.

11 CHAIR SHEEHY: Okay, so in a particular year
12 it may not be inspected.

13 What does the federal law require? Does the
14 federal law require that each one has to be inspected
15 once every year, once every five years, once every ten?
16 What does the federal law require?

17 MR. LAUFFER: The federal law -- now, again,
18 there are two different programs here. There is the
19 Municipal Storm Water Permit Program, and then there is
20 a separate General Industrial Permit Program that the
21 State Water Board issues a general permit for. And there
22 are tens of thousands of permittees subject to that
23 permit.

24 There is no independent federal requirement as
25 to how often the State Board or a Regional Water Quality

1 Control board has to conduct inspections at those
2 facilities.

3 We receive annual reports from those facilities
4 and review those reports, both at the State Board and
5 primarily at the Regional Board levels. That's where
6 their documentation comes in. But inspections are
7 something that is part of our Compliance Assurance and
8 Enforcement Program, and there are work plans that each
9 of the regions develop. The Los Angeles region has its
10 own work plan. At times, it works with the County and
11 the other municipalities in that region so that we can
12 ensure that we're all hitting those particular -- all of
13 the facilities in an orderly and efficient way. But the
14 region has its own work plan where it ultimately tries to
15 work through every single one of its facilities that it
16 has a general permit for.

17 CHAIR SHEEHY: What percentage of the permitted
18 facilities does the State inspect in any one calendar
19 year?

20 MR. LAUFFER: I wouldn't have that information.

21 CHAIR SHEEHY: You have no idea at all?

22 MR. LAUFFER: No, I do not.

23 CHAIR SHEEHY: Okay.

24 MR. KAYE: Could I respond to that?

25 CHAIR SHEEHY: Yes, Mr. Kaye.

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1 MR. KAYE: Okay, I don't have a percentage for
2 you, but I would simply point out on page 67 of the
3 Commission staff analysis, they note that California's
4 1994 Water Quality Inventory Report states that
5 stormwater and urban runoffs are leading sources of
6 pollution in California estuaries and ocean waters.
7 Proponents argue that noncompliance is rampant, with
8 approximately 10,000 industries in the Los Angeles area
9 alone were required but have failed to obtain stormwater
10 permits. Further, the proponents point out that the
11 Los Angeles Regional Water Quality Control Board has only
12 two staff to contact, educate, and control each site, and
13 question whether adequate revenues are returned to the
14 regional boards for this program.

15 CHAIR SHEEHY: Well, you can flip this argument
16 and say, "I don't know how much the permit is and what
17 part of that permit is supposed to be for inspection."
18 But if it's a de minimis amount --

19 MEMBER WORTHLEY: I'm sorry, Mr. Chairman, the
20 statute says -- it says at the top of the page --

21 CHAIR SHEEHY: I'm sorry, Mr. Worthley, can you
22 hit your microphone so everybody can hear you?

23 MEMBER WORTHLEY: I'm sorry. It says at the
24 top of the page that according to the --

25 CHAIR SHEEHY: I'm sorry, where are you

1 looking?

2 MEMBER WORTHLEY: I'm looking at the top of
3 page 67, and I'm assuming it's quoting some statutory
4 authority, but the funds that are collected, not less
5 than 50 percent is to go towards regulatory compliance.

6 CHAIR SHEEHY: Yes, well, that doesn't
7 necessarily mean inspection.

8 MEMBER WORTHLEY: Well, I beg to differ. I
9 mean, that's what regulatory compliance is all about, is
10 inspection.

11 I'm on an air board -- the Regional Air Board
12 in the San Joaquin Valley. If I'm an owner of something
13 which is a permitted -- you know, something that we
14 permit as an air board, we charge a fee for that, to have
15 it inspected. The expectation is when someone pays that
16 fee, it's going to be inspected. That's what they're
17 paying for.

18 If the county were to step in -- or a
19 municipality -- and say, "Oh, they didn't get around to
20 it this year, so we're going to charge you an additional
21 fee," as the owner of that, I would be incensed. I would
22 think I'm being double-paid for, whether I am or not,
23 because that's what I'm paying a fee for.

24 My concern here is that if there's not adequate
25 funding generated from the State, that's their fault.

1 I don't see how they can push that burden on the local
2 government to come in and charge to have another
3 inspection. Because, again, I think it's a horrible
4 system to think that, as an owner, or whatever this case
5 might be, I pay a fee with the expectation it's going to
6 be inspected. The State says, "Oh, we didn't get enough
7 money this year, there's too many projects, we haven't
8 got enough people, we didn't inspect it." Well, I paid
9 for it. The fact that you didn't inspect it, that's not
10 my problem, that's your problem.

11 And then for the State to turn around and say,
12 "Well, we didn't do it so, therefore, counties, you can
13 pay for it." I think they've occupied the field. They
14 have just simply failed perhaps to get enough money to do
15 the job correctly. That's their fault. It shouldn't be
16 pushed back on local government.

17 I think the argument can be made this has been
18 occupied. They simply have not done an adequate job.
19 I mean, all of us in local government, we have to deal
20 with fees all the time. And frequently, our fees don't
21 pay 100 percent, and that's where the general fund has to
22 come in to pay some of that difference. But we can't
23 push that off on somebody else.

24 I think the argument really should be made
25 here, this has been fully occupied by the State. They

1 may have not adequately done their analysis in
2 determining how much money they should be charging people
3 to do these fees, but that doesn't give them the right to
4 push it back on local government.

5 CHAIR SHEEHY: Thank you, Mr. Worthley.

6 Is there -- to either the Water Board or the
7 claimants -- is there any fundamental -- is there a
8 significant difference or fundamental difference in the
9 type of inspections that are done, whether it's the state
10 or local government doing the inspection? Or are the
11 inspections essentially the same? Is there some
12 difference in the inspections?

13 MR. LAUFFER: Largely, at this point in time,
14 the municipal ordinance, as I understand it -- and
15 Ms. Fries or Mr. Gest may be in a better position to
16 explain this -- are basically duplicating -- in other
17 words, the municipalities, while they've identified these
18 particular classes of facilities as a significant
19 critical source of pollution to their municipal
20 stormwater systems, they have not taken the next step.

21 And one of the things about these permits is
22 they're iterative. Each iteration gets more stringent as
23 we identify what the sources of the pollution are, and as
24 we recognize that we're not doing the job that needs to
25 be done to reduce pollutants to the maximum extent

1 practicable.

2 And at this point in time, their ordinances,
3 as I understand it, are largely replicating the State
4 requirements. However, what the permit requires is that
5 they develop their own ordinances in order to assure that
6 the discharges from these critical sources are
7 controlled.

8 CHAIR SHEEHY: So -- right now?

9 MR. LAUFFER: That's my understanding, is that
10 they are largely the same.

11 CHAIR SHEEHY: Okay, can I hear from staff
12 on -- whatever you wanted to comment on; and could you
13 also add on, does the federal requirement require two
14 inspections? Does it require a state and a local
15 inspection or does it just require one inspection?

16 MR. FELLER: Okay, as far as -- the federal
17 regulations require inspections for construction sites,
18 but they don't say whether the state or local agencies
19 have to do that. And that's one of the things I wanted
20 to point out, is that when we talk about
21 double-inspections, that the locals don't need to inspect
22 it if the State already has, that only applies to
23 industrial facilities. The permit doesn't say that about
24 construction sites.

25 CHAIR SHEEHY: I'm sorry, I apologize. But

1 what's the significance of that? That it doesn't apply
2 to construction sites?

3 MR. FELLER: Right.

4 CHAIR SHEEHY: Okay, so what?

5 MR. FELLER: Well, the significance of that is
6 that you don't have the double-inspection requirement for
7 construction sites, because it doesn't say in the permit
8 that the locals don't have to if the State already has.
9 It does say that for industrial facilities.

10 As far as federal law goes, it only calls for
11 inspections of construction sites. It doesn't call for
12 inspections in the regulations of industrial facilities,
13 the federal regulations that I've quoted in the analysis.

14 CHAIR SHEEHY: Mr. Glaab?

15 MEMBER GLAAB: Yes, thank you, Mr. Chairman and
16 Members.

17 A couple things resonate here. I think that --
18 and I think this is where you may have been going,
19 Mr. Chairman, with this -- is that multiple inspections
20 and then imposing the second fee requiring the city or
21 municipality to do it. You said something earlier that
22 kind of rang true, and you said you kind of have a team
23 effort. I think, given the limited resources that
24 collectively everybody has -- and, again, I'm probably
25 being over-simplistic here -- but if you recognize that

1 you're not getting the job done in general, it would seem
2 to me that you get together with the local inspectors and
3 say, "Okay, fine. Let's figure out a way to divide this
4 up so that the business or job site gets at least one
5 inspection," and then they can bill the state for that
6 inspection.

7 I mean, I know that jurisdictions, the
8 Department of Housing and Community Development, they
9 relinquish their ability to do building inspections, and
10 the city gets to collect the fee directly. And it seems
11 to be a system that works fairly well.

12 And it would appear to me that some common
13 sense might be thought of here and get a team effort
14 going. And then whoever does the inspection gets the
15 fee. But certainly not requiring multiple inspections,
16 notwithstanding, of course, any federal requirement for
17 multiple inspections.

18 But it seems like a simplistic approach to me.
19 And you do all have resources -- the county, the city and
20 the state -- you all ought to get in a room at some point
21 in time and talk about how you're going to go after it.
22 And then whoever does the inspection, the other two
23 agencies will respect.

24 Thank you.

25 CHAIR SHEEHY: Thank you, Mr. Glaab.

1 Ms. Bryant?

2 MEMBER BRYANT: I think I want to just go back
3 a little bit to understanding the permit itself.

4 So you have -- your standard is, you have to
5 develop, achieve, and implement a timely, comprehensive,
6 cost-effective stormwater pollution control program to
7 the maximum extent practicable; right? And so the whole
8 thing -- every condition that's in the permit is part of
9 that permit; is that correct? Am I understanding that
10 right?

11 MR. LAUFFER: Correct. That's a good,
12 simplified way to look at it.

13 MEMBER BRYANT: And then what happens? So in
14 1996, right -- do you want to correct me? Go ahead, you
15 answer, too.

16 MR. GEST: I think there's a significant
17 disagreement about that statement. I understand it was
18 meant to be a generalization; but it's the State Water
19 Board's argument that everything in the permit complies
20 with the "maximum extent practicable" standard.

21 It's the County's and the Cities' argument that
22 the permit goes beyond what the federal regulations
23 require and, in particular, what we are talking about
24 today goes beyond the MEP standard and go beyond what's
25 required.

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1 MEMBER BRYANT: Okay, so when the permit was
2 issued, what is -- and I'm sure that I missed this
3 somewhere -- but how do you protest that? How do you go
4 and say, "The State has gone too far"?

5 MEMBER WORTHLEY: They're here.

6 MEMBER BRYANT: I get that.

7 But I'm saying -- I'm asking, was it
8 adjudicated prior to you getting here? Did someone say
9 this trash-receptacle issue went too far? Or do you have
10 to look at the permit holistically?

11 I'm kind of back to thinking that -- you get
12 to the point where your stormwater gets to the clean --
13 the spot that you have to get it to. If the trash
14 receptacles are part of that, isn't that part of the
15 permit?

16 MR. GEST: I think both the State and I want to
17 respond to that question. I'll let Mr. Lauffer go first,
18 if you'd like.

19 MR. LAUFFER: No, go ahead, Howard.

20 MR. GEST: All right, well, then I will go
21 first.

22 First of all, everybody shares the same goals.
23 We all want to reduce pollutants. And we really are
24 trying to find a way to do this partnership and do it
25 right.

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1 How we challenge it. First of all, before the
2 Regional Board and before the State Board and in the
3 courts, you have the right to say that they've exceeded
4 law. However, the State Board has vigorously argued and
5 the courts have upheld, that the State has the authority
6 to impose, in an NPDES permit like this, requirements
7 that exceed federal law. That's, of course, why we're
8 here.

9 So there was challenges to all of these
10 obligations, both originally and in state court, saying,
11 "Wait a minute, we're required to have a subvention of
12 funds." And those were immediately dismissed. They
13 said, "No, no, that issue has to go before the Commission
14 on State Mandates." And, of course, there's been a
15 history of, it had to go -- whether they could hear it or
16 not, and come back.

17 So this whole specific issue of, "Does it
18 exceed federal law and is entitled to a subvention of
19 funds?" really is, for the first instance, before the
20 proper forum, which is this Commission.

21 As to whether it exceeds federal law, the State
22 Board argued that they have the right to impose
23 obligations that go beyond federal law. And that was
24 litigated.

25 And we would say that the courts held in the

1 litigation that the State had the authority to impose
2 these obligations. It wasn't, if you will, inconsistent
3 or in violation of federal law, but they did not address
4 whether it was within federal law or exceeded it. That's
5 our position.

6 MR. LAUFFER: And I have a different
7 perspective, having lived this for the last eight years:
8 The issue of whether or not the permit exceeds maximum
9 extent practicable.

10 First of all, there are three different permit
11 findings that indicate that the permit, taken as a whole,
12 is designed to reflect the "maximum extent practicable"
13 standard. In other words, not that it's relying on any
14 reserved authority to exceed it. I mean, that the permit
15 taken as a whole, including trash receptacles, reflects
16 the "maximum extent practicable" standard.

17 Now, Mr. Gest's client in the prior litigation
18 was solely the County of Los Angeles. Many of the cities
19 who he is now representing in this particular claim also
20 litigated the permit. The permit went before the State
21 Board, and then it went to superior court. And the issue
22 of whether or not it exceeded the "maximum extent
23 practicable" standard was a core issue of that
24 litigation.

25 Now, in many respects, the courts were finding

1 that, yes, the Board had the authority to go beyond MEP,
2 if it wanted to. And I don't disagree with Mr. Gest's
3 characterization that the California Supreme Court and
4 those -- and also the trial courts here have said the
5 boards could do state requirements that are more
6 stringent than federal law. However, many of the cities,
7 including -- when I say this matter was litigated, it was
8 aggressively litigated. It was a two-phase trial.
9 Thirty-two discrete issues. And motions for new trial.
10 And one of the core issues in the motion for new trial
11 was that it was more stringent than federal law, that it
12 went beyond the federal "maximum extent practicable"
13 standard. Because under California Supreme Court
14 jurisprudence not related to your body of law, not
15 related to subvention, there is a whole host of other
16 obligations that would kick in with respect to what kind
17 of analysis the water boards would have to do if they
18 exceeded the federal requirements.

19 And the courts found that they didn't, and that
20 the board, you know, taken as a whole, the permit does
21 reflect the "maximum extent practicable" standard.

22 So I do agree with Mr. Gest about the import
23 of the Court's findings. And I think that those are
24 important. They change how the boards analyze their
25 responsibilities under the state water quality laws. The

1 corollary to them is they also have an effect over here
2 in subvention. Because if we are not going more
3 stringent than the "maximum extent practicable" standard,
4 then it is still a federal mandate. And like I said, the
5 permit findings already say that they do not go -- that
6 they are designed to reflect that federal standard. And
7 this has been an issue that's been litigated.

