STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

October 31, 2023

Mr. Howard Gest
Burhenn & Gest, LLP
12401 Wilshire Blvd, Suite 200
Los Angeles, CA 90025

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

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

Re: Decision
California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, Sections B.2.; C.; D.; F.1.d.; F.1.d.7.i.; F.1.f.; F.1.h.; F.3.a.4.c.; F.3.d.; F.4.b.; F.4.d.; F.4.e.; G.6.; I.; J.; K.1.b.4.n.; and, Only as They Relate to the Reporting Checklist, Section K.3.a. and Attachment D,[1] Adopted December 16, 2009, 10-TC-11
Cities of Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, San Juan Capistrano, the County of Orange, and the Orange County Flood Control District, Claimants

Dear Mr. Gest and Mr. Hill:

On October 27, 2023, the Commission on State Mandates adopted the Decision partially approving the Test Claim on the above-captioned matter.

Sincerely,

Heather Halsey
Executive Director

[1] Government Code section 17553(b)(1) requires test claims to identify the specific sections of the executive order alleged to contain a mandate and a detailed description of the new activities mandated by the state. Only the sections indicated in this caption, and Section K.3.a. and Attachment D only as they relate to the reporting checklist, have been properly pled.

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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, Sections B.2; C.; D.; F.1.d.; F.1.d.7.i.; F.1.f.; F.1.h.; F.3.a.4.c.; F.3.d.; F.4.b.; F.4.d.; F.4.e.; G.6.; I.; J.; K.1.b.4.n.; and, Only as They Relate to the Reporting Checklist, Section K.3.a., and Attachment D[1] Adopted: December 16, 2009 Filed on June 30, 2011 and Revised on January 6, 2017 Cities of Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, San Juan Capistrano, the County of Orange and the Orange County Flood Control District, Claimants	Case No.: 10-TC-11 *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, Sections B.2; C.; D.; F.1.d.; F.1.d.7.i.; F.1.f.; F.1.h.; F.3.a.4.c.; F.3.d.; F.4.b.; F.4.d.; F.4.e.; G.6.; I.; J.; K.1.b.4.n.; and, Only as They Relate to the Reporting Checklist, Section K.3.a., and Attachment D, Adopted December 16, 2009* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted October 27, 2023*) (*Served October 31, 2023*)

TEST CLAIM

The Commission on State Mandates adopted the attached Decision on October 27, 2023.

Heather Halsey, Executive Director

[1] Government Code section 17553(b)(1) requires test claims to identify the specific sections of the executive order alleged to contain a mandate and a detailed description of the new activities mandated by the state. Only the sections indicated in this caption, and Section K.3.a. and Attachment D only as they relate to the reporting checklist, have been properly pled.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, Sections B.2; C.; D.; F.1.d.; F.1.d.7.i.; F.1.f.; F.1.h.; F.3.a.4.c.; F.3.d.; F.4.b.; F.4.d.; F.4.e.; G.6.; I.; J.; K.1.b.4.n.; and, Only as They Relate to the Reporting Checklist, Section K.3.a., and Attachment D[1] Adopted: December 16, 2009 Filed on June 30, 2011 and Revised on January 6, 2017 Cities of Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, San Juan Capistrano, the County of Orange and the Orange County Flood Control District, Claimants	Case No.: 10-TC-11 *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, Sections B.2; C.; D.; F.1.d.; F.1.d.7.i.; F.1.f.; F.1.h.; F.3.a.4.c.; F.3.d.; F.4.b.; F.4.d.; F.4.e.; G.6.; I.; J.; K.1.b.4.n.; and, Only as They Relate to the Reporting Checklist, Section K.3.a., and Attachment D, Adopted December 16, 2009* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted October 27, 2023*) (*Served October 31, 2023*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on October 27, 2023. Howard Gest appeared for the claimants. Donna Ferebee appeared for the Department of Finance. Catherine Hagan and Michael Lauffer appeared for the State Water Resources Control Board and the San Diego Regional Water Quality Control Board (Water Boards).

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the Proposed Decision to partially approve the Test Claim by a vote of 7-0, as follows:

[1] Government Code section 17553(b)(1) requires test claims to identify the specific sections of the executive order alleged to contain a mandate and a detailed description of the new activities mandated by the state. Only the sections indicated in this caption, and Section K.3.a. and Attachment D only as they relate to the reporting checklist, have been properly pled.

Member	Vote
Lee Adams, County Supervisor	Yes
Regina Evans, Representative of the State Controller, Vice Chairperson	Yes
Jennifer Holman, Representative of the Director of the Office of Planning and Research	Yes
Renee Nash, School Board Member	Yes
Sarah Olsen, Public Member	Yes
Joe Stephenshaw, Director of Finance, Chairperson	Yes
Spencer Walker, Representative of the State Treasurer	Yes

Summary of the Findings

This Test Claim alleges reimbursable state mandated activities arising from Order No. R9-2009-0002 (test claim permit), issued by the San Diego Regional Water Quality Control Board (Regional Board) on December 16, 2009, and became effective that day.[2] The claimants have properly pled the following sections of the test claim permit (arranged in alphabetical order, and not by topic), alleging these sections impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution: Sections B.2.; C.; D.; F.1.d.; F.1.d.7.i.; F.1.f.; F.1.h.; F.3.a.4.c.; F.3.d.; F.4.b.; F.4.d.; F.4.e.; G.6.; I.; J.; K.1.b.4.n.; and, only as they relate to the reporting checklist, section K.3.a. and Attachment D.

Section B.2. of the test claim permit removes landscape irrigation, irrigation water, and lawn watering from the exempt, non-prohibited list of non-stormwater discharges.[3] Thus, claimants are now required to effectively prohibit landscape irrigation, irrigation water, and lawn watering from entering the MS4 by implementing a program to detect and remove these illicit discharges, just like other prohibited non-stormwater discharges. The Commission finds that section B.2. of the test claim permit does not mandate a new program or higher level of service. Landscape irrigation, irrigation water, and lawn watering were identified by the permittees as sources of pollutants and, thus, under

[2] Exhibit A, Test Claim, filed June 30, 2011. Note that this test claim was filed on June 30, 2011; Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2207 (Test claim permit). All page number citations refer to the PDF page numbers.

[3] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2135-2136 (Order No. R9-2009-0002, section B.2.).

federal law, these discharges are now illicit, non-stormwater discharges that are required by federal law to be effectively prohibited.[4]

Sections C. and F.4.d. and e. of the test claim permit requires dry weather monitoring and field screening for the pollutants specified in the permit, and if a pollutant is shown to exceed the non-stormwater action level (NAL), which is based on existing water quality standards, then the claimants are required to investigate, identify and remove the source of the illicit, non-stormwater discharge.[5] The Commission finds that sections C. and F.4.d. and e. do not mandate a new program or higher level of service. Instead, the test claim permit simply identifies action levels for each pollutant consistent with existing water quality standards that, if detected in dry weather monitoring and field screening to be in excess of the action level, trigger the investigation, identification of the discharge, removal, and reporting activities required by the prior permit and existing federal law.[6] The claimants do not violate the permit by exceeding the action level, as implied by the claimants; rather a violation occurs only if a permittee fails to timely implement the required actions following an exceedance of an action level.[7] In this sense, the action levels established in the test claim permit function the same as the prior permit, which required the claimants to identify criteria to determine if significant sources of pollutants were present in dry weather non-stormwater discharges consistent with water quality objectives.[8] Under both permits, the action levels or criteria are intended to determine the presence of an illicit discharge, which then triggers the federal requirements to investigate, identify, and remove the illicit discharge, and report the findings to the Regional Board.

Section F.4.b. of the test claim permit requires each copermittee to use Geographic Information System (GIS) to update and submit to the Regional Board, within 365 days after adoption of the permit, a map of their entire MS4 and the corresponding drainage areas within their jurisdiction. The accuracy of the MS4 map must be confirmed during

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

[5] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2137-2140, 2186-2187 (Order No. R9-2009-0002, sections C. and F.4.d. and e.).

[6] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3439, 3465-3467, 3508-3510 (Order No. R9-2002-0001, sections B.5., F.5., Attachment E.); Code of Federal Regulations, title 40, sections 122.26(d)(2)(iv)(B), 122.41, 122.48, and Part 27 (reporting).

[7] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2138 (Order No. R9-2009-0002, section C.3.).

[8] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3466, 3510 (Order No. R9-2002-0001, section F.5.c.; sections E-3 and E.4.d.(4) of Attachment E.)

dry weather field screening and analytical monitoring and must be updated at least annually.[9] The Commission finds that the required *one-time activities* of updating the map of the entire MS4 and the corresponding drainage areas within each copermittees' jurisdiction *in GIS format* and submitting GIS layers within 365 days of adoption of the permit to the Regional Board constitute a state-mandated new program or higher level of service. However, maintaining an updated map of the entire MS4 and the corresponding drainage areas within each copermittees' jurisdiction; confirming the accuracy of the MS4 map during dry weather field screening and analytical monitoring; annually updating the map and submitting it with the Jurisdictional Runoff Management Plan were required by the prior permit and are not new.[10]

Section D. of the test claim permit establishes stormwater action levels (SALs) for eight selected pollutants (nitrate/nitrite, turbidity, and the following metals: cadmium, chromium, nickel, zinc, lead, and copper).[11] The action levels are based on EPA Rain Zone 6 Phase I MS4 monitoring data for pollutants in stormwater, and reflect the water quality standards in the Basin Plan, the federal California Toxics Rule (CTR), and the EPA Water Quality Criteria.[12] Section D. requires the copermittees to develop a monitoring plan and implement stormwater monitoring at major outfalls and BMPs to reduce the discharge of these pollutants in stormwater to the MEP standard so as not to exceed the SALs.[13] The Commission finds that section D.2. of the test claim permit mandates a new program or higher level of service for the following *one-time* activity:

- Develop a monitoring plan to sample a representative percent of the major outfalls within each hydrologic subarea to determine SAL compliance.[14]

However, the remaining requirements in Section D. to implement the monitoring, analyze the monitoring samples to determine if they meet water quality standards, determine the source of a pollutant, and evaluate and modify BMPs and work plans if an exceedance of a SAL exists, are not new and, do not mandate a new program or higher level of service. The SALs imposed by the test claim permit are simply numbers that

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[9] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2186 (Order No. R9-2009-0002, section F.4.b.).

[10] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3508 (Order No. R9-2002-0001, Attachment E).

[11] Exhibit A, Test Claim, filed June 30, 2011, pages 36, 64-67.

[12] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2141-2142, 2425 (Order No. R9-2009-0002; Fact Sheet).

[13] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2123, 2141-2142 (Order No. R9-2009-0002, Finding D.1.h., and Section D.).

[14] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2141 (Order No. R9-2009-0002, section D.2.).

reflect the existing water quality standards applicable to the waterbodies in the Basin Plan, the federal California Toxics Rule (CTR), and the US EPA Water Quality Criteria for turbidity, nitrate and nitrite, cadmium, chromium, nickel, zinc, lead, and copper, and if there is an exceedance of a SAL detected with monitoring, then the claimants have to address those exceedances by implementing or modifying BMPs to the MEP as required by the prior permit and existing federal law.[15] Thus, the Regional Board has imposed an iterative, BMP-based compliance regime, using the SALs as a target, or trigger, but leaving substantial flexibility to the permittees to determine how to comply with long-standing requirements imposed by the prior permit and federal law to monitor, implement BMPs, and report exceedances to the Regional Board.

Section I. of the test claim permit requires the County of Orange and the City of Dana Point to implement BMPs capable of achieving the interim and final wasteload allocations identified in the TMDL to meet water quality objectives for total coliform, fecal coliform, and Enterococcus at Baby Beach by the end of year 2014 for dry weather and 2019 for wet weather; conduct monitoring to assess the effectiveness of pollutant load reductions, changes in urban runoff and discharge water quality, and changes in receiving water quality; continue to meet the numeric targets in Baby Beach receiving waters once the wasteload reductions have been achieved; and submit annual progress reports as part of the annual report.[16] The Commission finds that the TMDL requirements in section I. of the test claim permit do not mandate a new program or higher level of service and, thus, do not require reimbursement pursuant to article XIII B, section 6 of the California Constitution. As stated in the TMDL, the numeric targets are the same as the water quality criteria and objectives for total coliform, fecal coliform, and Enterococcus in coastal recreational receiving waters, for both dry and wet weather, which were established by the state and federal governments long before the adoption of the TMDL and the test claim permit in this case.[17] And federal law has long required claimants to meet water quality objectives in receiving waters by monitoring,

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[15] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3440, 3487-3489 (Order R9-2002-0001, Attachment B.); United States Code, title 33, section 1342(a)(2) (Public Law 100-4); Code of Federal Regulations, title 40, sections 122.22, 122.44(d),(i)(1), 122.48.

[16] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2194 (Order No. R9-2009-0002, section I.).

[17] Exhibit K (55), Water Quality Standards for Coastal and Great Lakes Recreation Waters, Final Rule, 69 FR 67218; Health and Safety Code section 115880 (Stats. 1997, ch. 1987, AB 411); California Code of Regulations, title 17, section 1758; Exhibit K (46), U.S. EPA Ambient Water Quality Criteria for Bacteria, 1986; Exhibit K (4), 1994 Basin Plan; Exhibit K (13), Compilation of California Ocean Plans 1972-2001.

implementing BMPs, and reporting progress and exceedances to the Water Boards.[18] The only difference between the prior permit and the test claim permit is that the test claim permit now identifies the wasteload allocations for the bacterial indicators calculated in the TMDL so that claimants know the percentage of bacterial loads that need to be reduced to meet the existing water quality objectives for Baby Beach. The prior permit, however, required the claimants to comply with the numeric water quality objectives for total coliform, fecal coliform, and Enterococcus in coastal recreational receiving waters by expressly prohibiting claimants from discharging from the MS4s any runoff that caused or contributed to the violation or exceedance of the water quality objectives.[19] Instead of the water quality objectives being immediately enforceable, the test claim permit gives claimants more time to meet those objectives and, thus, does not mandate a new program or higher level of service.

Sections F.1.d., F.1.h., and F.3.d. of the test claim permit are part of the Jurisdictional Runoff Management Program (JRMP) that requires, in the continuing effort to reduce the discharges of stormwater pollution from the MS4 to the MEP and to prevent those discharges from causing or contributing to a violation of water quality standards, an updated plan for review of priority development projects proposed by residential, commercial, industrial, mixed-use, and public project proponents; implementation of Low-Impact Development (LID) site design BMPs at new development and redevelopment projects, including a LID waiver program; the development of a hydromodification plan to manage increases in runoff discharge rates and durations from priority development projects; and the development and implementation of a retrofitting program to reduce the impacts from hydromodification and promote LID BMPs.[20] The Commission finds that:

- The LID and hydromodification requirements imposed by sections F.1.d. and F.1.h. of the test claim permit with respect to municipal priority development projects are not mandated by the state and do not impose a new program or higher level of service because such costs are incurred at the discretion of the

[18] United States Code, title 33, section 1342(p)(3)(B)(iii); Code of Federal Regulations, title 40, section 122.44(d)(1), (i); Code of Federal Regulations, title 40, section 122.48; Code of Federal Regulations, title 40, Part 127 (electronic reporting).

[19] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3438-3439 (Order R9-2002-0001).

[20] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2147-2157, 2159-2163, and 2183-2185 (Order No. R9-2009-0002, sections F.1.d., and h., and F.3.d.).

local agency, are not unique to government, and do not carry out a governmental function of providing a service to the public.[21]

- The remaining new activities required by sections F.1.d., F.1.h., and F.3.d. relating to the claimants' regulatory activities for the LID, hydromodification, and retrofit provisions of other development are mandated by the state and impose a new program or higher level of service.

Section F.1.f. of the test claim permit requires as part of the JRMP, that each copermittee develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance for existing municipal, industrial, commercial, and residential developments within its jurisdiction since July 2001; and verify that approved post-construction BMPs are operating effectively and have been adequately maintained as specified in the permit.[22] The Commission finds that many activities required by section F.1.f. are not new, but were required by the prior permit. However, *except as applicable to a claimant's own municipal development* (which is not mandated by the state),[23] the following requirements imposed by section F.1.f. are new and constitute a state-mandated new program or higher level of service:

- Develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance for existing municipal, industrial, commercial, and residential developments within its jurisdiction since July 2001. (Section F.1.f.1.)
- Establish a mechanism to ensure that appropriate easements and ownerships are properly recorded in public records and that the information is conveyed to all appropriate parties when there is a change in project or site ownership. (Section F.1.f.2.)
- The inspections of BMP implementation, operation, and maintenance must note observations of vector conditions, such as mosquitoes, and where conditions are

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[21] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 754 [citing *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74]; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (*POBRA*); *Coast Community College Dist. v. Commission on State Mandates* (2022) (2022) 13 Cal.5th 800, 815.

[22] Exhibit C, Water Boards' Comments on Test Claim, filed October 21, 2016, pages 2157-2158 (Order No. R9-2009-0002, section F.1.f.).

[23] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 754 [citing *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74]; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (*POBRA*); *Coast Community College Dist. v. Commission on State Mandates* (2022) (2022) 13 Cal.5th 800, 815.

contributing to mosquito production, the copermittee is required to notify the Orange County Vector Control District. (Section F.1.f.3.)

Section J. of the test claim permit requires each copermittee to annually assess and review the implementation and effectiveness of its JRMP; plan program modifications and improvements when monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges and when activities and BMPs are ineffective or less effective than other comparable BMPs; and include a description and summary of the long-term effectiveness assessments within each annual report. Section J. also requires each copermittee to develop and annually update a work plan to address high priority water quality problems in an iterative manner.[24] The Commission finds that the following new requirements imposed by Section J. of the test claim permit are mandated by the state and impose a new program or higher level of service.

- Establish annual assessment measures for reducing discharges into each downstream 303(d) listed water body and downstream environmentally sensitive areas that conform to the six outcome levels developed by CASQA, and which target water quality outcomes and the results of municipal enforcement activities, and to annually assess those measures. (Section J.1.a.)
- Include the following effectiveness assessment information within each annual report, beginning with the 2011 annual report:
    1. A description and results of the annual assessment measures or methods for reducing discharges of stormwater pollutants from the MS4 into each 303(d) listed waterbody. (Section J.3.a.1.)
    2. A description and results of the annual assessment measures or methods for managing discharges of pollutants from the MS4 into each downstream environmentally sensitive area. (Section J.3.a.2.)
    3. A description of the steps that will be taken to improve the copermittees' ability to assess program effectiveness using measurable targeted outcomes, assessment measures, assessment methods, and outcome levels 1-6, and include a time schedule for when improvement will occur. (Section J.3.a.8.)
- Develop a work plan to address high priority water quality problems in an iterative manner over the life of the permit. The plan is required to be submitted to the Regional Board within 365 days of the adoption of the test claim permit, and shall be annually updated and included in the annual JRMP report. The work plan shall include the following information:

[24] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2195-2198.