8 MEMBER BRYANT: Eric, do you have any thoughts
9 about that?

10 MR. FELLER: No, I think I'll let the parties
11 speak for themselves on that.

12 MS. SHELTON: Could I just mention, though, in
13 all those prior cases and prior litigation, none of the
14 cases dealt with any mandates law. So they didn't deal
15 with the *Hayes* case, they didn't deal with *Long Beach*
16 *Unified School District* and the standards that have been
17 established for mandates law.

18 MEMBER BRYANT: Okay, will you go through those
19 again?

20 MS. SHELTON: Under *Hayes*, the Court
21 established an analysis of how the Commission is required
22 to analyze whether there's a federal mandate or a state
23 mandate. And, first, you have to --

24 CHAIR SHEEHY: Camille, I'm not sure
25 everybody's getting this. Can you --

1 MS. SHELTON: First, the Court in *Hayes*
2 indicated that first you have to determine whether there
3 is a federal mandate on the state. Even if there is a
4 federal mandate on the state, then you also have to go
5 beyond and analyze whether the state has really imposed
6 any costs on a local agency.

7 The next case was *Long Beach Unified School*
8 *District*, which Mr. Lauffer is trying to distinguish
9 here. But in that case, it was a situation where you had
10 existing federal and state law preventing racial
11 discrimination in the schools or desegregation in the
12 schools. The case law did not -- the courts did not
13 explain or tell the school districts how to do that.
14 The State stepped in and issued an executive order
15 specifically requiring the schools to take specific
16 steps.

17 And the Court there, in the Second District
18 Court of Appeal, did find that those specific steps were
19 reimbursable when you compared them to existing decisions
20 of the court interpreting federal law.

21 And so those are the mandate issues that have
22 not been addressed, and specifically not addressed in
23 this litigation. That, I think, has been occurring for
24 ten years.

25 CHAIR SHEEHY: Okay, do we have additional

1 questions or comments from Board members?

2 (No response)

3 CHAIR SHEEHY: We've got a staff
4 recommendation, I think, which is a partial approval of
5 the test claim and a partial rejection.

6 You approve the part of the test claim dealing
7 with the trash receptacles; is that right?

8 MS. SHELTON: Yes.

9 CHAIR SHEEHY: Finance, you don't agree with
10 the staff recommendation on that; did you?

11 MS. CASTAÑEDA: We only agreed that the
12 police-power fee authority does not apply, as they said.
13 We had not had a chance to look at the Public Utilities
14 Code reference to see if there was other fee authority.

15 CHAIR SHEEHY: I see.

16 MS. SHELTON: Can I also clarify that Public
17 Utilities Code reference is the first time that we've
18 heard that here today, and we have not seen it, either.

19 MR. LAUFFER: And I'll profess, it was my
20 responsibility for bringing that up. And the reason --
21 this is our first opportunity to address it. The final
22 staff analysis only came out two weeks ago, where the
23 staff --

24 CHAIR SHEEHY: I thought you said 20 days.
25 Now it's two weeks?

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1 MR. LAUFFER: I said it was less than 20 days,
2 Mr. Sheehy.

3 CHAIR SHEEHY: You're moving that bar around on
4 me there.

5 MR. LAUFFER: No, in all fairness, we have only
6 had a chance to look at that issue within the last two
7 weeks. And we've identified the code section in the last
8 day or two.

9 CHAIR SHEEHY: What's the pleasure of the
10 Commission this morning on this item? Is there a motion?

11 MEMBER WORTHLEY: Mr. Chairman, I would like to
12 move the staff recommendation with the modification that
13 I believe that, as it relates to Phase I projects, that
14 the field has been fully occupied by the State relative
15 to the charging of fees for those inspection purposes and
16 would, therefore, find that any additional costs incurred
17 by local jurisdictions would be a reimbursable mandate.

18 MR. FELLER: Just to clarify, you're
19 specifically speaking to Phase I facilities that are
20 covered under a general statewide permit?

21 MEMBER WORTHLEY: Yes.

22 CHAIR SHEEHY: So which ones would that not
23 cover?

24 MR. FELLER: We don't have that information in
25 the record as to facilities that are or are not covered

1 under the Phase I permits.

2 Maybe the parties could speak to that better
3 than I could.

4 CHAIR SHEEHY: Could the parties speak to
5 the -- so, Mr. Worthley, your motion would be to approve
6 the staff recommendation and then go beyond it?

7 MEMBER WORTHLEY: Absolutely.

8 CHAIR SHEEHY: Could the parties explain what
9 they think Mr. Worthley is trying to get at with the
10 "going beyond"? Because I'm not sure I totally got it.
11 But I think the claimants get it.

12 MR. GEST: It's my understanding that with
13 respect to a facility that has to apply to the State
14 Board for a General Industrial Activities permit, or a
15 General Construction Stormwater permit, with respect to
16 the cost of these inspections -- I'm sorry, he's saying
17 that basically the field has been preempted and,
18 therefore, the --

19 CHAIR SHEEHY: Saying that the field has been
20 preempted? Meaning, that --

21 MR. GEST: That the Cities or the County cannot
22 assess a fee for that, and they would be entitled to a
23 subvention of funds. And that's to distinguish them from
24 the other commercial facilities, such as restaurants,
25 retail gas outlets, automotive dealerships, and the like.

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1 MEMBER WORTHLEY: Which acknowledge that they
2 have the ability to charge fees for.

3 CHAIR SHEEHY: In the situation where the State
4 has levied a fee, are you prevented from levying a fee or
5 you just don't want to double-charge your constituent?

6 MR. GEST: It's our argument that if it is
7 fully preempted, we are legal prevented.

8 CHAIR SHEEHY: Why is it fully preempted?

9 MEMBER WORTHLEY: My discussion or my argument
10 is that -- or my reasoning for it is because
11 specifically, they are required to charge people for
12 those applications for purposes of inspection. It's
13 already part of the statutory framework. The fact that
14 they're not charging enough is their problem.

15 CHAIR SHEEHY: If the Cities and County come in
16 to do an inspection, why can't they go ahead and charge a
17 fee?

18 MEMBER WORTHLEY: Because it's been preempted
19 by the State. And if they've been preempted by the
20 State, local governments are prevented from that.

21 CHAIR SHEEHY: Are they just asserting that it
22 is preempted, or is it legally preempted? That's what I
23 don't understand.

24 MS. SHELTON: It has not been decided by the
25 court. They're making an argument that it's been

1 preempted.

2 MEMBER WORTHLEY: Right.

3 CHAIR SHEEHY: So you're not even trying to
4 charge in those days? You're just saying, "Well, we've
5 been preempted by the State"?

6 A question for the claimants. In other words,
7 if you end up having to go and inspect a facility, and it
8 hasn't been inspected in three years, you go in and
9 inspect it, the State has already collected a permit fee,
10 some portion of which has been ostensibly collected for
11 doing an inspection, the State hasn't done an inspection,
12 and you believe you've been preempted because of that
13 permit, have you tried to collect a fee in that case or
14 have you just already decided that you're legally barred
15 from doing it?

16 MS. FRIES: We certainly have not tried to
17 impose a fee that we believe we are not legally
18 authorized to impose.

19 If the County -- and this would apply as well
20 to the Cities -- was doing an inspection for some reason
21 that was not required by this permit, then naturally, we
22 would believe we had the authority to impose a fee for
23 that.

24 But for the inspections that we're doing solely
25 because they're required under this permit and the fee

1 has been collected by the State, we believe we do not
2 have the authority. And our ordinance, which does impose
3 fees for other types of inspections, specifically does
4 not require fees for these inspections.

5 CHAIR SHEEHY: Thank you, Ms. Fries. Hold on.

6 Camille or Eric, how does the issue of the
7 preemption get resolved legally? Does it get resolved
8 through this process?

9 MR. FELLER: We don't have the authority to --
10 well, for the mandates part of it.

11 If the locals did try to impose a fee, then a
12 party could bring it to court and it would be judicially
13 decided whether or not that was preempted by the state
14 law or, as Mr. Gest has argued in the briefings, it would
15 be a double-fee imposed on them by the State and the
16 local agencies, and, therefore, it would be a special tax
17 subject to a vote under Proposition 13.

18 MS. SHELTON: The Commission has the authority
19 to make the decision whether or not the claimants have
20 fee authority. That is within your jurisdiction to make.

21 It's a difficult analysis here because you
22 don't -- it's not stemming from a statutory fee
23 authority. It's coming, one, from the Constitution, and
24 it's within their police power. So that's the first
25 issue. And then the other issues are the issues

1 presented by the claimants. They believe that if they
2 did have the power -- they don't have the power, their
3 argument is they don't have the police power to impose a
4 fee authority because that fee authority is preempted by
5 the State.

6 MEMBER WORTHLEY: Then perhaps I can specify
7 that in my motion, that I would just simply say that we
8 make the finding then that local jurisdictions do not
9 have the authority under these circumstances to assess a
10 fee.

11 MS. SHELTON: That would be the appropriate
12 motion.

13 CHAIR SHEEHY: So explain how that motion would
14 work then, the second part of it. The practical effect
15 of it.

16 MS. SHELTON: Then you would be approving
17 reimbursement for the inspection of the Phase I
18 facilities.

19 CHAIR SHEEHY: That the cities and counties
20 have to do?

21 MS. SHELTON: Correct.

22 CHAIR SHEEHY: And they'd only have to do it if
23 the State didn't?

24 MEMBER WORTHLEY: Correct.

25 MS. SHELTON: Well, that's true for Phase I,

1 correct.

2 CHAIR SHEEHY: For Phase I.

3 MS. HIGASHI: These are the ones -- and those
4 are only the facilities that would have paid that state
5 fee; correct?

6 MEMBER WORTHLEY: *(Nodding head.)*

7 MR. FELLER: Well, there is also a statewide
8 fee for construction sites, a statewide permit, that
9 construction -- well, the landowner pays when
10 construction on the property, so there are two statewide
11 general permits. And I believe the motion is, is only
12 the industrial --

13 MS. HIGASHI: The Phase I.

14 MS. FERBEE: -- statewide permit fees would be
15 preempted and not the statewide construction fees.

16 CHAIR SHEEHY: Is there a reason why,
17 Mr. Worthley, in your motion you wanted to exclude the
18 construction?

19 MEMBER WORTHLEY: I'm going to ask the
20 claimants, but I'm assuming that in construction --
21 normally in a construction project, you actually have
22 inspections. So if the State is charging an inspection
23 fee for construction, they're doing the inspections.

24 The other one is a little different, I think.
25 It's not the same kind of thing.

1 Usually, like, if you build a house, you pay
2 a fee for the county or the city, and then you have
3 inspectors coming out, and they actually are doing the
4 inspecting. So I'm assuming in construction that it's a
5 nonissue for the claimants.

6 MR. GEST: May I address that?

7 It is an issue, as follows.

8 First of all -- and the State Board can speak
9 to this -- but it's my understanding that the inspector
10 for the State Board, who is going out to inspect that
11 construction site, is only going to inspect for
12 compliance with the state-issued permit, not inspecting
13 for other matters.

14 And, of course, a local city has inspectors out
15 there for many different reasons. However, what has
16 happened is that this permit imposes an obligation upon
17 that local inspector to inspect not only for compliance
18 with municipal law -- and I'm talking about
19 non-stormwater, non-pollution, just straight construction
20 issues or grading issues -- but in addition, for a
21 determination as to whether that construction site is
22 complying with the stormwater permit issued by the State,
23 which, of course, creates an incremental cost.

24 So there is an additional cost on the city
25 inspector. And I do not think it's fair to assume that

1 the State is going out and inspecting all those sites
2 because their function is only to inspect for compliance
3 with the stormwater permit. And if they believe that the
4 local government is doing it, then they will feel that
5 they don't have to do it, and they don't have financially
6 all the staff.

7 MEMBER WORTHLEY: And they are charging a fee
8 for that purpose? The State is charging -- the Regional
9 Board is charging a fee for inspection, Mr. Lauffer?

10 MR. LAUFFER: And again, yes, Mr. Worthley,
11 there's an annual fee and there's also a new-permit fee
12 that construction sites that are subject to this general
13 permit have to pay.

14 Again, I understand where you're coming from
15 on the districts that you've worked with and the
16 localities that you've worked with, that it's more of a
17 fee-for-service type of approach. But keep in mind,
18 these funds all get aggregated, and 50 percent of the
19 funds are to be used by the water boards for inspections
20 and compliance.

21 And again, as you're well aware, the cost of
22 these can be highly technical issues, there are reports
23 coming in, and field inspections are just one component
24 of Compliance Assurance.

25 MEMBER WORTHLEY: Well, I would then amend --

1 I think I should amend my motion to include also this,
2 along with the -- so it would be both of the fee
3 structures you're talking about, both for construction
4 and for the --

5 MR. FELLER: Industrial facilities.

6 MEMBER WORTHLEY: -- industrial facilities.

7 MEMBER GLAAB: Mr. Chairman, I'd be happy to
8 second that motion.

9 CHAIR SHEEHY: Okay, we have a motion and a
10 second. We will have a vote on that in a second.

11 MS. HIGASHI: Mr. Sheehy, we still have to
12 request whether there are any interested persons in the
13 audience --

14 CHAIR SHEEHY: We're not there. We're not
15 there yet. Don't worry, we're not taking the vote until
16 we're ready. They'll get a chance, but I appreciate you
17 reminding me.

18 My concern -- and I don't know which other
19 colleagues on the Board share it -- my concern revolved
20 around the State collecting an inspection fee. And if
21 it's true that there was a preemption -- and that, I
22 guess, is an unsettled matter of law, so I don't know
23 whether you're preempted.

24 I mean, I was sort of leaning towards the
25 claimants on this issue, but then I realized it's really

1 unsettled, so it makes it hard for me to lean against
2 the claimants. But as a matter of equity, my concern
3 was the State collecting an inspection fee, not doing
4 the inspection, then the local government being required
5 then to come in and do the inspection, and then not being
6 able to collect a fee.

7 Now, Mr. Lauffer is saying, "Well, you know,
8 the fee isn't really just an inspection fee. The
9 inspection is a component of the fee. All the fees are
10 aggregated at the state level. These are fees necessary
11 to support the administration of the whole program,"
12 which I think is true in other state programs. So I
13 don't think he's actually -- I don't think the mechanism
14 you're describing is unique, by any means. I think we
15 can point to other examples of state fees that operate
16 similarly.

17 So -- and I don't know whether the local
18 governments are actually preempted from charging a fee
19 if they've got to actually come in.

20 And I'm just also thinking about it from the
21 standpoint of the business owner or the entity that's
22 being inspected. And I don't know what the State fee is,
23 if it's a big fee or a small fee. Maybe you're
24 undercharging, maybe you're overcharging. I mean, I
25 don't know. I mean, that's somewhat of a different

1 issue. But it's not completely unrelated. Because if
2 I'm a business owner and I need to have this inspection,
3 I pay a permit fee with the expectation that I have now
4 paid a fee, I'm going to get an inspection. The State
5 never comes around to do the inspection. Now, the County
6 shows up because I'm in an unincorporated area, and they
7 say "Well, I'm going to charge you a fee." Well, I've
8 already paid a fee.

9 So I will have the vote on the motion. I
10 don't -- I just -- I'm on the fence.

11 At this time, are there -- and I don't know
12 about my colleagues, if anybody else wanted to say
13 anything at this point.