1. The problems and priorities identified during the assessment.
2. A list of priority pollutants and known or suspected sources.
3. A brief description of the strategy employed to reduce, eliminate or mitigate the negative impacts.
4. A description and schedule for new or modified BMPs. The schedule is to include dates for significant milestones.
5. A description of how the selected activities will address an identified high priority problem, including a description of the expected effectiveness and benefits of the new or modified BMPs.
6. A description of how efficacy results will be used to modify priorities and implementation.
7. A review of past activities implemented, progress in meeting water quality standards, and planned program adjustments. (Section J.4.)

The remaining provisions of section J. do not impose any new required activities.

The claimants have pled sections F.1.d.7.i., F.3.a.4.c.; and K.3.a. and Attachment D. only as they relate to the reporting checklist, and contend that the following activities are now required to be included in the annual report and are mandated by the state.[25]

- Priority development projects choosing to participate in the LID waiver program, including details of the feasibility analysis, BMPs implemented, and funding details, pursuant to section F.1.d.7.i. of the test claim permit.
- An evaluation of existing flood control devices that cause or contribute to a condition of pollution, measures to reduce or eliminate the structure's effect on pollution, and an inventory and evaluation of the feasibility of retrofitting the flood control device, pursuant to section F.3.a.4.c. of the test claim permit.
- A reporting checklist as required by section K.3.a.3. and Attachment D. of the test claim permit.[26]

The Commission finds that the requirements in section F.3.a.4.c. are not new and are, therefore, denied. The Commission further finds that the new requirements in section F.1.d.7.i.; and, K.3.a. and Attachment D. only as they relate to the reporting checklist, are not mandated by the state for the reporting of a permittee's own municipal development projects, construction, and facilities because the requirement is triggered

[25] Exhibit A, Test Claim, filed June 30, 2011, pages 93-95.

[26] Exhibit A, Test Claim, filed June 30, 2011, page 94.

by a local discretionary decision to build.[27] However, the Commission finds that the following activities mandate a new program or higher level of service:

- Except for the permittee's own municipal priority development projects, notify the Regional Board in the annual report of all other priority development projects choosing to participate in the LID waiver program. The annual report must include the following information: name of the developer of the participating priority development project; site location; reason for LID waiver including technical feasibility analysis; description of BMPs implemented; total amount deposited, if any, into the stormwater mitigation fund; water quality improvement projects proposed to be funded; and timeframe for implementation of water quality improvement projects. (Section F.1.d.7.i.)
- Gather and report the following new information in the annual report checklist:
    - Construction - Except for the permittee's own municipal construction, which is not reimbursable, gather and report number of active sites, number of inactive sites, and number of violations for all other construction.
    - New development – Except for the permittee's own municipal new development, which is not reimbursable, gather and report the number of development plan reviews, number of grading permits issued, and number of projects exempted from interim/final hydromodification requirements for all other new development.
    - Post construction development – Except for the permittee's own municipal priority development projects, which is not reimbursable, gather and report the number of priority development projects; and number of SUSMP [standard urban storm water mitigation plans] required post construction BMP violations.
    - MS4 maintenance –amount of waste removed, and total miles of MS4 inspected.
    - Municipal/Commercial/industrial – Except for the permittee's own municipal facilities, which is not reimbursable, gather and report the number of facilities and number of violations. (Section K.3.a.3.c., and Attachment D., section D-2., of the test claim permit.)

[27] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 754 [citing *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74]; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (*POBRA*); *Coast Community College Dist. v. Commission on State Mandates* (2022) (2022) 13 Cal.5th 800, 815.

Sections G.6., and K.1.b.4.n., of the test claim permit requires the claimants to annually review and update the watershed workplan during a meeting that is open to the public and adequately noticed, in order to identify needed changes to the prioritized water quality problems identified in the plan.[28] The Commission finds that the requirements to annually notice and conduct a public meeting to review and update the watershed workplan are new because federal law simply requires public participation, which at a minimum means notice of the updates and the opportunity to file comments,[29] and the prior permit required "a mechanism for public participation throughout the entire watershed process."[30] Prior law did not specifically require a meeting open to the public and adequately noticed to update the watershed workplan, which the Commission finds to be mandated by the state and impose a new program or higher level of service.

To be reimbursable, the new state-mandated activities must result in costs mandated by the state, forcing local government to incur "increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit."[31] In addition, a finding of costs mandated by the state means that none of the exceptions in Government Code section 17556 apply to deny the claim. Government Code section 17556(d) states that the Commission shall not find costs mandated by the state when "[t]he local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." The Commission finds that:

- There is substantial evidence in the record, as required by Government Code section 17559, that the claimants incurred increased costs exceeding $1,000 and used their local "proceeds of taxes" to comply with the new state-mandated activities.[32]

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[28] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2190, 2200 (Order No. R9-2009-0002, sections G.6. and K.1.b.4.n.).

[29] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv); Exhibit K (50), U.S. EPA MS4 Program Evaluation Guidance, January 2007, page 38.

[30] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3472-3473, 3475 (Order No. R9-2002-0001, sections J. and L.).

[31] California Constitution, article XIII B, section 6; Government Code sections 17514, 17561(a); *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1185, emphasis added.

[32] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 144-193 (Declaration of Cindy Rivers, Senior Environmental Resources Specialist with the Orange County Environmental Resources Service Area of the Orange County Public Works Department), 195-197 (Declaration of Lisa G. Zawaski, Senior Water Quality Engineer for the City of Dana Point), 199-201 (Declaration of

- Based on article XIII C, section 1(e)(3) of the California Constitution, *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590,and other cases, there are no costs mandated by the state for the new activities relating to LID, Hydromodification Plans, LID Waiver Program, BMPs for Priority Development Projects, and a Retrofitting Program required by sections F.1.d., F.1.h., and F.3.d., of the test claim permit; and the new BMP maintenance tracking and inspection activities required by section F.1.f. of the test claim permit. The claimants have regulatory fee authority through their police powers sufficient to cover the costs these state-mandated activities pursuant to Government Code section 17556(d) and, thus, reimbursement is not required.
- The claimants have constitutional and statutory authority to charge property-related fees for the remaining new requirements to develop a monitoring plan to sample a representative percent of the major outfalls within each hydrologic subarea to determine SAL compliance (one-time activity as required by section D.2.); update the map of the entire MS4 and the corresponding drainage areas within each copermittees' jurisdiction *in GIS format* and submit GIS layers within 365 days of adoption of the permit to the Regional Board (one-time only, as required by section F.4.b.); the new requirements relating to JRMP Effectiveness Assessment and Reporting, and the work plan to address high priority water quality problems (Sections J.1., J.3., and J.4.); the new requirements related to the annual JRMP report (Sections F.1.d.7.i., K.3.a.3.c., and Attachment D., section D-2.); and the new requirement to annually notice and conduct public meetings to review and update the watershed workplan (G.6., and K.1.b.4.n.).[33]

  However, from December 16, 2009 through December 31, 2017 only, and based on the court's holding in *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351 (*City of Salinas),* which interpreted article XIII D of the California Constitution as requiring the voter's approval before any stormwater fees can be imposed, Government Code section 17556(d) does not apply. When voter approval is required by article XIII D, the claimants do *not*

Joseph Ames, Public Works Director/City Engineer for the City of Laguna Hills), 203-205 (Declaration of Trevor Agrelius, Finance Director for the City of Laguna Niguel).

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

have the authority to levy fees sufficient as a matter of law to cover the costs of these activities within the meaning of Government Code section 17556(d).[34]

- Based on *Paradise Irrigation District* case and Government Code sections 57350 and 57351 (which overturned *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351), there are no costs mandated by the state on or after January 1, 2018, to comply with the new requirements because claimants have constitutional and statutory authority to charge property-related fees for these costs subject only to the voter protest provisions of article XIII D, which is sufficient as a matter of law to cover the costs of the mandated activities within the meaning of Government Code section 17556(d).[35]

Accordingly, the Commission partially approves this Test Claim for the activities listed in the Conclusion from December 16, 2009, through December 31, 2017, only. Reimbursement is denied beginning January 1, 2018, because the claimants have fee authority sufficient as a matter of law to cover the costs of these activities pursuant to Government Code section 17556(d) and, thus, there are no costs mandated by the state.

In addition, reimbursement from any source, including but not limited to, state and federal funds, any service charge, fees, or assessments to offset all or part of the costs of this program, and any other funds that are not the claimant's proceeds of taxes including Measure M2 funds received from the Orange County Local Transportation Authority, shall be identified and deducted from any claim submitted for reimbursement.

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[34] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581 (review denied March 1, 2023).

[35] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194-195.

COMMISSION FINDINGS

I. Chronology

12/16/2009 The Test Claim Permit, San Diego Regional Water Quality Control Board, Order No. R9-2009-0002 was adopted and became effective that day.[36]

07/20/2010 The Department of Finance (Finance) filed a petition for writ of administrative mandamus on the Commission's Decision on Test Claims 03-TC-04, 03-TC-19, 03-TC-20 and 03-TC-21, adopted July 31, 2009, which addressed Los Angeles Regional Water Quality Control Board Order No. 01-182, NPDES Permit CAS004001.[37]

06/30/2011 The claimants filed the Test Claim.[38]

07/13/2011 Commission staff issued the Notice of Complete Test Claim Filing and Schedule for Comments.

08/03/2011 Commission staff issued Notice of Revised Schedule for Comments.

09/20/2011-08/06/2015 The State Water Resources Control Board and the San Diego Regional Water Quality Control Board (Water Boards) filed 15 requests for extensions of time to submit comments on the Test Claim, which were approved for good cause.

10/16/2013 The Court of Appeal for the Second District issued its decision in *Department of Finance v. Commission on State Mandates*, Case No. B237153 (Los Angeles County Superior Court Case No. BS130730).

01/29/2014 The California Supreme Court granted review of *Department of Finance v. Commission on State Mandates*, Case No. S214855 (2nd Dist. Court of Appeal Case No. B237153; Los Angeles County Superior Court Case No. BS130730)

06/13/2016 The Water Boards filed a request for an extension of time to file comments on the Test Claim, which was approved for good cause on

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[36] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2207 (Test claim permit).

[37] Initially filed in Superior Court of California, County of Sacramento, Case No. 34-2010-80000605. Venue changed to the Los Angeles County Superior Court, Case No. BS130730. Because this test claim raised issues similar to those being litigated with respect to the Los Angeles Regional Board Order that was the subject of the writ, the Commission placed this claim on inactive status pending the outcome of this litigation.

[38] Exhibit A, Test Claim, filed June 30, 2011.

June 15, 2016, with comments due 30 days from the Supreme Court decision.

08/29/2016 The California Supreme Court issued its decision in *Department of Finance v. Commission on State Mandates*, Case No. S214855.

09/06/2016 The Water Boards filed a request for an extension of time to file comments on the Test Claim and a postponement of the hearing.

09/09/2016 Commission staff issued Notice of Limited Extension Request Approval, Notice of Postponement Request Denial, Request for Additional Briefing, and Request for Additional Information.

09/19/2016 The Water Boards filed a request for an extension of time to file the administrative record for Order No. R9-2009-0002, which was granted for good cause.

10/04/2016 The claimants filed a request for an extension of time for all parties to submit additional briefing on the Supreme Court decision, which was approved for good cause until October 21, 2016.

10/07/2016 The Water Boards filed a request for an extension of time to file comments on the Test Claim, which was approved for good cause until October 21, 2016.

10/10/2016 Finance filed comments on the Test Claim.[39]

10/21/2016 The Water Boards filed comments on the Test Claim.[40]

10/21/2016 The claimants filed response to the request for additional briefing.[41]

10/28/2016 The claimant City of Dana Point filed late supplemental response to the request for additional briefing.[42]

11/04/2016 The claimants filed a request for an extension of time to file rebuttal comments, which was approved for good cause until December 6, 2016.

11/17/2016 The Water Boards filed a request for an extension of time to file the administrative record and a request for postponement of the hearing, which were approved for good cause.

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[39] Exhibit B, Finance's Comments on the Test Claim, filed October 10, 2016.

[40] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016.

[41] Exhibit D, Claimants' Response to Request for Additional Briefing, filed October 21, 2016.

[42] Exhibit E, Claimant City of Dana Point Late Supplemental Response to the Request for Additional Briefing, filed October 28, 2016.

11/18/2016	Commission staff issued Notice of Incomplete Joint Test Claim Filing.
11/23/2016	The claimants filed a request for an extension of time to file rebuttal comments, which was approved for good cause until January 5, 2017
12/02/2016	The claimants filed comments on the Notice of Incomplete Joint Test Claim Filing and request an extension of time to file a complete Test Claim, which was granted for good cause.
12/09/2016	The Cities of Mission Viejo, Laguna Hills, Dana Point, and Laguna Niguel filed designation of Julia Woo as the joint test claimant representative.
12/09/2016	Commission staff issued Clarification of Extension Request Approval.
12/14/2016	The City of San Juan Capistrano filed designation of Julia Woo as the joint test claimant representative.
12/19/2016	The San Diego Regional Water Quality Control Board (Regional Board) filed the administrative record in four parts on Order No. R9-2009-0002.
12/30/2016	The claimants filed a request for an extension of time to file rebuttal comments and their response to the Notice of Incomplete Joint Test Claim Filing, which was approved with good cause.
01/06/2017	The claimants filed rebuttal comments.[43]
01/06/2017	The claimants filed the response to the Notice of Incomplete Joint Test Claim Filing.
01/17/2017	Commission staff issued the Notice of Complete Joint Test Claim Filing.
04/16/2018	The claimants filed an inquiry regarding the hearing date.
04/19/2018	Commission staff issued Response to Claimants' Inquiry Regarding Hearing Date and Notice of Tentative Hearing Date.
05/03/2018	The claimants filed comments on the Response to Claimants' Inquiry Regarding Hearing Date and Notice of Tentative Hearing Date.
07/05/2022	The claimants filed an inquiry regarding the hearing date.
06/30/2023	Commission staff issued the Draft Proposed Decision.[44]
07/11/2023	The claimants filed a request for an extension of time to comment on the Draft Proposed Decision and postponement of hearing, which was granted for good cause.

[43] Exhibit F, Claimants' Rebuttal Comments, filed January 6, 2017.

[44] Exhibit G, Draft Proposed Decision, issued June 30, 2023.

07/18/2023, 07/20/2023	The Water Boards and Finance filed requests for extensions of time to comment on the Draft Proposed Decision, which were approved for good cause.
08/22/2023	The claimants filed a Notice of Change of Representation.
08/25/2023	The Water Boards filed comments on the Draft Proposed Decision.[45]
08/25/2023	Finance filed comments on the Draft Proposed Decision.[46]
08/25/2023	The claimants filed comments on the Draft Proposed Decision.[47]

II. Background

A. History of the Federal Regulation of Municipal Stormwater

The law commonly known today as the Clean Water Act (CWA) is the result of major amendments to the Federal Water Pollution Control Act enacted in 1977. The history that follows details the evolution of the federal law and implementing regulations which are applicable to the case at hand. The bottom line is that CWA's stated goal is to *eliminate* the discharge of pollutants into the nation's waters by 1985.[48] "*This goal is to be achieved through the enforcement of the strict timetables and technology-based effluent limitations established by the Act.*"[49] The CWA utilizes a permit program that was established in 1972, the National Pollutant Discharge Elimination System (NPDES), as the primary means of enforcing the Act's effluent limitations. As will be made apparent by the following history, the goal of eliminating the discharge of pollutants into the nation's waters was still far from being achieved as of 2009, when the test claim permit was issued, and the enforcement, rather than being strict, has taken an iterative approach, at least with respect to municipal stormwater dischargers.

Regulation of water pollution in the United States finds its beginnings in the Rivers and Harbors Appropriation Act of 1899, which made it unlawful to throw or discharge "any refuse matter of any kind or description…into any navigable water of the United States, or into any tributary of any navigable water."[50] This prohibition survives in the current

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[45] Exhibit H, Water Boards' Comments on the Draft Proposed Decision, filed August 25, 2023.

[46] Exhibit I, Finance's Comments on the Draft Proposed Decision, filed August 25, 2023.

[47] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023.

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

[49] *Natural Res. Def. Council v. Costle* (D.C.Cir.1977) 568 F.2d 1369, 1371 (emphasis added).

[50] United States Code, title 33, section 401 (Mar. 3, 1899, c. 425, § 13, 30 Stat. 1152).

United States Code today, qualified by more recent provisions of law that authorize the issuance of discharge permits with specified restrictions to ensure that such discharges will not degrade water quality or cause or contribute to the violation of any water quality standards set for the water body by the United States Environmental Protection Agency (US EPA) or by states on behalf of US EPA.[51]

In 1948, the Federal Water Pollution Control Act "adopted principles of state and federal cooperative program development, limited federal enforcement authority, and limited federal financial assistance."[52] Pursuant to further amendments to the Act made in 1965, "States were directed to develop water quality standards establishing water quality goals for interstate waters." However, the purely water quality-based approach "lacked enforceable Federal mandates and standards, and a strong impetus to implement plans for water quality improvement. The result was an incomplete program that in Congress' view needed strengthening."[53]

Up until 1972, many states had "water quality standards" that attempted to limit pollutant concentrations in their lakes, rivers, streams, wetlands, and coastal waters. Yet the lack of efficient and effective monitoring and assessment tools and the sheer difficulty in identifying pollutant sources resulted in a cumbersome, slow, ineffective system that was unable to reverse growing pollution levels in the nation's waters. In 1972, after earlier state and federal laws failed to sufficiently improve water quality, and rivers that were literally on fire provoked public outcry, the Congress passed the Federal Water Pollution Control Act Amendments, restructuring the authority for water pollution control to regulate individual point source dischargers and generally prohibit the discharge of any pollutant to navigable waters from a point source unless the discharge was authorized by a NPDES permit. The 1972 amendments also consolidated authority in the Administrator of US EPA.

In 1973, US EPA adopted regulations to implement the Act which provided exclusions for several types of discharges including "uncontrolled discharges composed entirely of storm runoff when these discharges are uncontaminated by any industrial or commercial activity" and have not been identified "as a significant contributor of

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[51] See United States Code, title 33, sections 1311-1342 (CWA 301(a) and 402); Code of Federal Regulations, title 40, section 131.12.

[52] Exhibit K (45), U.S. EPA, Advanced Notice of Proposed Rule Making, 63 FR 129, July 7, 1998, https://www.gpo.gov/fdsys/pkg/FR-1998-07-07/pdf/98-17513.pdf (accessed on December 15, 2017), page 4.

[53] Exhibit K (45), U.S. EPA, Advanced Notice of Proposed Rule Making, 63 FR 129, July 7, 1998, https://www.gpo.gov/fdsys/pkg/FR-1998-07-07/pdf/98-17513.pdf (accessed on December 15, 2017).

pollution."[54] This particular exclusion applied only to municipal separate storm sewer systems (MS4s). As a result, as point source pollutant loads were addressed effectively by hundreds of new treatment plants, the problem with polluted runoff (i.e., both nonpoint source pollution and stormwater discharges) became more evident.