14 Mr. Lujano?

15 MEMBER LUJANO: I just have a question for the
16 staff.

17 How different is Mr. Worthley's motion compared
18 to what your recommendation is?

19 MR. FELLER: Can I address that?

20 The staff recommendations, the staff findings
21 in the analysis in the last part of it is that these
22 inspections are not preempted by the State fee. So you'd
23 be finding basically for the claimants in the fact that
24 these would be reimbursable -- these inspection costs
25 would be reimbursable for facilities covered under the

1 statewide general construction permit and the statewide
2 general industrial permit.

3 MEMBER LUJANO: Did I read wrong, that you've
4 found that the fees of the claimants do have fee
5 authority to inspect both the construction and the --

6 MR. FELLER: No, that's correct. We found that
7 they have fee authority, even though they're paying under
8 a state fee. And the reasoning for that is because --
9 the courts have said -- well, the courts describe
10 preemption. And the factors that they listed, we didn't
11 see applied to the state statute that allowed the State
12 to impose a fee.

13 The other argument that the claimants made was
14 that because we're double-charging, we're going to exceed
15 the cost of the regulation and, therefore, we're going to
16 violate Prop. 13, and it would be subject to a vote -- it
17 would be -- we'd have to call it special tax and it would
18 be subject to a vote.

19 The reason that the staff disagreed with that
20 is because we don't see it as a single program; we see it
21 as a local program and a state program and, therefore,
22 subject to two separate fees, even though they're
23 essentially inspecting for the same compliance issues.

24 CHAIR SHEEHY: Well, may I follow up on that,
25 Mr. Lujano?

1 On the issue of whether -- I don't claim to
2 have expertise on Prop. 218. But on the issue of whether
3 or not it's a fee or a tax, that gets back to what I said
4 a minute ago to Mr. Lauffer, which is, what is the permit
5 fee they're charging and how much of that is for
6 inspection? Is that a reasonable amount of money to
7 cover an inspection? Is that on an annual basis, is that
8 biennial, is that triennial? What is it? Because that
9 seems to me, if that were to be litigated, that's what
10 you'd have to look at, is how much fee revenue is being
11 collected and what was actually being provided and what
12 was the cost of that.

13 I don't know that we have -- we don't have that
14 information before us, so it's impossible to determine
15 that today, as far as I can tell.

16 But what does the federal law say about the
17 preemption -- you essentially make a finding that the
18 locals are not preempted. And you base that on what?
19 Have you looked at the criteria that the federal
20 governments said it has to be made?

21 MR. FELLER: That was on page -- I believe that
22 was on page 60.

23 And that's not a federal issue. That's
24 strictly a state statutory issue as to whether that fee
25 would be preempted. And that's a Water Code --

1 California Water Code statute that allows the State Board
2 to charge that fee. The locals are arguing that they
3 don't have fee authority because the State does.

4 As far as those standards, again, it's on
5 page 65, the second full paragraph. I mean -- and
6 there's two things to look at. Is it expressly
7 preempted? And the answer is no.

8 The statute itself is on the bottom of page 65
9 and the top of page 66. If you read that statute, there
10 is nothing about express preemption; whereas where the
11 Legislature would say, "Because we have this fee, the
12 local agencies would have no authority to charge fees."
13 The Legislature didn't do that.

14 So then you have to look to these factors on
15 implied preemption. And those are in that second full
16 paragraph.

17 "Where the subject matter has been so fully and
18 completely covered by general law as to clearly indicate
19 it's become exclusively a matter of state concern, or the
20 subject matter has been partially covered by general law,
21 couched in such terms as to indicate, clearly, that a
22 paramount state concern will not further tolerate
23 additional local action; or, third, the subject matter
24 has been partially covered by the general law and the
25 subject is of such a nature that the adverse effects of

1 local ordinance on the transient citizens of the state
2 outweighs the possible benefit to the locality.”

3 So it would have to be -- if you were making a
4 preemption finding, I'd have to find that this Water
5 Code's fee statute fit within one of those criteria. We
6 found that they did not.

7 Mr. Gest argued, in his comments on the draft
8 analysis, that because of the specificity of the
9 permit -- or the specificity of the fee statute, that
10 that's how the State had preempted this issue. We
11 disagreed with that in the analysis.

12 CHAIR SHEEHY: Okay.

13 MEMBER WORTHLEY: Mr. Chairman, and my response
14 to that is, I want to put myself back into the position
15 of the applicant. I go and I file my permit application.
16 And a part of that permit application is a fee for
17 inspection. And that's set by statute; and it says it's
18 not to be less than 50 percent of the fee that's charged
19 the applicant for inspection purposes.

20 My expectation is, I have paid a fee by state
21 law that I'm required to pay for inspection. The fact
22 that the State has failed to perhaps adequately charge
23 for that service, how am I to anticipate I'm going to pay
24 another fee to another agency when I've already paid for
25 an inspection fee? And in my mind, that's the

1 occupation. The State has occupied -- because they've
2 said, "We're going to charge you a fee for inspection.
3 That's what we're doing." Where is there room for
4 somebody else to come in and say, "Oh, and by the way,
5 we're going to charge you, too. And we're going to
6 charge you, too." How many other agencies, how many air
7 boards, water boards, counties, cities are going to
8 charge fees because, "You know, that really wasn't
9 enough. We've got to get more." And I think that's the
10 occupancy. The fact that it specifically says, "We're
11 charging you a fee for inspection." Whether that's
12 enough or not, that's another issue, but they have
13 occupied that field.

14 CHAIR SHEEHY: Mr. Lauffer, in addition to what
15 you're about to say, can you tell us or give us -- I'd
16 like to know, what do these permits cost? And is that
17 money collected annually or how often is the money
18 collected? What are you charging?

19 MR. LAUFFER: First of all, the fees vary,
20 depending on the size of the facility and the type of the
21 facility.

22 I don't have the fee schedule for this year
23 directly in front of me. It's an annual fee, and there
24 have to be basic reports and whatnot actually submitted
25 to the water boards on a regular basis.

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1 My recollection is that the fees start around
2 \$1,000-a-year range.

3 Now -- and when a facility initiates coverage
4 under this permit, they have to submit --

5 CHAIR SHEEHY: So the range would be from
6 \$1,000 to --

7 MR. LAUFFER: And I apologize, it's something
8 I could look up fairly quickly, if you wanted to take a
9 break. It's established in the --

10 CHAIR SHEEHY: \$10,000, \$100,000?

11 MR. LAUFFER: No, much less than that.

12 These are general permits --

13 CHAIR SHEEHY: From \$1,000 to \$5,000?

14 MR. LAUFFER: They're all in the four-digit
15 range --

16 CHAIR SHEEHY: Okay, they're all in the
17 four-digit range.

18 MR. LAUFFER: -- for these kind of general
19 permits, for these kinds of facilities.

20 CHAIR SHEEHY: That's helpful.

21 Do the inspections ever take more than a day?

22 MR. LAUFFER: Compliance, which can involve
23 actual enforcement actions, obviously take a lot more.

24 But a facility-specific inspection at one of
25 these facilities, would never take more than a day.

1 There are follow-on, because what happens is they have to
2 correct activities. And those, you know, require regular
3 revisiting to the sites, to ensure that the construction
4 best management practices are being implemented.

5 But there's one thing that I'm very concerned
6 the Commission's getting a little bit sideways on, on
7 this issue, which is that the fees are not set, and
8 there's not an inspection component to the fees.

9 What the Legislature said was that when the
10 boards collect these fees -- and it's an important
11 distinction from a legal perspective. The fees are set
12 to cover the cost of the program. But once the boards
13 have recovered these fees and they have their
14 appropriation, 50 percent of the money has to be spent
15 by the water boards on compliance assurance and
16 inspection.

17 And, again, the boards are going to be
18 prioritizing based on threats to water quality.
19 Individual facilities may get a lot of attention in a
20 particular year. And in subsequent years, that they've
21 cleaned up their act, they may not get as much attention.

22 So the idea that the fee is being paid for an
23 inspection is not something that's supportable under the
24 Water Code. And I think your staff has done a very good
25 job of explaining why, as a matter of law, there is no

1 preemption.

2 Now, Mr. Worthley is raising an interesting
3 policy issue as to whether or not they should be
4 preempted. But, again, your staff have laid out a clear
5 analysis of what's legally necessary for preemption.
6 And in this case, the water boards don't see it, I don't
7 believe Finance sees it, and your staff didn't see that
8 the legal requirements for preemption had been met.

9 MEMBER BRYANT: Can I just ask one more
10 question on the inspection issue? What does federal law
11 say about inspections in the context of permitting. What
12 is your requirement?

13 MR. LAUFFER: There are certain facilities that
14 are required -- the federal regulations -- and, again,
15 these regulations are, again, more application
16 requirements on the municipalities. There are certain
17 facilities that have to be inspected. The ones that are
18 the subject of the discussion here, federal law doesn't
19 have specificity. Federal law does say that the
20 municipalities have to identify an inspection and
21 compliance program for critical sources. And in this
22 particular case, these were critical sources identified
23 within the Los Angeles area. So the implication is, in
24 our view, is clearly under federal law and under our
25 requirements to make the federal law more specific,

1 Federal law essentially requires inspections of these
2 facilities. And that will change over time as the
3 different facilities are -- or as the different critical
4 sources of pollution within a municipality are
5 identified.

6 MR. FELLER: May I add to that?

7 Mr. Lauffer is correct. Certain facilities
8 like hazardous waste facilities and landfills do require
9 inspection. The Phase I facilities in this permit,
10 industrial facilities, the federal regs doesn't say they
11 have to be inspected. They do say there has to be
12 inspections of construction sites over a certain size.
13 I believe it's five acres. But they don't specify
14 whether the state or the local agency has to conduct
15 those inspections. They just have to be inspected.

16 And the analysis said, "Well, you know, these
17 could easily enough be inspected under the general
18 statewide permits," and, you know, frequently are, so..

19 CHAIR SHEEHY: I have a question of Finance --
20 Ms. Bryant, did that answer your question?

21 MEMBER BRYANT: Yes.

22 CHAIR SHEEHY: I have a question of Finance.

23 So the staff recommendation here is finding in
24 favor of the claimants on the trash-receptacle issue.

25 Now, this may ultimately go on to the courts

1 and have more litigation. But if they ultimately prevail
2 on that, there is going to be a mandated local
3 reimbursement; correct?

4 MS. CASTAÑEDA: Yes.

5 CHAIR SHEEHY: Now, does that money have to
6 come out of the General Fund?

7 MS. CASTAÑEDA: Not necessarily.

8 CHAIR SHEEHY: What would our other options be?

9 MS. CASTAÑEDA: If there are special funds that
10 can be used for these purposes -- so there are mandates
11 that exist that we currently fund out of other funds
12 besides the General Fund. It would depend, though, if
13 there was some other fund that can be used, besides --

14 CHAIR SHEEHY: In this case, would be other
15 funds that could pay that cost?

16 MS. CASTAÑEDA: I'm not familiar with the
17 funding for the fees or where that money goes, so I
18 couldn't say.

19 CHAIR SHEEHY: We could always look to the
20 recycling fund.

21 You know, I guess, one concern I have, just
22 putting on a different hat for a minute, is that on the
23 inspection issue, you've got the Water Board, which is
24 levying a fee. That money goes into a State special
25 fund, the State Water Resources Control Fund, I think

1 that it's called -- is that right?

2 MR. LAUFFER: Waste Discharge Permit Fund.

3 CHAIR SHEEHY: Oh, that goes to the Waste
4 Discharge Permit Fund, which is a special fund.

5 So you're collecting a fee, a component of
6 which -- I understand your fee is to run the whole
7 program. But a component of that is for inspection, so
8 you're collecting that money.

9 Then if they prevail on their test claim and
10 wanting reimbursement because they say they've been
11 preempted on the fees, then it's the State General Fund
12 that's on the hook, essentially, to pay that, even though
13 we've got a special fund that's collecting the fees.
14 And that gives me massive indigestion, almost as much
15 indigestion as the size of the massive state budget
16 deficit that we have.

17 MEMBER WORTHLEY: That's pretty bad.

18 CHAIR SHEEHY: So I can assure you,
19 Mr. Lauffer, that if the claimants ultimately prevail,
20 which I don't think is going to be decided in a final way
21 today, that we're going to be looking for other ways, if
22 they do -- and I'm not saying they will or even that they
23 should -- but if they do, we're going to be looking for
24 other ways to take care of them rather than having the
25 State General Fund ponying up the money for those

1 inspections for which your agency is charging for right
2 now.

3 Okay, we have a motion and a second on the
4 floor.

5 MEMBER WORTHLEY: Mr. Chairman, I'd like to
6 make one final comment --

7 CHAIR SHEEHY: Mr. Worthley?

8 MEMBER WORTHLEY: -- before we call for the
9 vote.

10 When you look at the staff analysis, they
11 really focused on the adequacy of the fee being charged
12 and the services being provided. To me, that is not the
13 appropriate analysis. The analysis is not whether or not
14 they're doing an adequate job. The analysis should have
15 focused on the fact they're being charged a fee for this
16 purpose. And that's what it is. I really struggle with
17 the idea that anybody can charge a fee, and if it's not
18 adequately done by this jurisdiction, it gets pushed off
19 on somebody else.

20 Again, as the applicant, I would think I'm
21 paying a fee for inspection. I go to this agency for
22 that purpose, I'm paying the fee, it's their obligation
23 to do it. It's not somebody else's obligation to do it.

24 And now I'll call for the question.

25 CHAIR SHEEHY: You're an advocate for a fee

1 increase, Mr. Worthley.

2 Okay, Mr. Lujano?

3 MEMBER LUJANO: Just one clarification. So the
4 staff analysis is saying that the claimant has fee
5 authority for both construction and industrial sites
6 under the statewide permit?

7 CHAIR SHEEHY: Correct.

8 MEMBER LUJANO: But what you're saying is, they
9 don't and they need reimbursement?

10 CHAIR SHEEHY: Correct. I think that's right.

11 MEMBER WORTHLEY: If the burden is being pushed
12 by the Regional boards or the State to the local agencies
13 to do this inspection -- because what they're saying is,
14 you can go ahead and charge a fee for this inspection and
15 so, therefore, you're not entitled to reimbursement. I'm
16 saying, I don't think they've got the ability to charge
17 a fee because they've already paid a fee for this
18 purpose. How can I be charging another fee?

19 MEMBER LUJANO: And, staff, your analysis says
20 they do have the authority, or you believe they do?

21 MR. FELLER: That's correct. Because the legal
22 standard for implied preemption, which as far as I'm
23 concerned, the statute is -- I guess it's not expressly
24 preempted, I'll say that -- the legal standard in that
25 paragraph on page 60, the statute would have to fit into

1 one of these three categories. And the general law would
2 clearly indicate that it's become exclusively a matter of
3 state concern or the subject matter has been partially
4 covered and couched in such terms as to indicate clearly
5 the paramount state concern will not tolerate further
6 additional local action. I don't think the third point
7 applies.

8 And I'd be interested, if we are finding
9 implied preemption on the basis of this Water Code
10 statute, which of those --

11 MEMBER WORTHLEY: Ones you create.

12 MR. FELLER: Okay. That's just helpful to know
13 if I have to rewrite it.

14 CHAIR SHEEHY: Okay, so, Mr. Chivaro?

15 MEMBER CHIVARO: No, I'm waiting.

16 CHAIR SHEEHY: Okay, Mr. Worthley, so we have
17 a motion and a second. Before we call the roll or we get
18 to that, I want you to clarify what your motion is.