However, in 1977 the Court in *Natural Resources Defense Council v. Costle* held that EPA had no authority to exempt point source discharges, including stormwater discharges from MS4s, from the requirements of the Act and that to do so contravened the Legislature's intent.[55] The Act prohibits "the discharge of any pollutant by any person" without an NPDES permit.[56] The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from *any* point source."[57] A "point source" is any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.[58] Thus, when an MS4 discharges stormwater contaminated with pollutants from a pipe, ditch, channel, gutter or other conveyance, it is a point source discharger subject to the requirements of the CWA to obtain and comply with an NPDES permit or else be found in violation of the CWA.

Stormwater runoff "…is generated from rain and snowmelt events that flow over land or impervious surfaces, such as paved streets, parking lots, and building rooftops, and does not soak into the ground."[59] Polluted stormwater runoff is commonly transported through MS4s, and then often discharged, untreated, into local water bodies.[60] As the Ninth Circuit Court of Appeal has stated:

> Storm water runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination

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

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

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

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

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

[59] See Code of Federal Regulations, title 40, section 122.26(b)(13) and Exhibit K (61), U.S. EPA, NPDES Stormwater Program, Problems with Stormwater Pollution, https://www.epa.gov/npdes/npdes-stormwater-program (accessed on August 10, 2017).

[60] Exhibit K (54), U.S. EPA NPDES Stormwater Program, Stormwater Discharges from Municipal Sources, https://www.epa.gov/npdes/stormwater-discharges-municipal-sources (accessed on December 2, 2022), page 3.

> from industrial and sewage sources." [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial facilities, construction sites, and illicit discharges and connections to storm sewer systems.[61]

Major amendments to the Federal Water Pollution Control Act were enacted in the federal Clean Water Act of 1977, and the federal act is now commonly referred to as the Clean Water Act (CWA). CWA's stated goal is to eliminate the discharge of pollutants into the nation's waters by 1985.[62] "This goal is to be achieved through the enforcement of the strict timetables and technology-based effluent limitations established by the Act."[63]

MS4s are thus established point sources subject to the CWA's NPDES permitting requirements.[64]

In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted CWA section 402(p), codified at United States Code, title 33, section 1342(p), "Municipal and Industrial Stormwater Discharges." Sections 1342(p)(2) and (3) require NPDES permits for stormwater discharges "associated with industrial activity," discharges from large and medium-sized municipal storm sewer systems, and certain other discharges. Section 402(p)(4) sets out a timetable for promulgation of the first of a two-phase overall program of stormwater regulation with the first permits to issue by

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

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

[63] *Natural Res. Def. Council v. Costle* (D.C.Cir.1977) 568 F.2d 1369, 1371.

[64] *Natural Res. Def. Council v. Costle* (D.C.Cir.1977) 568 F.2d 1369, 1379 (holding unlawful EPA's exemption of stormwater discharges from NPDES permitting requirements); Natural Res. Def. *Council v. U.S. EPA*, 966 F.2d 1292, 1295- 1298.

not later than 1991 or 1993, depending on the size of the population served by the MS4.[65]

Generally, NPDES permits issued under the CWA must "contain limits on what you can discharge, monitoring and reporting requirements, and other provisions to ensure that the discharge does not hurt water quality or people's health."[66] A NPDES permit specifies "an acceptable level of a pollutant or pollutant parameter in a discharge." [67]

With regard to MS4s specifically, the 1987 amendments require control technologies that reduce pollutant discharges to the maximum extent practicable (MEP), including best management practices (BMPs), control techniques and system design and engineering methods, and such other provisions as the Administrator[68] deems appropriate for the control of such pollutants.[69] A statutory anti-backsliding requirement was also added to preserve present pollution control levels achieved by dischargers by prohibiting the adoption of less stringent effluent limitations[70] than those already contained in their discharge permits, except in certain narrowly defined circumstances.[71]

The United States Supreme Court has observed the cooperative nature of water quality regulation under the CWA as follows:

> The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251(a).) Toward this end, the Act provides for two

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[65] United States Code, title 33, section 1342(p)(2)-(4); *Natural Res. Def. Council v. U.S. EPA*, 966 F.2d 1292, 1296.

[66] Exhibit K (53), U.S. EPA NPDES Permit Basics, https://www.epa.gov/npdes/npdes-permit-basics (accessed on July 17, 2020).

[67] Exhibit K (53), U.S. EPA NPDES Permit Basics, https://www.epa.gov/npdes/npdes-permit-basics (accessed on July 17, 2020).

[68] Defined in United States Code, title 33, section 1251(d) (section 101(d) of the CWA) as the Administrator of the U.S. Environmental Protection Agency.

[69] United States Code, title 33, section 1342(p)(3). This is in contrast to the "best available technology" standard that applies to the treatment of industrial discharges (see United States Code, title 33, section 1311(b)(2)(A)).

[70] The Senate and Conference Reports from the 99th Congress state that these additions were intended to "clarify the Clean Water Act's prohibition of backsliding on effluent limitations." See H.R. Conf. Rep. No. 99-1004 (1986) (emphasis added); see also S. Rep. No. 99-50, 45 (1985).

[71] United States Code, title 33, section 1342(o); see Joint Explanatory Statement of the Committee of Conference, H.R.Conf. Rep. No. 99-1004, 153 (1986).

> sets of water quality measures. "Effluent limitations" are promulgated by the EPA and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. (See §§ 1311, 1314.) "[W]ater quality standards" are, in general, promulgated by the States and establish the desired condition of a waterway. (See § 1313.) These standards supplement effluent limitations "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." (*EPA v. California ex rel. State Water Resources Control Bd.,* 426 U.S. 200, 205, n. 12, 96 S.Ct. 2022, 2025, n. 12, 48 L.Ed.2d 578 (1976).)[72]

The CWA thus employs two primary mechanisms for controlling water pollution: identification and standard-setting for bodies of water (i.e. 303(d) listings of impaired water bodies and the setting of water quality standards), and identification and regulation of dischargers (i.e., the inclusion of effluent limitations consistent with water quality standards in NPDES permits).

In 1990, pursuant to CWA section 1342, EPA issued the "Phase I Rule" regulating large and medium MS4s. The Phase I Rule and later amendments thereto, in addition to generally applicable provisions of the CWA and its implementing regulations and other state and federal environmental laws, apply to the permit at issue in this Test Claim.

B. Key Definitions

1. Water Quality Standards

A "water quality standard" defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria that protect the designated uses.[73] The term "water quality standard applicable to such waters" and "applicable water quality standards" refer to those water quality standards established under section 303 of the CWA, including numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements which may be adopted by the federal or state government and may be found in a variety of places including but not limited to 40 Code of Federal Regulations 131.36, 131.38, and California state adopted water quality control plans and basin plans.[74] A TMDL is a regulatory term in the CWA, describing a plan for restoring impaired waters that identifies the maximum amount of a pollutant that a body of water can receive while still meeting water quality standards. Federal law requires the states to adopt an anti-degradation policy which at minimum

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[72] *Arkansas v. Oklahoma* (1992) 503 U.S. 91, pages 101-102.

[73] Code of Federal Regulations, title 40, part 131.2.

[74] Code of Federal Regulations, title 40, part 130.7(b)(3).

protects existing uses and requires that existing high quality waters be maintained to the maximum extent possible unless certain findings are made.[75]

The water quality criteria can be expressed in narrative form, which are broad statements of desirable water quality goals, or in a numeric form, which identifies specific pollutant concentrations.[76] When water quality criteria are met, water quality will generally protect the designated use."[77] Federal regulations state the purpose of a water quality standard as follows:

> A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria that protect the designated uses. States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (the Act). "Serve the purposes of the Act" (as defined in sections 101(a)(2) and 303(c) of the Act) means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.[78]

With respect to standard-setting for bodies of water, section 1313(a) of the United States Code provides that existing water quality standards may remain in effect unless the standards are not consistent with the CWA, and that the Administrator "shall promptly prepare and publish" water quality standards for any waters for which a state fails to submit water quality standards, or for which the standards are not consistent with the CWA.[79] In addition, states are required to hold public hearings from time to time but "at least once each three year period" for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards:

> Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the [US EPA] Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such

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[75] Code of Federal Regulations, title 40, part 131.12.

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

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

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

[79] United States Code, title 33, section 1313(a), note that section 1313 was last amended by 114 Stat. 870, effective Oct. 10, 2000.

> waters based upon such uses. Such standards shall protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.[80]

In general, if a body of water is identified as impaired under section 303(d) of the CWA, it is necessarily exceeding one or more of the relevant water quality standards.[81]

2. Total Maximum Daily Loads (TMDLs).

Section 303(d) of the CWA, codified at United States Code, title 33, section 1313(d), requires that each state "identify those waters within its boundaries for which the effluent limitations…are not stringent enough to implement any water quality standard applicable to such waters." The identification of waters not meeting water quality standards is called an "impairment" finding, and the priority ranking is known as the "303(d) list."[82] The state is required by the Act to "establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters."[83]

After the waters are ranked, federal law requires that "TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical WQS [water quality standards] with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. Determinations of TMDLs shall take into account critical conditions for stream flow, loading, and water quality parameters."[84] A TMDL is defined as the sum of the amount of a pollutant allocated to *all point sources* (*i.e.*, the sum of all waste load allocations, or WLAs), plus the amount of a pollutant allocated for nonpoint sources and natural background. A TMDL is essentially a plan setting forth the amount

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[80] United States Code, title 33, section 1313(c)(2)(A), effective October 10, 2000.

[81] See United States Code, title 33, section 1313(d)(1)(A) (codifying CWA § 303(d) and stating: "Each State shall identify [as impaired] those waters within its boundaries for which the effluent limitations … are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.")

[82] Code of Federal Regulations, title 40, part 130.7(d)(1); see also *San Francisco Baykeeper, Inc. v. Browner* (N.D. Cal 2001) 147 F.Supp.2d 991, 995.

[83] United States Code, title 33, section 1313(d)(1)(A).

[84] Code of Federal Regulations, title 40, part 130.7(c)(1).

of a pollutant allowable that will attain the water quality standard necessary for beneficial uses.[85]

303(d) lists and TMDLs are required to be submitted to the Administrator "not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) [of the CWA]" and thereafter “from time to time,” and the Administrator “shall either approve or disapprove such identification and load not later than thirty days after the date of submission.”[86] A complete failure by a state to submit a TMDL for a pollutant received by waters designated as “water quality limited segments” pursuant to the CWA, will be construed as a constructive submission of no TMDL, triggering a nondiscretionary duty of the federal EPA to establish a TMDL for the state.[87] If the Administrator disapproves the 303(d) List or a TMDL, the Administrator “shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement [water quality standards].”[88] Finally, the identification of waters and setting of standards and TMDLs is required as a part of a state’s “continuing planning process approved [by the Administrator] which is consistent with this chapter.”[89]

If a TMDL has been established for a body of water identified as impaired under section 303(d), an NPDES permit must contain limitations that “must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level that will cause, have the reasonable potential to cause, or contribute to an excursion above any [s]tate water quality standard, including [s]tate narrative criteria for water quality.”[90] And, for new sources or discharges, the limitations must ensure that the source or discharge will not cause or contribute to the violation of water quality standards and will not violate the TMDL.[91]

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[85] Code of Federal Regulations, title 40, part 130.2.

[86] United States Code, title 33, section 1313(d)(2); See also *San Francisco Baykeeper, Inc. v. Browner* (N.D. Cal. 2001) 147 F. Supp. 2d 991, 995.

[87] United States Code, title 33, section 1313(d)(1)(A, C) and (d)(2); See also *San Francisco Baykeeper, Inc. v. Browner* (9th Circuit, 2002) 297 F.3d 877.

[88] United States Code, title 33, section 1313(d)(2).

[89] United States Code, title 33, section 1313(d-e).

[90] Code of Federal Regulations, title 40, section 122.44(d)(1)(i), emphasis added.

[91] Code of Federal Regulations, title 40, section 122.4(i). See also Code of Federal Regulations, title 40, section 130.2(i); *Friends of Pinto Creek v. EPA* (9th Cir.2007) 504 F.3d 1007, 1011 (“A TMDL specifies the maximum amount of a particular pollutant that can be discharged or loaded into the waters from all combined sources, so as to comply with the water quality standards.”).

3. Municipal Separate Storm Sewer System (MS4)

A “Municipal Separate Storm Sewer System” (or MS4) refers to a collection of structures designed to gather stormwater and discharge it into local streams and rivers. A storm sewer contains untreated water, so the water that enters a storm drain and then into a storm sewer enters rivers, creeks, or the ocean at the other end is the same water that entered the system.

4. Best Management Practices (BMPs)

The acronym "BMP" is short for Best Management Practice. In the context of water quality, BMPs are methods, or practices designed and selected to reduce or eliminate the discharge of pollutants to surface waters from point and non-point source discharges including storm water. BMPs include but are not limited to structural and nonstructural controls and operation and maintenance procedures. BMPs can be applied before, during, and after pollution-producing activities.

C. Specific Federal Legal Provisions Relating to Stormwater Pollution Prevention

1. Federal Antidegrdation Policy

When a TMDL has not been established, however, a permit may be issued provided that the new source does not degrade water quality in violation of the applicable anti-degradation policy. Any increase in loading of a pollutant to a waterbody that is impaired because of that pollutant would degrade water quality in violation of the applicable anti-degradation policy. Federal law, section 40 Code of Federal Regulations section 131.12(a)(1), requires the state to adopt and implement an anti-degradation policy that will “maintain the level of water quality necessary to protect existing (in stream water) uses.”

NPDES permits must include conditions to achieve water quality standards and objectives and generally may not allow dischargers to backslide.[92]

[92] United States Code, title 33, section 1311(b)(1)(C), which states that “in order to carry out the objective of this chapter there shall be achieved . . . any more stringent limitation, including those necessary to meet water quality standards”; 33 U.S.C. section 1342(o)(3), which states that “In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters”; and Code of Federal Regulations, title 40, section 122.44(d)(1), which states that NPDES permits must include “any requirements in addition to or more stringent than promulgated effluent limitations guidelines . . . necessary to . . . [a]chieve water quality standards established under section 303 of the CWA.”

2. Requirement to Effectively Prohibit Non-Stormwater Discharges

CWA section 402(p)(3)(B)(ii) requires that permits for MS4s "shall include a requirement to effectively prohibit non-storm water discharges into the storm sewers."

3. Standard Setting for Dischargers of Pollutants: NPDES Permits

Section 1342 of the CWA provides for the NPDES program, the final piece of the regulatory framework under which discharges of pollutants are regulated and permitted, and applies whether or not a TMDL has been established. Section 1342 states that "the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title."[93] Section 1342 further provides that states may submit a plan to administer the NPDES permit program, and that upon review of the state's submitted program "[t]he Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State."[94]

Whether issued by the Administrator or by a state permitting program, all NPDES permits must ensure compliance with the requirements of sections 1311, 1312, 1316, 1317, and 1343 of the Act; must be for fixed terms not exceeding five years; can be terminated or modified for cause, including violation of any condition of the permit; and must control the disposal of pollutants into wells.[95] In addition, NPDES permits are generally prohibited, with some exceptions, from containing effluent limitations that are "less stringent than the comparable effluent limitations in the previous permit."[96] An NPDES permit for a point source discharging into an impaired water body must be consistent with the WLAs made in a TMDL, if a TMDL is approved and is applicable to the water body.[97]

4. The Federal Toxics Rules (40 CFR 131.36 and 131.38)

In 1987, Congress amended CWA section 303(c)(2) by adding subparagraph (B) which requires that a state, whenever reviewing, revising, or adopting new water quality standards, must adopt numeric criteria for all toxic pollutants listed pursuant to section 307(a)(1) for which criteria have been published under section 304(a). Section 303(c)(4) of the CWA authorizes the U.S. EPA Administrator to promulgate standards where necessary to meet the requirements of the Act. The federal criteria below are

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

[94] United States Code, title 33, section 1342(a)(5); (b).

[95] United States Code, title 33, section 1342(b)(1).

[96] United States Code, title 33, section 1342(o).

[97] Code of Federal Regulations, title 40, section 122.44(d).

legally applicable in the State of California for inland surface waters, enclosed bays, and estuaries for all purposes and programs under the CWA.

5. National Toxics Rule (NTR)

For the 14 states that did not timely adopt numeric criteria as required, U.S. EPA promulgated the National Toxics Rule (NTR) on December 22, 1992.[98] About 40 criteria in the NTR apply in California.

6. The California Toxics Rule (CTR)

The "California Toxics Rule" is also a federal regulation, notwithstanding its somewhat confusing name. On May 18, 2000, U.S. EPA adopted the CTR. The CTR promulgated new toxics criteria for California to supplement the previously adopted NTR criteria that applied in the State. U.S. EPA amended the CTR on February 13, 2001. EPA promulgated this rule to fill a gap in California water quality standards that was created in 1994 when a State court overturned the State's water quality control plans which contained water quality criteria for priority toxic pollutants, leaving the State without numeric water quality criteria for many priority toxic pollutants as required by the CWA.

California had not adopted numeric water quality criteria for toxic pollutants as required by CWA section 303(c)(2)(B), which was added to the CWA by Congress in 1987 and was the only state in the nation for which CWA section 303(c)(2)(B) had remained substantially unimplemented after EPA's promulgation of the NTR in December of 1992.[99] The Administrator determined that this rule was a necessary and important component for the implementation of CWA section 303(c)(2)(B) in California.

In adopting the CTR, U.S. EPA states:

> EPA is promulgating this rule based on the Administrator's determination that numeric criteria are necessary in the State of California to protect human health and the environment. The Clean Water Act requires States to adopt numeric water quality criteria for priority toxic pollutants for which EPA has issued criteria guidance, the presence or discharge of which could reasonably be expected to interfere with maintaining designated uses.

And:

> Numeric criteria for toxic pollutants allow the State and EPA to evaluate the adequacy of existing and potential control measures to protect aquatic ecosystems and human health. Numeric criteria also provide a more precise basis for deriving water quality-based effluent limitations (WQBELs) in National Pollutant Discharge Elimination System (NPDES)

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[98] Exhibit K (22), Federal Register, Volume 57, Number 246 (NTR), page 142.

[99] Exhibit K (23), Federal Register, Volume 65, Number 97 (CTR), page 7.

permits and wasteload allocations for total maximum daily loads (TMDLs) to control toxic pollutant discharges. Congress recognized these issues when it enacted section 303(c)(2)(B) to the CWA.