19 There's two parts. Part one was to approve the staff
20 recommendation on the partial approval of the claim; and
21 then part two had to do with the fee-preemption issue.

22 Could you clarify that so we're all clear on
23 what we're voting on?

24 MEMBER WORTHLEY: Yes. Well, I think you've
25 stated it. It was related to the two areas that Eric

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1 pointed out. One, as to the --

2 MR. FELLER: Phase I, industrial facilities and
3 the construction sites, both of which are covered under a
4 general statewide permit.

5 MEMBER WORTHLEY: As to that issue, we would
6 find that local jurisdictions do not have authority --
7 fee authority to charge an additional fee.

8 CHAIR SHEEHY: Ms. Bryant?

9 MEMBER BRYANT: At the risk of being stoned by
10 my colleagues --

11 CHAIR SHEEHY: No. Listen, if you want to have
12 more discussion, that's fine.

13 MEMBER BRYANT: Can I have -- can we have a
14 five-minute break?

15 CHAIR SHEEHY: Absolutely.

16 MEMBER BRYANT: It's just, I've got to read
17 this. Or ten minutes. I need to read a little bit.

18 CHAIR SHEEHY: The Commission on State Mandates
19 will be adjourned for ten minutes -- not adjourned,
20 recessed for ten minutes.

21 *(Recess from 11:21 a.m. to 11:33 a.m.)*

22 CHAIR SHEEHY: We're back in session.

23 Now, I think where we left off, Ms. Bryant had
24 requested a recess, and we had a motion and a second on
25 the floor: A motion by Mr. Worthley, a second by

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1 Mr. Glaab. Mr. Worthley had explained his motion.

2 Board Members, are we ready for a vote, or
3 would you like to have more discussion?

4 MEMBER BRYANT: I think there's more witnesses.

5 CHAIR SHEEHY: Okay, there's more witnesses?

6 And I know that Mr. Lauffer wanted to also read some
7 permit-fee numbers into the record.

8 Did you want to do that now, Mr. Lauffer?

9 MR. LAUFFER: For the Commissioners' benefit,
10 yes, thank you very much, Mr. Sheehy.

11 I had pulled California Code of Regulations,
12 Title 23, section 2200, during the break, and that
13 specifies the fees that the various facilities that are
14 being discussed right now, what are known as the Phase I
15 facilities, are subject to under the State Water Board's
16 annual fee structure for construction and industrial
17 stormwater permits.

18 For industrial facilities, the annual fee is
19 \$833. And then for construction facilities, it is a
20 variable fee. It starts at \$238, plus \$24 per acre;
21 and that fee caps out at \$2,600. So, obviously, very
22 large facilities, very large construction projects would
23 be subject to a larger fee than potentially \$1,000, but
24 it's only \$2,600. It's not locked into --

25 CHAIR SHEEHY: So the industrial fee of \$833,

1 is that a flat fee?

2 MR. LAUFFER: It's a flat fee, correct.

3 CHAIR SHEEHY: Okay, thank you.

4 All right, do we have additional witnesses?

5 Yes, Mr. Brosseau -- correct?

6 MR. BROSSEAU: Thank you.

7 Thank you, Chair Sheehy and Commissioners.

8 My name is Geoff Brosseau. I am the executive director
9 for the Bay Area Stormwater Management Agencies
10 Association, or BASMAA. Other than being a mouthful, it
11 is an association of the 96 agencies in the Bay Area that
12 have stormwater permits, the Phase I cities primarily,
13 about 84 cities in seven counties.

14 BASMAA was formed in 1989, in the very
15 earliest days of the stormwater program in this country.
16 And it's focusing really on regional challenges as well
17 as opportunities to improving the quality of storm water
18 that flows to our local creeks, San Francisco Bay, and
19 the Pacific Ocean.

20 And the reason I'm here today is because we
21 submitted a comment letter on February 2nd. And our own
22 permit is coming up for renewal fairly soon in the
23 San Francisco Bay Area. And many of the provisions that
24 you are talking about today may also be part of that same
25 permit. So we have keen interest in the Commission's

1 decision today or in a subsequent meeting.

2 I really just want to emphasize three points
3 very quickly.

4 First of all, this is a matter, I think as
5 you've heard and it's your understanding, of broad
6 implications for the stormwater permits in California.
7 Not just in the Los Angeles area, not just in the
8 Bay Area, but throughout the state. We have almost every
9 city, county, and town in this state now has stormwater
10 permit for the state of California. So it has broad
11 implications.

12 The Bay Area Stormwater Agencies strongly
13 supports the conclusion in the proposed decision that
14 all stormwater permit requirements at issue are new
15 programs and/or higher levels of service resulting from
16 the State's exercise of discretion.

17 And finally, the Bay Area Stormwater Agencies
18 strongly support the conclusion in the proposed decision
19 regarding the placement and maintenance of trash
20 receptacles at transit stops, that the municipalities
21 do not have adequate fee authority for these permit
22 activities, and to approve the test claim as your staff
23 is recommending.

24 Thank you.

25 CHAIR SHEEHY: Did you want to weigh in on the

1 preemption issue?

2 MR. BROSSEAU: I don't think -- we were not
3 prepared to do that today. I think you've heard enough
4 about that today.

5 Thank you, though.

6 CHAIR SHEEHY: Thank you, Mr. Brosseau.

7 Do we have any other public comment on this
8 item before the vote?

9 *(No response)*

10 CHAIR SHEEHY: Okay, without further ado,
11 Paula, could you please call the roll on Mr. Worthley's
12 motion?

13 MEMBER BRYANT: Wait, wait, wait.

14 CHAIR SHEEHY: Ms. Bryant. I'm sorry.

15 MEMBER BRYANT: Hold on.

16 CHAIR SHEEHY: I apologize, Ms. Bryant.

17 MEMBER BRYANT: I was wondering if it would be
18 possible -- let me just say what I'm thinking. At the
19 moment, based on Mr. Worthley's motion, I would be voting
20 "no."

21 I think that from my point of view, this
22 activity of the trash cans is part of this overall
23 permit, and that this federal Clean Water Act, as best as
24 I can tell, seems to require the Regional Water Quality
25 Control Board as the permitting agency to come up with

1 ways and means to reach this standard that's in federal
2 law.

3 However, I do think I agree with the second
4 half of Mr. Worthley's motion, which shocks me somehow,
5 that in this question of the fee, that there does seem to
6 be this notion of a preemption. And also I think that
7 we do there have a higher level of service. Federal law
8 is not specific on how many inspections you can have.
9 And it seems to me that there's -- that the State is
10 going out and trying to get more inspections. Arguably,
11 it does provide better storm water, if we're monitoring
12 and watching it. But it still seems like the State is
13 asking for more than we would necessarily have to do
14 under federal law.

15 So if you would like -- I mean, I'll vote "no"
16 on it, as it is now. But if you split it and do a motion
17 on the trash-receptacle question, I could vote "no" on
18 that, and then vote "yes" on the second half.

19 MEMBER WORTHLEY: The maker of the motion would
20 have no objection to splitting it into two separate
21 motions.

22 CHAIR SHEEHY: Well, before we go there, I want
23 to understand, Ms. Bryant, where you're coming from.

24 So you disagree with the staff recommendation
25 on the trash receptacles?

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1 MEMBER BRYANT: I do. And it's -- I've argued
2 a bit with counsel during our break about whether or not
3 you can distinguish *Long Beach*. And I may be kind of out
4 there a little bit, but I think that in the instance of
5 *Long Beach*, it just says, "You shall not discriminate in
6 schools." And then the State did an executive order and
7 came up with a lot of ways that we are going to keep our
8 schools from discriminating, and that list created higher
9 levels of service and a mandate. And I agree with that.

10 And I'm kind of -- here, I think, that in and
11 of itself, the nature of clean-water permitting, as I
12 understand it, is that the Regional boards, as a
13 permitting agency, are coming up with methods and means
14 and ways to prevent stormwater pollution. Now, they
15 could have not done the trash-receptacle thing here, if
16 I understand it correctly; and they could have, instead,
17 had the permittees build some kind of a treatment place
18 before the water goes into the ocean, where then they
19 would take out the trash. That the trash receptacles may
20 have actually been a more cost-effective method of doing
21 it. And I think that, in their expertise and judgment at
22 the time of issuing the permit, they did it that way.
23 And that's kind of where I come out. I don't -- I think
24 that's my position.

25 CHAIR SHEEHY: I think it's well thought. I

1 respect your position.

2 Since you've publicly already stated what your
3 position is, I don't think I can support
4 Mr. Worthley's -- in fact, I'm not going to support
5 Mr. Worthley's motion because I'm on the opposite side
6 of you. I think the trash-receptacle part of the staff
7 finding was appropriate, but I'm not convinced about the
8 preemption issue on the fees.

9 Although I -- and now that I've heard the fees
10 are as low as they are, it strengthened how I feel
11 because at \$838 for a big industrial facility, it's a
12 rather low fee. If somebody was out there for a full day
13 doing an inspection, half that wouldn't cover the cost.

14 So I do believe there's room under the fee
15 structure that Mr. Lauffer has talked about for
16 additional fees to be imposed. So it would not be
17 unreasonable to the regulated community.

18 But I -- just as an aside, I found it odd that
19 the only thing the Water Board picked was the transit
20 stops for the trash. I mean, personally, I've never
21 walked around a city with trash to throw away and said,
22 "Where's the nearest bus stop? I've got to go throw the
23 trash away." I mean, I've never done that. Usually, I
24 see a trash receptacle on the corner -- like, in New York
25 City, for example, Manhattan, you look, there's a trash

1 receptacle on the corner, you throw your trash in there.

2 And I don't know about Los Angeles --

3 MEMBER BRYANT: I think that this permit, if I
4 remember the testimony correctly, is 100 pages long of
5 terms and conditions. And this is the one issue that the
6 claimants brought forward as a potential mandate. I'm
7 sure there's a lot of other activities they're doing
8 besides the trash at the transit stations.

9 CHAIR SHEEHY: Yes, right. Well, we can have
10 other comments from Board members.

11 I think we should have a note on Mr. Worthley's
12 motion so we can see where the votes are.

13 MEMBER WORTHLEY: Well, Mr. Chairman, in the
14 interest of time, if it would expedite the process, I
15 think it might be good to have two separate motions
16 heard, and then we can go ahead and vote on those two
17 motions.

18 CHAIR SHEEHY: So do you want to withdraw your
19 original motion?

20 MEMBER WORTHLEY: I will. And I'll remake the
21 motion on the issue which my colleague to the right
22 agrees with me on, which would be the preemption issue.

23 CHAIR SHEEHY: So you want to make a motion now
24 to find in favor of the claimants on the preemption issue
25 for both the industrial and the construction permits; is

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1 that correct?

2 MEMBER WORTHLEY: That's correct.

3 CHAIR SHEEHY: Do we have a second?

4 MEMBER GLAAB: Second.

5 CHAIR SHEEHY: Okay, we have a motion and a
6 second.

7 Paula, please call the roll.

8 MS. HIGASHI: Mr. Sheehy?

9 CHAIR SHEEHY: No.

10 MS. HIGASHI: Ms. Bryant?

11 MEMBER BRYANT: Aye.

12 MS. HIGASHI: Mr. Chivaro?

13 MEMBER CHIVARO: No.

14 MS. HIGASHI: Mr. Glaab?

15 MEMBER GLAAB: Aye.

16 MS. HIGASHI: Mr. Lujano?

17 MEMBER LUJANO: No.

18 MS. HIGASHI: Mr. Worthley?

19 MEMBER WORTHLEY: Aye.

20 CHAIR SHEEHY: Okay, so that motion fails. We
21 need four votes.

22 MS. HIGASHI: Correct.

23 CHAIR SHEEHY: Do we have another motion?

24 MEMBER LUJANO: I move that we accept the staff
25 analysis.

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1 MEMBER WORTHLEY: I'll second.

2 CHAIR SHEEHY: We have a motion and a second to
3 accept the staff analysis.

4 Paula, please call the roll.

5 MS. HIGASHI: Mr. Sheehy?

6 CHAIR SHEEHY: Aye.

7 MS. HIGASHI: Ms. Bryant?

8 MEMBER BRYANT: No.

9 MS. HIGASHI: Mr. Chivaro?

10 MEMBER CHIVARO: Aye.

11 MS. HIGASHI: Mr. Glaab?

12 MEMBER GLAAB: Aye.

13 MS. HIGASHI: Mr. Lujano?

14 MEMBER LUJANO: Aye.

15 MS. HIGASHI: Mr. Worthley?

16 MEMBER WORTHLEY: No.

17 MS. HIGASHI: That motion carries 4-2.

18 CHAIR SHEEHY: Okay, thank you very much.

19 We're going to move on now to --

20 MS. HIGASHI: I'd like to just take a pause

21 right now and just go over what's remaining on the

22 agenda, and just assess how long, if all of you are with

23 us until 12:30. Because it is now a quarter to 12:00.

24 And whether you want to continue working, if you want to

25 put items over. We have had a couple of requests made.

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1 We've had witnesses sitting here all morning who would
2 like the items to go forward. But I just want to get a
3 sense, first off, if --

4 CHAIR SHEEHY: You have to see if we have a
5 working quorum?

6 MS. HIGASHI: We have a working quorum until at
7 least 12:30 or one o'clock.

8 CHAIR SHEEHY: We'll start with the chair. I
9 have other plans in the afternoon, but they are flexible,
10 so I'm willing to stay here as long as it takes.

11 MEMBER BRYANT: I have a 1:30 call, which I
12 think takes about a half hour. And I have to leave the
13 building by 3:00.

14 MS. HIGASHI: Okay.

15 MEMBER CHIVARO: And I have to leave at 1:30 as
16 well.

17 MEMBER LUJANO: I'm here for the long haul.

18 MEMBER GLAAB: My flight is at 3:15.

19 MS. HIGASHI: Okay, so it sounds like we're
20 good. Thank you.

21 CHAIR SHEEHY: So we're going to move on now to
22 Item 4.

23 Paula?

24 MS. HIGASHI: Item 4 -- wait a second.

25 Mr. Feller?

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1 MR. FELLER: Unless there's objections, staff
2 recommends the Commission adopt the Proposed Statement of
3 Decision which accurately reflects the Commission's
4 decision on Item 3 to partially approve the test claim.
5 Staff also recommends the Commission allow minor changes
6 to be made to the proposed decision reflecting the
7 witnesses, hearing testimony, and the vote count that
8 will be included in the Final Statement of Decision.

9 MEMBER WORTHLEY: Move approval.

10 MEMBER GLAAB: Second.

11 CHAIR SHEEHY: We have a motion and a second.

12 Is there -- do we need a roll-call vote here,
13 Commission members? I know there were two "no" votes on
14 this.

15 MS. HIGASHI: Right.

16 MEMBER WORTHLEY: It's aye. I mean, I'll vote
17 for it.

18 CHAIR SHEEHY: Okay, so all in favor?

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

20 CHAIR SHEEHY: Any opposed?

21 *(No response)*

22 CHAIR SHEEHY: Hearing none, such will be the
23 order.

24 MS. HIGASHI: Okay, thank you.

25 I've had a request to take an item out of

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1 order because we have witnesses from out of town. It's
2 Item 13, the *Academic Performance Index*. And what I'd
3 like to do is find out from the Commission members if
4 they're okay with this request. We'll give Mr. Kaye a
5 few minutes of rest before he has to come back.