D. The California Water Pollution Control Program

1. Porter-Cologne

California's water pollution control laws were substantially overhauled in 1969 with the Porter-Cologne Water Quality Control Act (Porter-Cologne).[100] Beginning with section 13000, Porter-Cologne provides:

> The Legislature finds and declares that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by all the people of the state.
>
> The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.
>
> The Legislature further finds and declares that the health, safety, and welfare of the people of the state requires that there be a statewide program for the control of the quality of all the waters of the state…and that the statewide program for water quality control can be most effectively administered regionally, within a framework of statewide coordination and policy.[101]

The state water pollution control program was again modified, beginning in 1972, so that the code would substantially comply with the federal CWA, and "on May 14, 1973, California became the first state to be approved by the EPA to administer the NPDES permit program."[102]

Section 13160 provides that the State Water Resources Control Board (State Board) "is designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act…[and is] authorized to exercise any powers delegated to the state by the Federal Water Pollution Control Act (33 U.S.C. § 1251 et

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[100] Water Code section 13020 (Stats. 1969, ch. 482).

[101] Water Code section 13000 (Stats. 1969, ch. 482).

[102] *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* (Cal. Ct. App. 5th Dist. 2005) 127 Cal.App.4th 1544, at pp. 1565-1566. See also Water Code section 13370 *et seq*.

seq.) and acts amendatory thereto."[103] Section 13001 describes the state and regional boards as being "the principal state agencies with primary responsibility for the coordination and control of water quality."

To achieve the objectives of conserving and protecting the water resources of the state, and in exercise of the powers delegated, Porter-Cologne, like the CWA, employs a combination of water quality standards and point source pollution controls.[104]

Under Porter Cologne, the nine regional boards' primary regulatory tools are the water quality control plans, also known as basin plans.[105] These plans fulfill the planning function for the water boards, are regulations adopted under the Administrative Procedure Act with a specialized process,[106] and provide the underlying basis for most of the regional board's actions (e.g., NPDES permit conditions, cleanup levels). Basin plans consist of three elements:

- Determination of beneficial uses;
- Water quality objectives to reasonably protect beneficial uses; and
- An implementation program to achieve water quality objectives.[107]

Porter Cologne sections 13240-13247 address the development and implementation of regional water quality control plans (i.e. basin plans), including "water quality objectives," defined in section 13050 as "the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area."[108] Section 13241 provides that each regional board "shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance." The section directs the regional boards to consider, when developing water quality objectives:

> (a) Past, present, and probable future beneficial uses of water.

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[103] Water Code section 13160 (Stats. 1969, ch. 482; Stats. 1971, ch. 1288; Stats 1976, ch. 596).

[104] Water Code section 13142 (Stats. 1969, ch. 482; Stats. 1971, ch. 1288; Stats. 1979, ch. 947; Stats. 1995, ch. 28).

[105] Water Code sections 13240-13247.

[106] Water Code sections 11352–11354.

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

[108] Water Code section 13050 (Stats. 1969, ch. 482; Stats. 1969, ch. 800; Stats. 1970, ch. 202; Stats. 1980, ch. 877; Stats. 1989, ch. 642; Stats. 1991, ch. 187 (AB 673); Stats. 1992, ch. 211 (AB 3012); Stats. 1995, ch. 28 (AB 1247), ch. 847 (SB 206); Stats. 1996, ch. 1023 (SB 1497)).

(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.

(c) Water quality conditions that could reasonably by achieved through the coordinated control of all factors which affect water quality in the area.

(d) Economic considerations.

(e) The need for developing housing within the region.

(f) The need to develop and use recycled water.[109]

Beneficial uses, in turn, are defined in section 13050 as including, but not limited to "domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves."[110] In addition, section 13243 permits a regional board to define "certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted."[111]

Sections 13260-13274 address the development of "waste discharge requirements," which section 13374 states "is the equivalent of the term 'permits' as used in the Federal Water Pollution Control Act, as amended."[112] Section 13263 permits the regional boards, after a public hearing, to prescribe waste discharge requirements "as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge, except discharges into a community sewer system." Section 13263 also provides that the regional boards "need not authorize the utilization of the full waste assimilation capacities of the receiving waters," and that the board may prescribe requirements although no discharge report has been filed, and may review and revise requirements on its own motion. The section further provides that "[a]ll discharges of waste into waters of the state are privileges, not rights."[113] Section 13377 permits a regional board to issue waste discharge requirements "which apply and ensure compliance with all applicable provisions of the [Federal Water Pollution Control

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[109] Water Code section 13241 (Stats. 1969, ch. 482; Stats. 1979, ch. 947; Stats. 1991, ch. 187 (AB 673)).

[110] Water Code section 13050 (Stats. 1969, ch. 482; Stats. 1969, ch. 800; Stats. 1970, ch. 202; Stats. 1980, ch. 877; Stats. 1989, ch. 642; Stats. 1991, ch. 187 (AB 673); Stats. 1992, ch. 211 (AB 3012); Stats. 1995, ch. 28 (AB 1247); Stats. 1995, ch. 847 (SB 206); Stats. 1996 ch. 1023 (SB 1497)).

[111] Water Code section 13243 (Stats. 1969, ch. 482).

[112] Water Code section 13374 (Stats. 1972, ch. 1256).

[113] Water Code section 13263(a-b); (g) (Stats. 1969, ch. 482; Stats. 1992, ch. 211 (AB 3012) Stats. 1995, ch. 28 (AB 1247), ch. 421 (SB 572)).

Act]."[114] In effect, sections 13263 and 13377 permit the issuance of waste discharge requirements concurrently with an NPDES permit "if a discharge is to waters of both California and the United States."[115]

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

> California was the first state authorized to issue its own pollutant discharge permits. (Citations omitted.) Shortly after the CWA's enactment, the Legislature amended the Porter–Cologne Act, adding chapter 5.5 (Wat. Code, § 13370 et seq.) to authorize state issuance of permits (Wat. Code, § 13370, subd. (c)). The Legislature explained the amendment was "in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to [the Porter–Cologne Act]." (*Ibid*.) The Legislature provided that Chapter 5.5 be "construed to ensure consistency" with the CWA. (Wat. Code, § 13372, subd. (a).) It directed that state and regional boards issue waste discharge requirements "ensur[ing] compliance with all applicable provisions of the [CWA] ... *together with any more stringent effluent standards or limitations* necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance." (Wat. Code, § 13377, italics added.) To align the state and federal permitting systems, the legislation provided that the term " 'waste discharge requirements' " under the Act was equivalent to the term " 'permits' " under the CWA. (Wat. Code, § 13374.) Accordingly, California's permitting system now regulates discharges under both state and federal law. (Citations omitted.)
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> In 1987, Congress amended the CWA to clarify that a permit is required for any discharge from a municipal storm sewer system serving a population of 100,000 or more. (33 U.S.C. § 1342(p)(2)(C), (D).) Under those amendments, a permit may be issued either on a system- or jurisdiction-wide basis, must effectively prohibit nonstorm water discharges into the storm sewers, and must "require controls to reduce the discharge of pollutants *to the maximum extent practicable*." (33 U.S.C. § 1342(p)(3)(B), italics added.) The phrase "maximum extent practicable" is not further defined. How that phrase is applied, and by whom, are important aspects of this case.
>
> EPA regulations specify the information to be included in a permit application. (See 40 C.F.R. § 122.26(d)(1)(i)-(vi), (d)(2)(i)-(viii).) Among

[114] Water Code section 13377 (Stats. 1972, ch. 1256; Stats. 1978, ch. 746).

[115] Exhibit A, Test Claim filed June 30, 2010, page 7.

other things, an applicant must set out a proposed management program that includes management practices; control techniques; and system, design, and engineering methods to reduce the discharge of pollutants to the maximum extent practicable. (40 C.F.R. § 122.26(d)(2)(iv).) The permit-issuing agency has discretion to determine which practices, whether or not proposed by the applicant, will be imposed as conditions. (*Ibid*.)[116]

2. California's Antidegradation Policy (State Water Resources Control Board Resolution NO. 68-16 adopted October 24, 1968)

In 1968, the State Board adopted Resolution 68-16, formally entitled "Statement of Policy With Respect to Maintaining High Quality of Waters In California," to prevent the degradation of surface waters where background water quality is higher than the established level necessary to protect beneficial uses. That executive order states the following:

> WHEREAS the California Legislature has declared that it is the policy of the State that the granting of permits and licenses for unappropriated water and the disposal of wastes into the waters of the State shall be so regulated as to achieve highest water quality consistent with maximum benefit to the people of the State and shall be controlled so as to promote the peace, health, safety and welfare of the people of the State; and
>
> WHEREAS water quality control policies have been and are being adopted for waters of the State; and
>
> WHEREAS the quality of some waters of the State is higher than that established by the adopted policies and it is the intent and purpose of this Board that such higher quality shall be maintained to the maximum extent possible consistent with the declaration of the Legislature;
>
> NOW, THEREFORE, BE IT RESOLVED:
>
> Whenever the existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies.
>
> Any activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge

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

> requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained.
>
> In implementing this policy, the Secretary of the Interior will be kept advised and will be provided with such information as he will need to discharge his responsibilities under the Federal Water Pollution Control Act.

State Board Resolution 68-16, Statement of Policy With Respect to Maintaining High Quality of Waters in California, is the policy that the State asserts incorporates the federal antidegradation policy. The Water Quality Control Plans in turn (i.e. Basin Plans) require conformity with State Board Resolution 68-16. Therefore, any provisions in a permit that are inconsistent with the State's anti-degradation policy are also inconsistent with the Basin Plan.