6 Is there any objection?

7 CHAIR SHEEHY: Seeing no objection, Paula, can
8 you please -- we're going to have Eric present Item 13;
9 is that right?

10 MS. HIGASHI: Yes, we are.

11 Will the parties please come up to the table?

12 MR. FELLER: The test claim consists of the
13 Public Schools Accountability Act and the Certificated
14 Performance Incentive Act and related regulations.

15 The Public Schools Accountability Act consists
16 of three programs: The Academic Performance Index, the
17 Governor's High Achieving/Improving Schools Program, and
18 the Intermediate Intervention/Underperforming Schools
19 Program.

20 Staff finds that nearly all the test-claim
21 statutes and regulations do not constitute a reimbursable
22 state-mandated program because they are either voluntary
23 or downstream of a voluntary activity. Claimants argue
24 they are practically compelled to participate in the
25 Intermediate Intervention/Underperforming Schools

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1 Program and other programs in the test claim. Staff
2 disagrees for the reasons stated in the analysis.

3 Staff finds only one statute that requires the
4 district governing board to discuss the results of its
5 annual ranking at the next regularly scheduled meeting
6 following the annual publication of the Academic
7 Performance Index and State Superintendent of Public
8 Instruction school rankings, which is reimbursable.

9 Staff recommends the Commission adopt this
10 analysis to partially approve the test claim for this
11 activity.

12 Would the parties and witnesses please state
13 your names for the record?

14 MR. PALKOWITZ: Good morning. Art Palkowitz on
15 behalf of the claimant.

16 MS. OROPEZA: Jeanie Oropeza, Department of
17 Finance.

18 MS. FEREBEE: Donna Ferebee, Department of
19 Finance.

20 CHAIR SHEEHY: Thank you.

21 So, Mr. Palkowitz, you're here representing the
22 claimants?

23 MR. PALKOWITZ: Yes, sir.

24 CHAIR SHEEHY: Why don't you go ahead?

25 MR. PALKOWITZ: Thank you.

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1 I would like to focus on two issues regarding
2 the analysis by the Commission staff.

3 The first issue is referring to the
4 Intermediate Intervention/Underperforming Schools
5 Program, which I'd like to refer to as just "USP."

6 This is a program where school districts are
7 invited by the State to participate in when their
8 performance on the STAR is below the 50th percentile.

9 This program, as I mentioned, is -- the schools
10 will receive an invitation that, based on your scores,
11 you can participate in this program.

12 If the schools do not make substantial
13 performance in this program, the potential consequences
14 are, is that the Superintendent of Public Instruction
15 will assume the rights and duties of the school, and
16 could result in the school being reorganized or closed.

17 It's the claimant's position that this is
18 practical compulsion. That the closing of the school is
19 a severe and a certain consequence, and based on the *Kern*
20 case, this would qualify as practical compulsion.

21 Clearly, the claimants feel that if you close
22 a school, that is a severe consequence. As a result of
23 that, the claimants feel participation in this program,
24 they are practically compelled. And as a result, the
25 activities that fall underneath this program should be

1 activities that are reimbursable.

2 The next issue I wanted to discuss is the issue
3 that appears on page 30. It refers to the activities
4 where school districts are to notify -- it's the bottom
5 of page 30. *"School districts are to notify CDE and the
6 publisher of errors in the STAR testing and demographic
7 data."*

8 If I may read to the Commission, the language
9 is that, *"The local education agency must notify the
10 department and the test publisher in writing whether
11 there are errors in the STAR testing or demographic data.
12 The local education agency's notification must be
13 received by the department."* And in the last sentence,
14 it indicates that the local education agency must submit
15 all data corrections to the publisher in writing or
16 e-mail.

17 There are several sentences containing the
18 word "must," which the staff has indicated the
19 word "must" in the regulation is as mandatory as the word
20 "shall."

21 Notwithstanding that language of "must" was
22 used several times, this was determined not to be also a
23 mandate. The basis for the Commission staff analysis is
24 that the underlying program, the Governor's Performance
25 Award, is a voluntary program so these activities are,

1 therefore, not required as downstream activities.

2 Clearly, there's case law that indicates that
3 even though the initial program might be voluntary, if
4 you participate, those downstream activities which are
5 mandatory through the "must" language are reimbursable
6 activities.

7 So on those two items, we would request that
8 the Commission not follow the staff's recommendation.

9 I'd just like some time to respond, please.

10 CHAIR SHEEHY: Sure. Absolutely,
11 Mr. Palkowitz.

12 Finance?

13 MS. FEREBEE: The Department of Finance concurs
14 with the final staff analysis.

15 CHAIR SHEEHY: Ms. Oropeza?

16 MS. OROPEZA: We would only also point out that
17 there's 800 schools per decile in the IIUSP program.
18 There's five deciles, and they all applied voluntarily.
19 And so it wasn't out of fear that they would be shut
20 down. We couldn't fund all of them. We funded less than
21 400 of those total schools.

22 CHAIR SHEEHY: Okay. Mr. Palkowitz?

23 MR. PALKOWITZ: I believe she's accurate in
24 that statement.

25 CHAIR SHEEHY: Okay, do we have other witnesses

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1 that would like to testify on this issue this morning?

2 (No response)

3 CHAIR SHEEHY: Is there anybody from the
4 general public that just wanted to make comment on this
5 item?

6 (No response)

7 CHAIR SHEEHY: Okay, seeing none, comments or
8 questions from Board members?

9 MEMBER WORTHLEY: Just real quickly. I'm
10 trying to understand your second point. I thought you
11 agreed that it's a discretionary act to enroll, and then
12 if you do that discretionary act, then there are these
13 mandatory things you have to do after you've engaged in
14 the discretionary act; that's what you've said?

15 MR. PALKOWITZ: Pertaining to the second issue?

16 MEMBER WORTHLEY: Yes.

17 MR. PALKOWITZ: Yes, sir, that the downstream
18 activities were mandatory.

19 MEMBER WORTHLEY: Right, after you engaged in a
20 discretionary determination whether or not to engage in
21 that activity.

22 MR. PALKOWITZ: The program is --

23 MEMBER WORTHLEY: Is it discretionary?

24 MR. PALKOWITZ: Yes, it is, it's a
25 discretionary program. But there are, I think -- there

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1 are some -- there is precedent, that even though a
2 program is discretionary, once you participate in that
3 program, downstream activities that are mandatory are
4 then reimbursable activities.

5 MEMBER WORTHLEY: It seems inconsistent with
6 what we normally do around here. Because if you -- if
7 something is discretionary to begin with, the fact that
8 if I decided I want to engage in a discretionary act with
9 you and then you say, "Okay, these are the conditions
10 you have to meet," that relieves the Commission from --
11 in fact, we're forbidden, I believe, from finding that
12 those downstream items are state-reimbursable mandates.

13 MR. PALKOWITZ: Well, they're probably during
14 the time you've been on the Commission, that's probably
15 the way that they've all ruled, but...

16 MEMBER WORTHLEY: Okay, all right.

17 CHAIR SHEEHY: But you don't necessarily agree
18 with that?

19 MR. PALKOWITZ: Well, it's not really -- I
20 agree with that there's some precedent in other mandates
21 or case law that allow such activities to be
22 reimbursable.

23 CHAIR SHEEHY: Okay. All right, do we have a
24 motion on Item 13?

25 MEMBER BRYANT: I'll move the staff analysis.

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1 CHAIR SHEEHY: We have a motion to move the
2 staff analysis.

3 Do we have a second?

4 MEMBER CHIVARO: Second.

5 CHAIR SHEEHY: We have a motion and a second.
6 Paula, please call the roll.

7 MS. HIGASHI: Ms. Bryant?

8 MEMBER BRYANT: Aye.

9 MS. HIGASHI: Mr. Chivaro?

10 MEMBER CHIVARO: Aye.

11 MS. HIGASHI: Mr. Glaab?

12 MEMBER GLAAB: Aye.

13 MS. HIGASHI: Mr. Lujano?

14 MEMBER LUJANO: Aye.

15 MS. HIGASHI: Mr. Worthley?

16 MEMBER WORTHLEY: Aye.

17 MS. HIGASHI: Mr. Sheehy?

18 CHAIR SHEEHY: Aye.

19 MS. HIGASHI: The motion is carried.

20 CHAIR SHEEHY: Okay, that motion is carried to
21 approve the staff analysis.

22 Eric, could you read the Statement of Decision,
23 please?

24 MR. FELLER: Unless there's objection, staff
25 recommends that the Commission adopt the Proposed

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1 Statement of Decision, which accurately reflects the
2 Commission decision on Item 13 to partially approve the
3 test claim.

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

9 MEMBER WORTHLEY: Move approval.

10 CHAIR SHEEHY: We have a motion to approve.

11 MEMBER CHIVARO: Second.

12 CHAIR SHEEHY: We have a motion and a second.

13 All in favor?

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

15 CHAIR SHEEHY: Very good.

16 Thank you, Mr. Palkowitz.

17 Thank you, Finance.

18 Since we went out of order, Paula, I'm a little
19 out of sorts. Now, where do we go next? Item 5?

20 MS. HIGASHI: Item 5.

21 CHAIR SHEEHY: Very good.

22 Will the witnesses for Item 5 today please come
23 forward?

24 MS. HIGASHI: Item 5 will be presented by
25 Commission Counsel Kenny Louie.

1 MR. LOUIE: Thank you, Paula.

2 Item 5 is *Re-Districting Senate and*
3 *Congressional Districts*. This test claim addresses the
4 methodology used for redistricting of Senate and
5 congressional districts. Under Article XXI of the
6 California Constitution, which was added by California
7 voters, the Legislature is required to adjust the
8 boundary lines of the Senate, Assembly, Board of
9 Equalization, and congressional districts.

10 In the year after the national decennial census
11 was taken, the test-claim statute pled by the claimant
12 is the Legislature's adjustment to the boundary lines of
13 the Senate and congressional districts as required by
14 Article XXI.

15 There are two issues still in dispute by the
16 claimant. The claimant argue that the first two sections
17 require the claimant to engage in a variety of
18 activities, including the establishment of precinct
19 boundaries and printing and providing ballots to voters.
20 However, the plain language of the first two sections
21 only set forth the Senate and congressional boundary
22 lines and do not require any activities of the claimants.

23 In addition, the claimant disagrees with the
24 application of the ballot initiative except the
25 ballot-initiative exception of Government Code section

1 17556. However, as discussed in staff's analysis, a
2 portion of the test-claim statute is necessary to
3 implement a ballot initiative.

4 Staff also notes that we have received a late
5 filing on behalf of the claimants. The filing has raised
6 issues for the first time that staff has not had time to
7 fully analyze. As a result, staff recommends the
8 Commission adopt the staff analysis and deny the test
9 claim.

10 Will the parties and witnesses state their
11 names for the record?

12 MR. KAYE: Leonard Kaye, County of Los Angeles.

13 MR. BENNETT: Kenneth Bennett, County of
14 Los Angeles.

15 MS. CAPLAN: Deborah Caplan, representing the
16 California School Boards Association.

17 MR. BURDICK: And Allan Burdick on behalf of
18 the CSAC SB-90 Service.

19 CHAIR SHEEHY: Okay, very good.

20 I'd like to confirm that staff has notified
21 each side, claimants and the State, that we're going to
22 allow a total of 15 minutes each for you to address the
23 item today. However, we do reserve the right to ask
24 additional questions of the various witnesses and parties
25 involved.

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1 So why don't we begin with the claimant,
2 Mr. Kaye?

3 MR. KAYE: Thank you.

4 CHAIR SHEEHY: And, Nancy, would you be our
5 official timekeeper?

6 MR. KAYE: Good morning again.

7 I just want to point out that we do have a
8 handout which illustrates several of the factual matters
9 in this test claim. I hope you all got a copy of that.

10 Basically, the Commission's analysis concludes
11 that the state-mandated redistricting program was not
12 imposed on the County pursuant to Chapter 348, Statutes
13 of 2001, the test-claim statutes.

14 Now, this is composed of several sections. But
15 I'd just like to clarify what Commission staff -- there
16 are three basic issues that the -- and we maintain -- the
17 County maintains that the claim redistricting activities
18 are not necessary to implement the redistricting ballot
19 initiative and, therefore, are not subject to the ballot
20 initiative funding disclaimer. That's a major issue and
21 we're very glad that we've had additional support today
22 for that position. And they'll explain further.

23 The second item is that the county election
24 officials, we believe, have no discretion in performing
25 redistricting as set forth in sections 1 and 2 of the

1 test-claim statute and that they are, therefore, mandated
2 to do so. That these are valid state-mandated programs.

3 The third item is that the redistricting
4 activities detailed in the County's claim are new. And
5 as a consequence, the test-claim statute meets the new
6 program, or higher-level-of-service test required for
7 reimbursement.

8 Now, in the allotted time, it's difficult to
9 cover everything. And we believe that this is a
10 factually based test claim. That there's no doubt about
11 it, Connie B. McCormack, who was our registered recorder
12 at the time, submitted a very detailed, fact-based
13 declaration as to what caused the increased costs which,
14 by the way, Commission staff feels is a substantial new
15 program. So we're not just claiming the increased cost.
16 It is a new program of benefit to the electorate.

17 The 1990 redistricting was done according to
18 census tracts and also had nested two Assembly districts
19 in each state Senate district. And this was a fairly
20 easy task.

21 When the 2000 redistricting was done by the
22 Legislature and the Governor, we got the data just two
23 days before the legal deadline. They did not nest two
24 Assembly districts to each state Senate. And most
25 importantly, they did not follow census-tract lines.

1 They did use -- and indeed, they reversed themselves and
2 they used census tracts. They used -- excuse me, they
3 used census blocks instead of the census tracts, which
4 makes it very, very difficult, as you'll shortly find
5 out, to do these analyses.

6 If -- the Commission staff do find that
7 section 4 is invoked if the boundary lines are ambiguous.
8 However, we go on to say that regardless of whether the
9 boundary lines are ambiguous or not, we still have to
10 follow the same boundary lines as set forth in sections 1
11 and 2. So that's equally mandated.

12 The County had no discretion to vary the Senate
13 and congressional district boundaries as specified in the
14 test-claim statute. Leg. Counsel certainly disagreed
15 with this and gives us added benefits.

16 The public ballot initiative disclaimer, all
17 I'll say about that -- because we're going to have more
18 testimony in a bit -- is that to the extent the amended
19 statute provides that the State need not reimburse local
20 governments for imposing duties that are expressly
21 included or necessary to implement a ballot measure,
22 the most recent court case found that the statute is
23 consistent with Article XIII B, section 6. However --
24 however, any duty -- and this is the Court speaking --
25 however, any duty not expressly included in or necessary

1 to implement the ballot measure gives rise to a
2 reimbursable state mandate, even if the duty is
3 reasonably within the scope of the measure.

4 So without going into further ado, because I
5 don't want to use up too much time, Kenneth, why don't
6 you explain your handout?

7 MR. BENNETT: Good afternoon, Commissioners.
8 The handout that I provided gives a description --

9 CHAIR SHEEHY: I'm sorry, could you please
10 identify yourself for the record?

11 MR. BENNETT: My name is Kenneth Bennett. I'm
12 with the County of Los Angeles.

13 CHAIR SHEEHY: Thank you.

14 MR. BENNETT: The handout that I provided,
15 provides a description of the technical mechanics of
16 why the decisions made by the State in their 2001
17 reapportionment represented a new mandated increased
18 level of service. And it did it in two ways already
19 expressed by Mr. Kaye. One was the decision to use
20 census blocks, and the other was to eliminate the past
21 practice of nesting state Assembly districts within the
22 state Senate district boundaries.

23 I would like to address the first one, the
24 census blocks.

25 If we can turn over to the figure, because I

1 think this will be the easiest way to move through this
2 technical matter.

3 In the diagram, Figure 1, it shows how
4 districts would -- district lines would look like when
5 you use census tracts to draw the boundary lines. As you
6 can see, it's much simpler. Whereas when you use blocks
7 and choose blocks which are a much more smaller
8 geographic area, it creates lines that are much more
9 complex to implement.

10 And I realize that many of you are not familiar
11 with maybe the operations and the technical systems that
12 do this. But it's very difficult to follow these lines.

13 I wanted to point out that the County's
14 election system is not able to support the ability to
15 store census-block boundaries in the system. We are
16 required to relate our precincts to census tracts. We
17 are not required to relate it to census blocks. And so
18 that makes the process of implementing those lines based
19 upon census blocks very difficult, because we do not have
20 that data in our system.

21 Moreover, if we were to try to implement it,
22 I just want to put it as a matter of scale, Los Angeles
23 County, which is one of the largest election
24 jurisdictions in the county, maintains 700 jurisdictional
25 boundaries for jurisdictions for which it conducts

1 elections. For us to implement census blocks, would
2 require us to implement 69,000 blocks, which are in the
3 system, recording those boundaries.

4 We do record the census tract in our system --
5 and there's about 2,000 of them -- and that enables us to
6 comply with the California Election Code, which says we
7 need to relate precincts to census tracts. And it also
8 allows us to prepare for upcoming reapportionments. The
9 decision to use blocks, though, made it impossible for us
10 to use the data we had in our system. So it increased
11 the difficulty of identifying those boundaries and
12 implementing them in our election system.

13 I want to move on to the second decision of the
14 elimination of nesting. If we look at the Figure 2, it's
15 been the practice of the State in the past to nest two
16 Assembly districts within one state Senate district. And
17 the decision -- Figure 2 is just an illustration of the
18 past practice. The decision in 2001 to draw the Assembly
19 district boundaries independent of the state Senate
20 boundaries, looking to Figure 3, caused Los Angeles
21 County or required Los Angeles County to draw many more
22 lines than it would normally have to.

23 Excuse me, going back to Figure 2, you can see,
24 to identify -- to create the Assembly district boundaries
25 when they are nested, all that requires is identifying a

1 single boundary, which splits the state Senate district
2 boundary. So you're implementing a state Senate district
3 boundary and then you're splitting it. It's a very
4 simple operation.

5 In Figure 3, when the lines are drawn
6 separately, you have a lot more work to do. And I
7 realize this is just a graphic and may be a
8 simplification of the operation; but you can see from
9 Figure 3, that you're spending a lot more time just
10 operationally trying to implement the boundary lines for
11 the state Assembly districts when they're not nested
12 within the state Senate districts.

13 So the first impact of not -- of elimination of
14 nesting is an increased district boundary lines.

15 The second impact that that has is an increase
16 in the number of precincts. So if you look at Figure 4,
17 according to California Election Code 12222, we are
18 prohibited from creating precinct boundary lines that
19 cross major district boundaries, and that includes the
20 state Senate and state Assembly districts. So by
21 effectively having more separate boundary lines, we are
22 required to have more precincts. And having more
23 precincts has a downstream impact on our precinct
24 consolidation process, which we have to do for every
25 single election. And, again, I'd like -- I know I

1 realize that this is --

2 MS. PATTON: You have five minutes.

3 MR. BENNETT: Excuse me?

4 MS. PATTON: You have five minutes.

5 MR. BENNETT: Should I go on?

6 MR. KAYE: Yes, just a minute or so.

7 MR. BURDICK: Take three more.

8 MR. BENNETT: Three more minutes? I apologize,
9 this is a complex issue, so I'll try to move through this
10 quickly.

11 So the result is --

12 CHAIR SHEEHY: Just so you know, your
13 illustrations here are really worth a thousand words. I
14 mean, it's very evident the point you're trying to make
15 about the nesting.

16 MR. BENNETT: Thank you. I appreciate that.

17 CHAIR SHEEHY: Those are good graphics.

18 MR. BENNETT: Okay, and so we have more
19 precincts as a result of this decision not to nest. And
20 what that results in is an increase in ballot groups.

21 When we, especially during major elections,
22 when we are required to respect major district
23 boundaries, if you move on to Figure 5, which is the
24 final figure, you can see that when the Assembly
25 districts are nested within the state Senate districts,

1 you only -- in this example here, you only have four
2 ballot groups.

3 A ballot group is a unique set of active
4 contests in an election. When you draw boundaries that
5 are independent of the state Senate boundaries and it
6 would result in more precincts that represent major
7 district boundary lines, we cannot cross those boundary
8 lines when we activate those districts for major
9 elections. The result is that we have more ballot
10 groups.

11 And I know many of you may not be familiar with
12 the election processes, but all of our -- the development
13 of our election materials, the distribution of our
14 materials, the publication of our materials is all
15 organized around ballot groups. So when you have
16 separate ballot groups, you essentially are increasing
17 the volume and the cost of producing those materials.

18 So I would like to conclude real quickly.
19 Again, it's our experience -- and I would like to add
20 that this is echoed in the academic literature -- that
21 making these decisions about how to reapportion the
22 districts in 2001 resulted in expanded data and process
23 complexity, higher levels of service, and increased costs
24 on the part of the County in the administration of
25 elections. And I would also like to note that this same

1 result, or this same consequence, will be realized if the
2 State makes the same decision in the upcoming 2001
3 reapportionment.

4 And the final thing I'd like to add is that
5 this is not unique to Los Angeles County. All the
6 counties have to implement the data in the same way. So
7 if the State decides to use blocks, if the State decides
8 not to nest, it has an impact on all counties. It isn't
9 the -- the cost is a matter of scale. Los Angeles County
10 is very large, but it does have an impact on all other
11 counties.

12 And that concludes my remarks.

13 CHAIR SHEEHY: Mr. Burdick?

14 MR. BURDICK: Chairman Sheehy and Members,
15 Allan Burdick on behalf of CSAC SB-90 Service.

16 I just wanted to say, CSAC, the League of
17 California Cities, and the California School Boards
18 Association have been working together on the issues
19 related that come out of the AB 138 lawsuit. And today
20 is the first claim you've had to deal with the new
21 language related to which statutes are reimbursable or
22 are not reimbursable due to ballot measures.

23 So what I'd like to do is turn my time over,
24 the rest of the time, to Deborah Caplan with the School
25 Boards Association to kind of present the position, which

1 I think is fairly represented by all of local government.

2 CHAIR SHEEHY: Ms. Caplan?

3 MS. CAPLAN: Thank you.

4 I am Deborah Caplan, representing the
5 California School Boards Association. And I was counsel
6 in the *CSBA vs. State* case in which the decision came
7 out of the Third District Court of Appeal recently, which
8 did, as was mentioned earlier, did approve the language
9 in section 17556(f) that now duties which are necessary
10 to implement a ballot measure are non-reimbursable. And
11 staff has relied on that language to some extent in
12 analyzing this particular claim.

13 And I apologize for the lateness of our letter,
14 but we did want to -- the California School Boards
15 Association, who is not a claimant here -- but did want
16 to make the point that this issue of how to interpret --

17 MS. PATTON: You have one minute.

18 MS. CAPLAN: Thank you -- of how to interpret
19 the language of what's necessary to implement a ballot
20 measure is an issue that's likely to recur. It's not
21 going to be unique to this case, but it's likely to recur
22 in many of your cases.

23 And we suggest in our letter that the
24 Commission may want to take this opportunity and look at
25 that, look at the language, look at the court decision,

1 interpret -- to interpret the language, to decide how --
2 what that actually means, and what level of proof will be
3 needed, and, very importantly, whose burden will it be to
4 produce proof or evidence on this point, and how should
5 the burden of proof be allocated in these proceedings.

6 So we suggest that the Commission may want to
7 take some more time and go through some of the
8 definitional stages before trying to apply it in a
9 particular case. And that's why we submitted the letter
10 today.

11 Thank you.

12 CHAIR SHEEHY: Thank you, Ms. Caplan.

13 Finance?

14 MS. ROMERO: Lorena Romero, Department of
15 Finance.

16 CHAIR SHEEHY: I'm sorry, are we picking that
17 up on the microphone? Can you hear Finance out there,
18 folks?

19 Okay, I'm sorry, go ahead.

20 MS. ROMERO: Finance has not had the
21 opportunity to review some of the newly provided
22 information and would like to continue to concur with the
23 staff analysis to deny the test claim.

24 CHAIR SHEEHY: Okay, so Finance agrees with the
25 staff analysis on the test claim?

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1 MS. ROMERO: Yes.

2 CHAIR SHEEHY: But there's some information you
3 haven't had a chance to review yet?

4 MS. ROMERO: I think there was information that
5 was newly provided to the Commission.

6 CHAIR SHEEHY: All right, fair enough.

7 MEMBER LUJANO: Mr. Chair?

8 CHAIR SHEEHY: Mr. Lujano?

9 MEMBER LUJANO: I'd like to propose that we
10 hold this over and give staff time to actually look at
11 the new information, and then respond to it, if that's
12 possible.

13 CHAIR SHEEHY: Okay, we have a request by
14 Mr. Lujano.

15 Is that request to put it over right now, or
16 did you want to have any more discussion and just not
17 take a vote today?

18 MEMBER LUJANO: Just to put it over and allow
19 time to analyze the information.

20 I'd like to see their opinion on what's in the
21 letter and...

22 MS. SHELTON: We have not had an opportunity to
23 review Ms. Caplan's letter at all.

24 You know, there's a major disagreement about
25 what the findings are with respect to the County of

1 Los Angeles claim. And the activity that has been found
2 to be a state-mandated new program or higher level of
3 service, is an activity that really hasn't been requested
4 for reimbursement by the claimant. So there's a
5 difference of opinion about the scope of the mandated
6 activities that even get into the discussion of 17556(f).

7 CHAIR SHEEHY: Ms. Bryant?

8 MEMBER BRYANT: I was just going to ask to hear
9 from staff, so...

10 CHAIR SHEEHY: Yes.

11 What is the downside of putting this over,
12 Paula?

13 MS. HIGASHI: Mr. Sheehy, if we were to be
14 responsive to Ms. Caplan's letter, her letter, at the
15 end, suggests postponement. And she suggests that we put
16 this issue out for further briefing, which I think we
17 would want to do before staff came back with any final
18 opinion, if that's the Commission's desire. And so I
19 would just like to point that out and allow the claimant,
20 certainly, to take a position on it.

21 CHAIR SHEEHY: Unless any of the Board members
22 feel really strongly about this, if there's no problem
23 we're going to create, I think we should accommodate
24 Mr. Lujano's request and we can put this matter over.

25 If we can't hear it at our next meeting, then

1 perhaps we could hear it at the one after that.

2 MS. HIGASHI: But I think what we would like
3 to do is put it out for further briefing in response to
4 Ms. Caplan's letter --

5 CHAIR SHEEHY: That's fine. What does that
6 mean time-wise, to put it out for briefing?

7 MS. HIGASHI: Well, we just need to ask the
8 parties afterwards as to how much time they would need to
9 respond.

10 CHAIR SHEEHY: Mr. Kaye?

11 MR. KAYE: Yes, that sounds like a great idea.
12 Not only are there issues within the current staff
13 analysis that I think are important, but just recently,
14 we learned of some substantial issues in applying this
15 AB 138 litigation, which I think everyone would benefit
16 because it is, you know, capable of repetition, and we
17 don't want it to evade review. And I think it's going
18 to apply to a lot of these cases.

19 CHAIR SHEEHY: Okay, very good, Mr. Kaye.

20 Well, if there's no objection from Board
21 members then, then we're going to, without prejudice,
22 we'll put this item over to a future hearing.

23 MEMBER WORTHLEY: Is there anybody to testify
24 today, or do we just continue --

25 CHAIR SHEEHY: Do we have anybody else here

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1 from the public today that came here because they wanted
2 to testify on this item? We'd be happy to take your
3 testimony at this time.

4 (No response)

5 CHAIR SHEEHY: Seeing none, Paula, we're going
6 to move on to the next item. So we're going to skip
7 Item 6 as well.

8 Are we on Item 7 now?

9 MS. HIGASHI: We're on Item 7.

10 CHAIR SHEEHY: Thank you, everybody.

11 MS. HIGASHI: Mr. Feller again.

12 CHAIR SHEEHY: Mr. Feller?

13 MS. HIGASHI: Would the parties come forward
14 for Item 7?

15 MR. FELLER: This test claim alleges activities
16 related to crime statistics reporting by local law
17 enforcement agencies. It was originally filed as an
18 amendment to test claim 02-TC-04 and 02-TC-11, which the
19 Commission determined imposed a reimbursable mandate on
20 June 26th, 2008.

21 For reasons in the analysis, staff finds that
22 the claim is a reimbursable mandate on local law
23 enforcement agencies to report hate-crime information in
24 a manner prescribed by the Attorney General and specified
25 in the analysis.

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1 Both the co-claimants and the Department of
2 Finance have submitted comments concurring with the draft
3 staff analysis which is reflected in the final analysis
4 before you.

5 Thus, staff recommends the test claim be
6 partially approved for the activities specified in the
7 analysis and the remainder of the statutes and chapters
8 pled be denied.

9 Would the parties and witnesses please state
10 your names for the record?

11 MS. MATO: My name is Hortensia Mato. I'm with
12 the City of Newport Beach.

13 MS. GMUR: Juliana Gmur on the City of Newport
14 Beach and the County of Sacramento.

15 CHAIR SHEEHY: Finance, do you want to identify
16 yourself again?

17 MS. GEANACOU: Susan Geanacou, Department of
18 Finance.

19 MS. ROMERO: Lorena Romero, Department of
20 Finance.

21 CHAIR SHEEHY: Who would like to start first?
22 Ms. Mato or Ms. Gmur?

23 MS. GMUR: I would. Thank you.

24 The test claimants support the staff analysis.

25 CHAIR SHEEHY: I'm sorry?

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1 MS. GMUR: We support the staff analysis, we
2 thank the staff for their analysis, and we thank you for
3 your time.

4 CHAIR SHEEHY: I'm shocked.

5 Ms. Mato, did you want to add to that?

6 MS. MATO: No, I am in concurrence.

7 MS. ROMERO: Finance concurs with the staff
8 analysis.

9 CHAIR SHEEHY: You mean, there's no drama at
10 all?

11 MS. GMUR: Sorry, not this time.

12 CHAIR SHEEHY: Any questions or comments from
13 Board members?

14 MEMBER WORTHLEY: Move staff analysis for
15 approval.

16 MEMBER BRYANT: Second.

17 CHAIR SHEEHY: We have a motion and a second.
18 All in favor?

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

20 CHAIR SHEEHY: Okay, that staff analysis is
21 approved for Item 7.

22 Eric, can you go ahead and read the Proposed
23 Statement of Decision?

24 MR. FELLER: Unless there is objection, staff
25 recommends that the Commission adopt the Proposed

1 Statement of Decision which accurately reflects the
2 Commission's decision on Item 7 to partially approve the
3 test claim.

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

9 MEMBER WORTHLEY: Move approval.

10 MEMBER GLAAB: Second.

11 CHAIR SHEEHY: We have a motion and a second.

12 All in favor?

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

14 CHAIR SHEEHY: Okay, very good.

15 We're going to move on now to Item 9 on our
16 agenda.

17 MS. HIGASHI: Will the parties please come
18 forward?

19 Item 9 will be presented by Commission Counsel
20 Heather Halsey.

21 MS. HALSEY: Thanks, Paula.

22 This test claim addresses the *Extended*
23 *Opportunities Programs and Services* Program or EOPS.
24 EOPS provides academic and financial support to
25 community-college students whose educational,

1 socio-economic backgrounds might otherwise prevent them
2 from successfully attending college. The community
3 college districts are encouraged to participate in EOPS
4 by legislative-intent language and state funding provided
5 specifically for EOPS.

6 In exchange for the state funding, the district
7 must meet minimum standards that are specified in the
8 test-claim statutes and executive orders. However, the
9 requirement to perform the activities required by the
10 statutes and executive orders pled by the claimant is
11 triggered by the district's discretionary decisions to
12 establish the EOPS program and to apply to the Board of
13 Governors for a state grant to fund all or a portion of
14 the costs of establishing and operating an EOPS program.

15 Based on the holding in *Kern* that downstream
16 activities triggered by an underlying discretionary
17 decision of a district are not state-mandated activities,
18 staff finds that these claim statutes and executive
19 orders do not impose state-mandated activities and are
20 thus not reimbursable.

21 Staff recommends denial of this test claim.

22 Will the parties and witnesses please state
23 your names for the record?

24 MS. FEREBEE: Donna Ferebee, Department of
25 Finance.

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1 MR. PETERSEN: Keith Petersen, representing the
2 test claimant.

3 CHAIR SHEEHY: Thank you, Ms. Halsey.

4 Mr. Petersen?

5 MR. PETERSEN: Thank you.

6 I will not need 20 minutes. And I hope I get
7 some rollover minutes at a future hearing, but...

8 CHAIR SHEEHY: If you take more than 20, it
9 will be a \$50 fine.

10 MR. PETERSEN: Okay. The Commission staff is
11 asserting that all of the claimed, test-claimed
12 activities are downstream from the voluntary decision to
13 participate in the EOPS program. After a great deal of
14 briefing, what this boils down to, I believe, is the
15 effect of Title V, section 56210. It's a short section.
16 It's quoted on page 19 of your final staff analysis. And
17 since it is short, I'd like to read it because I believe
18 this is the crux, the threshold issue.

19 *"Beginning with the 1987-88 academic year and*
20 *every year thereafter, the college shall maintain the*
21 *same dollar level of services supported with non-EOPS*
22 *funds, as the average reported in its final budget report*
23 *in the previous three academic years."*

24 I'm asserting that because colleges can no
25 longer withdraw, they're committed to continue their

1 participation. The final staff analysis' reliance upon
2 *Kern* is misplaced.

3 *Kern* -- the court case *Kern* found that certain
4 ostensibly volunteer school-site councils were later
5 charged with requirement to prepare agendas.

6 The finding in that court case was that the
7 school districts could stop voluntarily conducting or
8 holding these school-site councils and avoid the expense
9 of the agendas.

10 In the case of the EOPS program, whether it's
11 ostensibly voluntary or not, as of 1987-88, they're
12 required to continue. And I believe that makes *Kern*
13 irrelevant.

14 CHAIR SHEEHY: Does that conclude your
15 comments, Mr. Petersen?

16 MR. PETERSEN: For now, yes.

17 CHAIR SHEEHY: Okay, Ms. Ferebee?

18 MS. FEREBEE: The Department of Finance concurs
19 with the final staff analysis.

20 CHAIR SHEEHY: Okay, questions or comments from
21 Board members?

22 MEMBER WORTHLEY: Mr. Chairman, I note that in
23 our staff report, it's stated that -- this is at the top
24 of page 21 -- there's nothing in the regulatory history
25 to indicate that anyone thought that section 56210 would

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1 make the EOPS program mandatory. And my only response
2 to that is -- or question, really, for our staff is, a
3 lot of times things are done without anticipating other
4 impacts. In other words, maybe that was not
5 contemplated. But I'm wondering about Mr. Petersen's
6 position. Has anybody really had to --

7 MR. PETERSEN: My note was, "So what?"

8 MEMBER WORTHLEY: I beg your pardon?

9 MR. PETERSEN: My note on that is, "So what?"

10 MEMBER WORTHLEY: Yes, because in the sense
11 that we take action all the time. I mean, legislative
12 bodies will take action, and they don't anticipate an
13 impact that ultimately occurs from that.

14 MR. PETERSEN: They're not --

15 MEMBER WORTHLEY: So the fact that they may
16 never have thought that this would create -- require this
17 to be a continuing program, is there anybody who has
18 actually tested this to determine whether or not it will?

19 MS. HALSEY: To our knowledge, there has not
20 been a single community college that has attempted to
21 discontinue its EOPS program. And the Chancellor's
22 office takes the position that it's a voluntary program.
23 And that is the office that would approve the
24 establishment of the EOPS program.

25 MEMBER WORTHLEY: And so if someone were to --

1 who is under the program were to withdraw, then the
2 requirement of maintaining the same dollar level of
3 services supported, they would be excused from that?

4 MS. HALSEY: Yes, I believe that the
5 interpretation is that this requirement is one of the
6 many requirements of having an EOPS program. But if you
7 no longer have the EOPS program, then this requirement
8 would no longer exist.

9 There's been no attempt by anyone to withdraw
10 from the program. So it hasn't been tested.

11 MEMBER WORTHLEY: Thank you.

12 MR. PETERSEN: Mr. Sheehy, I really have to
13 object to that. That's meaningless. That's --

14 CHAIR SHEEHY: Please, if you have to, then
15 please go ahead.

16 So you do object?

17 MR. PETERSEN: Yes. That's not -- that's a
18 secondhand statement by the Chancellor's office, that
19 people can withdraw -- excuse me, districts can withdraw.
20 I don't know that that's been certified under penalty of
21 perjury.

22 And further, even if that's the opinion of the
23 Chancellor's office, that's not reflected by any
24 regulation. That's an artificial construct of some
25 people who are saying, "Yes, go ahead and withdraw."

1 There's nothing in the regulations that allow them to
2 withdraw. The regulation says, "You must continue your
3 funding commitment." It doesn't say, "If you want to"
4 and it doesn't say "It's conditioned on further
5 participation." The regulation says, "You must continue
6 your funding commitment."

7 The fact that the Chancellor thinks that they
8 can pull out of the program, there's no evidence of that,
9 and there's no regulatory support for that.

10 CHAIR SHEEHY: Camille, did you want to respond
11 to Mr. Petersen's --

12 MS. SHELTON: Just to clarify, that this is
13 an issue of law. And if you look on page 22, you cannot
14 read this regulation in isolation. You have to read it
15 within the entire statutory scheme. And when you do
16 that, the statutory scheme makes it clear that compliance
17 with the requirements of the statutes and regulations is
18 a condition of receiving funding.

19 MR. PETERSEN: Well, I agree with that. But --

20 CHAIR SHEEHY: The compliance with the statute
21 is a condition of receiving funding? So in other words,
22 you're not compelled to comply --

23 MS. SHELTON: Right.

24 CHAIR SHEEHY: You can choose to comply and
25 then receive the funding; is that right?

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1 MS. SHELTON: Correct.

2 CHAIR SHEEHY: And then the regulations flow
3 from the statute.

4 So if you choose not to receive the money, then
5 you don't have to implement the flow of the program?

6 MS. SHELTON: Correct.

7 CHAIR SHEEHY: And you disagree with that,
8 Mr. Petersen?

9 MR. PETERSEN: I agree that receipt of the
10 funding is conditioned on participation. I don't agree
11 that that mitigates the significance of 56210, which says
12 you've got to continue participating in the program.
13 They're two separate issues.

14 MS. SHELTON: Then we would have regulations
15 that are not consistent with statute, and the regulations
16 would not prevail. The statutes create a voluntary
17 program as a condition over the receipt of funds.

18 CHAIR SHEEHY: So you're referencing a
19 regulation, the 56210?

20 MR. PETERSEN: 56210.

21 CHAIR SHEEHY: So once you voluntarily opt into
22 the program, then you've got to follow the regs that are
23 in the program?

24 MR. PETERSEN: Yes. But if you take --

25 CHAIR SHEEHY: Why is that a "Yes, but"?

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1 MR. PETERSEN: If you take Ms. Camille's --

2 CHAIR SHEEHY: It's a discretionary act, right,
3 whether to get into EOPS?

4 MR. PETERSEN: Well, yes, under the Commission
5 analysis. Under the practice of education in California,
6 it certainly isn't. You don't frustrate --

7 CHAIR SHEEHY: Why is that? Why would a
8 community -- why is every community college district
9 compelled?

10 MR. PETERSEN: Because it's the intent of the
11 Legislature that they participate, and they fund it.

12 CHAIR SHEEHY: Yes, but I see hundreds of bills
13 every year -- some get enacted and some don't -- that
14 says it's the intent of the Legislature to do all sorts
15 of things that never happens.

16 MR. PETERSEN: Yes, but there's a
17 hundred million dollars attached to that intent in this
18 case.

19 CHAIR SHEEHY: I'm sorry?

20 MR. PETERSEN: There's a hundred million
21 dollars of state money attached to that intent.

22 CHAIR SHEEHY: So, therefore, then the college
23 wants to participate because it wants the funding stream?
24 So they make a decision that they want to participate?

25 MR. PETERSEN: Yes.

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1 CHAIR SHEEHY: They're not being forced to
2 participate?

3 MR. PETERSEN: Not in the staff analysis.

4 CHAIR SHEEHY: No, I mean --

5 MR. PETERSEN: If you're in the education
6 business --

7 CHAIR SHEEHY: Forget about the staff analysis.
8 I mean, there's nobody that's holding a gun to a
9 Chancellor's head in a community college saying "You have
10 to do this program"; right?

11 MR. PETERSEN: That's correct.

12 CHAIR SHEEHY: I mean, they have discretion as
13 to whether or not they're going to participate?

14 MR. PETERSEN: Under the staff analysis.

15 In the education business, you don't turn away
16 \$100 million and provide services to students.

17 CHAIR SHEEHY: You're mixing up the law with
18 what seems to me --

19 MR. PETERSEN: No, I'm not alleging that it's
20 practically compelled.

21 CHAIR SHEEHY: It seems to me you're mixing up
22 legal compulsion with practices and procedures. I mean,
23 if I'm running a college and I want to get access to a
24 revenue stream and I have to -- you're basically saying
25 that they have no choice but to participate because they

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1 need the revenue, that they're compelled to because they
2 need the money. That's essentially what you're saying.
3 And then once they're in there, then there's these other
4 requirements, and then...

5 MR. PETERSEN: I'm not saying they're
6 statutorily compelled to participate in the program.
7 I'm saying, they're now regulatorily compelled not to
8 withdraw. And that's different from the *Kern* case, so
9 you can't use the *Kern* analysis.

10 CHAIR SHEEHY: Okay, other questions or
11 comments for Commission members?

12 *(No response)*

13 CHAIR SHEEHY: Do we -- Ms. Bryant?

14 MEMBER BRYANT: I'll move the staff analysis.

15 MEMBER CHIVARO: Second.

16 CHAIR SHEEHY: Okay, we have a motion and a
17 second.

18 Was there any other -- before we have a vote,
19 was there any other public comment on this item?

20 *(No response)*

21 CHAIR SHEEHY: Seeing none --

22 MEMBER WORTHLEY: I just want to say,
23 Mr. Chairman, I was going to vote "no" on this. But
24 after listening to Ms. Shelton's explanation of the fact
25 that this falls under regulations which fall under the

1 statute, and that the statute would be prevailing so that
2 all that would happen here is if someone -- if we were
3 to take the interpretation, as I understand it, that
4 Mr. Petersen is presenting, it would be contrary to the
5 statute, which the statute would prevail over the
6 regulation.

7 CHAIR SHEEHY: Do we need a roll-call vote? I
8 don't sense that we do.

9 I'm going to ask the question: All in favor?

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

11 CHAIR SHEEHY: The "ayes" carry.

12 So the staff analysis is approved on Item 9.

13 Ms. Halsey, can you read the Proposed Statement
14 of Decision for Item 10, please?

15 MS. HALSEY: Sure. Item 10, staff recommends
16 that the Commission adopt the Proposed Statement of
17 Decision. The sole issue before the Commission is
18 whether the Proposed Statement of Decision accurately
19 reflects the decision of the Commission on Item 9. Minor
20 changes to reflect the vote count will be included in the
21 Final Statement of Decision.

22 CHAIR SHEEHY: Thank you, Ms. Halsey.

23 Do we have a motion?

24 MEMBER GLAAB: So moved.

25 MEMBER CHIVARO: Second.

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1 CHAIR SHEEHY: A motion and second.

2 All in favor?

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

4 CHAIR SHEEHY: Okay, so the Proposed Statement
5 of Decision has been adopted.

6 We're now going to move to our last regularly
7 scheduled calendar item, Number 11, which I believe is
8 going to be -- who is going to present that? Is that
9 going to be --

10 MS. HIGASHI: Ms. Shelton.

11 MS. SHELTON: This test claim addresses
12 amendments to the child-abuse reporting laws as they
13 apply to school districts and community-college
14 districts.

15 The claimant, the San Bernardino Community
16 College, alleges that statutes imposing investigation
17 and reporting requirements on the police and security
18 departments of local agencies and on all local law
19 enforcement agencies mandate a new program or higher
20 level of service on school district and community-college
21 police departments. The claimant further requests
22 reimbursement for other activities imposed on school
23 district employees to report, train, and assist law
24 enforcement in their investigation.

25 Staff finds that the State has not mandated

1 school-district or community-college district police or
2 security departments or their law enforcement agencies
3 to comply with the child-abuse reporting requirements
4 imposed on the law-enforcement agencies of cities and
5 counties.

6 Staff further finds that the two test-claim
7 statutes listed in the executive summary impose
8 reimbursable mandated duties on K-12 school districts to
9 report to the Department of Education the reasons why
10 training is not provided, and to inform a staff person
11 selected by a suspected victim of child abuse or neglect
12 to be present during an interview during school hours of
13 a staff person's presence in the interview and a
14 confidentiality requirement.

15 Staff recommends that the Commission adopt the
16 staff analysis.

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

19 MS. FEREBEE: Donna Ferebee, Department of
20 Finance.

21 MR. PETERSEN: Keith Petersen, representing the
22 test claimant.

23 CHAIR SHEEHY: Mr. Petersen?

24 MR. PETERSEN: I'll stand on the written
25 submissions.

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1 MS. FEREBEE: The Department of Finance also
2 concurs with this staff analysis.

3 Thank you.

4 CHAIR SHEEHY: Okay, any further public comment
5 on this item?

6 *(No response)*

7 CHAIR SHEEHY: Staff recommendation is a
8 partial approval of this item.

9 Is there a motion?

10 MEMBER WORTHLEY: So moved.

11 MEMBER CHIVARO: Second.

12 CHAIR SHEEHY: We have a motion and second.

13 All in favor?

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

15 CHAIR SHEEHY: Staff recommendation on Item 11
16 has been adopted.

17 Ms. Shelton, do we have a Proposed Statement of
18 Decision that you can read?

19 MS. SHELTON: Yes, Item 12. Staff recommends
20 that the Commission adopt the Proposed Statement of
21 Decision. I will update the Statement of Decision to
22 reflect the vote count.

23 CHAIR SHEEHY: Okay, do we have a motion?

24 MEMBER GLAAB: So moved.

25 MEMBER BRYANT: Second.

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1 CHAIR SHEEHY: Motion and second.

2 All in favor?

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

4 CHAIR SHEEHY: Okay, so that finishes our
5 regular items of business.

6 MS. HIGASHI: Everything in between was adopted
7 on the Consent Calendar.

8 So it brings us to Item 21, which we're passing
9 on. We've had no applications filed.

10 Item 22, Chief Counsel's report.

11 MS. SHELTON: There's nothing new to report
12 this month. Everything has remained the same for
13 litigation.

14 MS. HIGASHI: Item 23, my report.

15 I have three issues covered in this report that
16 actually require action by the Commission.

17 The first issue pertains to what is happening
18 with the Bureau of State Audits report that is being
19 conducted, the audit.

20 We don't know when we will actually receive
21 the final draft report. And because of that fact and
22 because of the fact that we will have five days to
23 respond to it once we receive it, what I'd like to
24 propose is that we do a couple of things:

25 One, that the Commission form a two-member

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1 subcommittee so that once staff receives that draft, that
2 we have two Commission members that we can concur with to
3 review the draft and review our proposed draft response.

4 The second point would be that definitely for
5 the September meeting, that, just for insurance, we
6 automatically schedule a closed session discussion,
7 because there's an exemption under Bagley-Keene to have
8 a closed session to discuss a final draft audit report.
9 But that would only then occur if that final draft audit
10 report is received during the five days within the
11 Commission hearing date.

12 And the third, assuming the report does issue
13 at some point in October, then we would schedule it for
14 public agenda, so that then we could discuss the report
15 in public and also receive public comment on the report
16 and the recommendations.

17 And so I have three bullets on pages 4 and 5
18 of my report. And I'd like to make this recommendation.

19 If the motion passes, obviously, then I would
20 want the Commission to form the subcommittee today.

21 CHAIR SHEEHY: Okay, so we're going to get this
22 confidential draft, then we have five days to comment --

23 MS. HIGASHI: Five days to respond.

24 CHAIR SHEEHY: -- and then our comments would
25 be published as part of the --

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1 MS. HIGASHI: As part of the report.

2 CHAIR SHEEHY: Okay, I think it's important for
3 this item -- normally, I don't insert the Chair into a
4 subcommittee unless it's necessary. But I think this
5 item is necessary for the Chair to be on the
6 subcommittee. So normally, I wouldn't nominate myself,
7 but I'm going to this time, if that's okay.

8 MEMBER WORTHLEY: The County nominates you.

9 CHAIR SHEEHY: So I'm going to be one of the
10 subcommittee members because I think I need to be; but we
11 need to have at least one other. And I'm going to leave
12 that up to the Board.

13 MEMBER LUJANO: Mr. Chair, I'll volunteer for
14 that.

15 CHAIR SHEEHY: All right, we have Mr. Lujano as
16 a volunteer.

17 Is there any objection from the Board members
18 for Mr. Lujano and the Chair to serve as the subcommittee
19 that Ms. Higashi has just recommended for the BSA audit?

20 *(No response)*

21 MEMBER WORTHLEY: Mr. Chairman, I would move
22 approval for the four bullet points with the members you
23 have identified as the audit subcommittee.

24 MEMBER BRYANT: I'll second.

25 CHAIR SHEEHY: Okay, all in favor?

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

2 CHAIR SHEEHY: Very good.

3 MS. HIGASHI: Thank you.

4 CHAIR SHEEHY: What's next, Paula?

5 MS. HIGASHI: The next issue is, we need to
6 modify our meeting calendar for 2009.

7 We are in the process of still developing
8 agenda items for hearing in -- they were originally for
9 September hearing. But because of the complexity of this
10 agenda and just with the imposition of the furlough days,
11 we're discovering that it would be virtually impossible
12 to release huge-enough items for just a September
13 hearing. So we're proposing to change the
14 October hearing from tentative to actual so that the
15 items that aren't released this week can then be
16 scheduled for October.

17 And then also, we have a hearing set for
18 December that is on a furlough Friday. So we're
19 recommending that that furlough Friday hearing be
20 canceled; and that the Commission consider rescheduling
21 it. It could be on a Thursday, for example.

22 CHAIR SHEEHY: I would recommend -- I realize
23 that Board members may need to consult their schedules,
24 but I would recommend just to, if we can, to do it on the
25 day before, on Thursday, the 3rd.

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1 If there's conflicts on that day, we could look
2 at another date. But that seems to stay as close as we
3 can to the existing schedule. I don't know, we have two
4 of our out-of-town colleagues today. I know Ms. Olsen is
5 not here.

6 MS. HIGASHI: And certainly, we can revisit
7 that December date at the October meeting.

8 CHAIR SHEEHY: You'll follow up with the --
9 why don't you see if we can schedule it for Thursday,
10 December 3rd. But would you please follow up with the
11 Board members to make sure that that works for them?

12 MS. HIGASHI: Okay.

13 CHAIR SHEEHY: And if it doesn't, then you can
14 reach out to us and see if there's another date we can
15 pick.

16 MS. HIGASHI: Okay, and everyone's okay with
17 the October 30th date?

18 CHAIR SHEEHY: Well, it was tentative; right?

19 MS. HIGASHI: It was tentative, correct. And
20 so we would merely change it on our Web site and we would
21 start setting items for hearing for that date.

22 CHAIR SHEEHY: Is there any objection to the
23 October 30th date, Commission Members?

24 (*No response*)

25 CHAIR SHEEHY: Okay, it seems to be okay.

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1 MS. HIGASHI: Okay.

2 And then lastly, on the very last page of my
3 report, on page 7, there is a proposed meeting calendar
4 for 2010. And we followed our practice of scheduling
5 our meetings on the last Friday of the month, except for
6 December. And since the current executive order for
7 furloughs only extends to the end of the fiscal year, we
8 just let that -- we left that as a Friday.

9 CHAIR SHEEHY: I'd rather have the -- I notice
10 we have one in June and July, and then we don't have one
11 in August. I'd rather have that meeting in August and
12 scrap the meeting in July. That's just my preference.
13 Maybe you all feel differently. But, I mean, the
14 Legislature is not going to be in session.

15 MEMBER WORTHLEY: Maybe that's why they want to
16 hold it then.

17 CHAIR SHEEHY: And people that have kids, their
18 kids won't be in school. But then -- so, I mean, for
19 some people -- for example, what's today, the 31st?
20 There's at least one Board member here that canceled
21 plans to be out of Sacramento today because of this Board
22 hearing. I'd like to avoid that next summer, if
23 possible. So I don't know why we give August a break and
24 we do it in July. Why not give July a break and do it at
25 the end of August?

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1 MS. HIGASHI: It's entirely up to the members.

2 CHAIR SHEEHY: I don't know how the other Board
3 members feel about that.

4 MEMBER BRYANT: Well, regarding 2010, my
5 opinion may or may not matter.

6 CHAIR SHEEHY: Okay, so you don't feel strongly
7 about it one way or the other?

8 And my opinion may not matter, either, for that
9 matter, but in case it does.

10 MR. PETERSEN: I'd like to speak to that.

11 MEMBER WORTHLEY: Mr. Chairman?

12 MS. HIGASHI: Mr. Sheehy?

13 CHAIR SHEEHY: Yes?

14 MEMBER WORTHLEY: Mr. Petersen would like to
15 say something.

16 CHAIR SHEEHY: I'm sorry?

17 MR. PETERSEN: I'm sorry to interrupt.
18 August has never been scheduled for hearings for the
19 20 years I've been doing this because all of the school
20 district people take their vacations that month.

21 CHAIR SHEEHY: Well, they can't be taking them
22 in my district, because my district is back in school in
23 August. And all my friends that I have and I know are in
24 school in August. So I know I'm going to be here in
25 August because my kids are going to be in school. My

1 kids are not in school in July, so...

2 I'm glad you shared that for the record,
3 though.

4 MS. HIGASHI: In an issue related to September,
5 as I recall, it's been because it's the start of school.
6 And because of that, some district officials cannot get
7 away, and --

8 CHAIR SHEEHY: Well, we've got September's on
9 the calendar, September 24's on the calendar.

10 MS. HIGASHI: It's the end of September,
11 though.

12 And so it's certainly up to the members,
13 certainly, to approve the hearing calendar.

14 CHAIR SHEEHY: Well, look, I don't want to
15 suggest something that doesn't work. But I don't
16 understand why the end of July is better than the end of
17 August. In other words, how is it that schools are --
18 it's never been done in August, Mr. Petersen, you said,
19 because it's hard for some of the school folks to get up
20 here? It's easier for them to get here in July than in
21 August?

22 MR. PETERSEN: School starts at the end of
23 August. And most fiscal people involved in this process,
24 the only time they can take vacations is the middle of
25 August. In other words --

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1 CHAIR SHEEHY: Why can't they take vacations in
2 July?

3 MR. PETERSEN: Well, there's the budget work
4 and year-end closing.

5 MS. SHELTON: He's talking about admin staff.
6 Admin staff --

7 CHAIR SHEEHY: I'm not convinced.

8 I'm going to suggest that we do the meeting --
9 I'm going to suggest that we break with tradition. It's
10 time for us to think outside the box and look for win-win
11 solutions to these problems. I'm going to suggest we go
12 for the end of August instead of the end of July.

13 We don't have to make the final decision today,
14 if anybody is really nervous about it, but I just think
15 that makes more sense.

16 MEMBER GLAAB: What date did you have in mind?

17 CHAIR SHEEHY: The end of August. Whatever
18 that date would be.

19 MS. HIGASHI: Whatever the last Friday in
20 August is.

21 CHAIR SHEEHY: Yes.

22 MS. HIGASHI: And I think the other issue is
23 potentially Labor Day. So, that's fine.

24 I will look up the date and I will bring this
25 back. So when Ms. Olsen is here, we will put all the

1 dates before the members again.

2 MEMBER WORTHLEY: One point that was just made
3 to me, Mr. Chairman, is that our June date is a tentative
4 date. Normally, we try to have two months in between our
5 meetings.

6 But by pushing July to the late August date,
7 then we are only 30 days away from our September date, or
8 even less. So that does create perhaps some difficulties
9 there.

10 MS. HIGASHI: What we need to do is work
11 through what our workload due dates are to see how it
12 would also accommodate staff vacations.

13 MEMBER WORTHLEY: Yes.

14 MS. HIGASHI: And then we'll come back to you.

15 CHAIR SHEEHY: Why don't you come back at our
16 next meeting and see if that is doable?

17 MS. HIGASHI: Okay, because I know from my own
18 personal situation, I understand your point completely,
19 Tom.

20 CHAIR SHEEHY: Okay, very good.

21 And so is there any other items on your
22 Executive Director's report?

23 MS. HIGASHI: No, that's all that requires
24 action.

25 CHAIR SHEEHY: Okay.

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1 MS. HIGASHI: Anything else, I think we've all
2 read the papers, so we can update --

3 CHAIR SHEEHY: This is the last opportunity for
4 anybody in the public to make any comments today. Come
5 forward and speak or you're going to have to wait until
6 September.

7 MEMBER WORTHLEY: Paula -- excuse me,
8 Mr. Chairman. Did you want to discuss our subcommittee
9 meeting on the personnel --

10 MS. HIGASHI: That's when we go into closed
11 session.

12 MEMBER WORTHLEY: Okay.

13 CHAIR SHEEHY: Ms. Geanacou?

14 MS. GEANACOU: Just real quick for
15 clarification. I don't know why these calendar things
16 are so confusing to me. I want to make sure I understood
17 your comments, Paula, to mean that there is no
18 September hearing, but then I heard Mr. Sheehy --

19 MS. HIGASHI: No, there is a September meeting.

20 MS. GEANACOU: But it will just be fewer items
21 because of conflict?

22 MS. HIGASHI: Right. We have to schedule the
23 meeting because we need to comply with the writ in the
24 CSBA case. But we will also have other items that we can
25 take up.

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1 CHAIR SHEEHY: Okay, well, before we go into
2 closed session, I want to just make one more comment that
3 I think is important, and maybe I should have made it at
4 the beginning of the hearing. But this was a big agenda,
5 and there was a tremendous amount of work that went into
6 it. And I just want to acknowledge the fact that the
7 staff on the Commission on State Mandates, like all other
8 state employees -- like most other State employees --
9 92 percent of the other state employees have been taking
10 two furlough days, and now a third furlough day. And I
11 think that this is tough on all agencies. Of course,
12 it's tough on individual employees. They have a cut in
13 pay. But you did a great job today, and I want to
14 recognize that, and thank you for your hard work. And I
15 know it's difficult.

16 But I also know the Governor appreciates the
17 fact that all state employees are doing everything they
18 can to play their part, as part of the solution. And
19 so this is the situation we find ourselves in. But we
20 really appreciate your work. And thank you for doing it
21 so professionally.

22 And with that said, I have the following
23 statement: The Commission on State Mandates will 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 public notice and agenda, and to
4 confer with and receive advice from our legal counsel
5 regarding potential litigation.

6 The Commission will also confer on personnel
7 matters listed on the published notice and agenda.

8 We will reconvene in open session in
9 approximately 15 minutes.

10 So unless you are staff to the Commission, if
11 you could please exit the room until we resume our public
12 hearing.

13 Thank you.

14 *(The Board met in closed executive session*
15 *from 12:45 p.m. to 1:05 p.m.)*

16 CHAIR SHEEHY: The Commission on State Mandates
17 did meet in closed executive session pursuant to
18 Government Code section 11126, subdivision (e), to
19 confer with and receive advice from legal counsel for
20 consideration and action, as necessary and appropriate,
21 upon pending litigation listed on the public notice and
22 agenda, and potential litigation pursuant to Government
23 Code section 11126, subdivision (a), and to code section
24 17526, to confer on personnel matters listed on the
25 public notice and agenda.

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The Commission will reconvene in open session.

We are now in open session.

Does anybody else have anything to say?

(No response)

CHAIR SHEEHY: The Commission is adjourned.

(The meeting concluded at 1:06 p.m.)

--oOo--

REPORTER'S CERTIFICATE

I hereby certify:

That the foregoing proceedings were duly reported by me at the time and place herein specified;
10and

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

In witness whereof, I have hereunto set my hand on August 21st, 2009.

Daniel P. Feldhaus

Daniel P. Feldhaus
California CSR #6949
Registered Diplomate Reporter
Certified Realtime Reporter