3. Administrative Procedures Update, Antidegradation Policy Implementation for NPDES Permitting, 90-004

The May 1990 Administrative Procedures Update, entitled Antidegradation Policy Implementation for NPDES Permitting, APU 90-004, provides guidance for the State's regional boards in implementing the State Board's Resolution No. 68-16, Statement of Policy With Respect to Maintaining High Quality of Waters in California, and the Federal Antidegradation Policy, as set forth in section 40 Code of Federal Regulations part 131.12. It states that "If baseline water quality is equal to or less than the quality as defined by the water quality objective, water quality shall be maintained or improved to a level that achieves the objectives."[117]

4. Statewide Plans: The Ocean Plan, the California Inland Surface Waters Plan (ISWP), and, the Enclosed Bays and Estuaries Plan (EBEP)

California has adopted an Ocean Plan, applicable to interstate waters, and two other state-wide plans which establish water quality criteria or objectives for all fresh waters, bays and estuaries in the State.

a. California Ocean Plan

Section 303(c)(3)(A) of the CWA provides that "[a]ny State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the [U.S. EPA] Administrator." Section 303(c)(3)(C) further provides that "[i]f the [U.S. EPA] Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in

[117] Exhibit K (38), State Water Resources Control Board Administrative Procedures Update 90-004, page 4.

effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section." Thus, beginning October 18, 1972, states were required to adopt water quality laws applicable to intrastate waters or else allow the U.S. EPA to adopt such standards for them.

California's first adopted its Ocean Plan in July 6, 1972, and as applicable to this test claim, has amended it in 1978, 1983, 1988, 1990, 1997, 2001, 2005, and 2009.[118]

b. The California Inland Surface Waters Plan (ISWP) and the Enclosed Bays and Estuaries Plan (EBEP)

On April 11, 1991, the State Board adopted two statewide water quality control plans, the California Inland Surface Waters Plan (ISWP) and the Enclosed Bays and Estuaries Plan (EBEP). These statewide plans contained narrative and numeric water quality criteria for toxic pollutants, in part to satisfy CWA section 303(c)(2)(B). The water quality criteria contained in these statewide plans, together with the designated uses in each of the Basin Plans, created a set of water quality standards for waters within the State of California.

Specifically, the two plans established water quality criteria or objectives for all fresh waters, bays and estuaries in the State.

Section 303(c)(2)(B) of the federal CWA requires that states adopt numeric criteria for priority pollutants for which EPA has issued criteria guidance, as part of the states' water quality standards. As discussed above, U.S. EPA promulgated these criteria in the CTR in 2000 because the State court overturned two of California's water quality

[118] California's first adopted its Ocean Plan in July 6, 1972, and has amended it in 1978 (Order 78-002, adopted 1/19/1978), 1983 (Order 83-087, adopted 11/17/1983), 1988 (Order 88-111, adopted 9/22/1988), 1990 (Order 90-027, amendment regarding new water quality objectives in Table B, adopted 3/22/1990), 1997 (Order 97-026, amendment regarding revisions to the list of critical life stage protocols used in testing the toxicity of waste discharges, adopted 3/20/1997), 2001 (Order 2000-108, amendment regarding Table A, chemical water quality objectives, provisions of compliance, special protection for water quality and designated uses, and administrative changes, adopted 11/16/2000), 2005 (Order 2005-0013, amendment regarding Water Contact Bacterial Standards, adopted 1/20/2005; Order 2005-0035, amendments regarding (1) Reasonable Potential, Determining When California Ocean Plan Water Quality-Based Effluent Limitations are Required, and (2) Minor Changes to the Areas of Special Biological Significance, and Exception Provisions, 4/21/2005) and 2009 (Order 2009-0072, amendments to regarding total recoverable metals, compliance schedules, toxicity definitions, and the list of exceptions, adopted 9/15/2009).

control plans (the ISWP and the EBEP) in 1994 and the State failed to promulgate new plans, so the State was left without enforceable standards. The federal toxics criteria apply to the State of California for inland surface waters, enclosed bays, and estuaries for "all purposes and programs under the CWA" and are commonly known as "the California Toxics Rule" (CTR).[119] There are 126 chemicals on the federal CTR[120] and the State Implementation Policy (SIP) for Implementation of the Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries adds another 6 isomers of chlorinated dioxins and 10 isomers of chlorinated furans for optional use in California (however, these are required to be used in the California Ocean Plan).

The EBEP was later adopted with respect to sediment quality objectives for toxic pollutants by the State Board on September 16, 2008 (Resolution No. 2008-0070), effective on January 5, 2009, and has been amended twice after the adoption of the test claim permit on April 6, 2011 (Resolution No. 2011-0017), effective on June 8, 2011 and June 5, 2018 (Resolution No. 2018-0028), effective March 11, 2019.

Likewise, the following adopted amendments, all of which were adopted after the test claim permit at issue in this case, were incorporated into the ISWP:

- Part 1: Trash Provisions, adopted on April 7, 2015 (Resolution No. 2015-0019), effective on December 2, 2015
- Part 2: Tribal Subsistence Beneficial Uses and Mercury Provisions, adopted on May 2, 2017 (Resolution No. 2017-0027), effective on June 28, 2017
- Part 3: Bacteria Provisions and Variance Policy, adopted on August 7, 2018 (Resolution No. 2018-0038), effective on February 4, 2019
- State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State (for waters of the United States only), adopted on April 2, 2019 (Resolution No. 2019-0015), effective on May 28, 2020

5. Basin Plans (also known as Water Quality Control Plans)

The Basin Plan is a regional board's master water quality control planning document for a particular water basin. It designates beneficial uses and water quality objectives for waters of the State, including surface waters and groundwater. It also must include any TMDL programs of implementation to achieve water quality objectives.[121] Basin Plans must be adopted by the regional board and approved by the State Board, the California

[119] Code of Federal Regulations, title 40, Part 131, May 18, 2000.

[120] See Code of Federal Regulations, title 40, Part 131, May 18, 2000.

[121] Water Code section 13241.

Office of Administrative Law (OAL), and U.S. EPA, in the case of action on surface waters standards.[122]

E. The History of the Test Claim Permit

In July 1990, the Regional Board adopted and issued an MS4 permit (Order No. 90-38) to the County of Orange, six incorporated cities within the County of Orange in the San Diego Region, and the Orange County Flood Control District for their urban runoff discharges. The County of Orange was named the principal permittee.[123] The original permit required the permittees to develop and implement a drainage area management plan (DAMP), a storm water and receiving water monitoring plan, a plan to eliminate illegal and illicit discharges to the storm drain systems, and required them to enact the necessary legal authority to effectively prohibit such discharges.[124] The requirements of this early permit were written in "very broad, generic and often vague terms" to provide the maximum amount of flexibility to the copermittees in implementing the new requirements.[125]

The permittees developed and submitted a DAMP to the Regional Board, which was approved on April 9, 1996. The Orange County DAMP defined a management structure for the permittees' compliance effort, a formal agreement for cooperation, and detailed municipal efforts to develop, implement, and evaluate various BMPs or control programs in the areas of public agency activities, public information, new development and construction, public works construction, industrial discharger identification, and illicit discharger/connection identification and elimination. The DAMP also defined a surface water quality and sediment monitoring program.[126]

On August 8, 1996, the second term permit was adopted (Order No. 96-03).[127] The second term permit indicates that "[p]reliminary results from urban storm water monitoring programs within the permitted area indicate that the major pollutants of concern are certain heavy metals, sediment, chemical oxygen demand (COD), pesticides, herbicides, and nutrients," and that "[t]he beneficial uses of these water

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[122] Water Code section 13245; Title 33, United States Code, section 1313(c)(1).

[123] Exhibit K (31), Order No. 96-03, page 1 (AR, Volume II, on Order No. R9-2009-0002).

[124] Exhibit K (31), Order No. 96-03, page 2 (AR, Volume II, on Order No. R9-2009-0002).

[125] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3527 (Order No. R9-2002-0001, Fact Sheet, page 17).

[126] Exhibit K (31), Order No. 96-03, page 6 (AR, Volume II, on Order No. R9-2009-0002).

[127] Exhibit K (31), Order No. 96-03, pages 1-28 (AR, Volume II, on Order No. R9-2009-0002).

bodies have been found to be threatened or impaired due to point and non-point source discharges."[128] The second term permit required the permittees to continue to implement the BMPs listed in the DAMP; submit storm drain system maps with periodic revisions as necessary; monitor storm drain system outfalls; develop criteria for and conduct inspections of the MS4; implement area-wide stormwater quality management activities such as public education, pollution prevention, and household hazardous waste collection; effectively prohibit illegal and illicit discharges to the storm drain system; pursue enforcement actions to ensure compliance with stormwater management programs; respond to emergency spills, leaks, illegal discharges/illicit connections; and prepare and submit reports.[129] The second term permit also contained discharge limitations prohibiting illicit and illegal non-stormwater discharges, with a list of non-stormwater discharges exempt from the prohibition, and receiving water limitations based on the beneficial uses, water quality objectives and water quality standards contained in the Basin Plan.[130] In addition, the second term permit authorized stormwater runoff from municipal construction projects that may result in land disturbance of five acres or more. Before construction began, however, the permittees had to develop and implement a stormwater pollution prevention plan (SWPPP) and a monitoring program, consistent with the State's General Construction Activity Stormwater Permit, that was specific for the construction project.[131] The permittees also had to implement new development and redevelopment BMPs for public works construction.[132]

The third term permit (R9-2002-0001) was adopted on February 13, 2002, and constitutes the "prior permit" for purposes of this Test Claim. The prior permit is "a more specifically detailed Order . . . that emphasizes the strong jurisdictional level programs developed by the Copermittees during the First and Second Term Permits as well as the watershed-level approach embodied in the proposed DAMP."[133] The jurisdictional responsibility imposed on each copermittee stems from local governments' land use authority, and requires each copermittee to take responsibility for water quality impacts

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[128] Exhibit K (31), Order No. 96-03, page 3 (AR, Volume II, on Order No. R9-2009-0002).

[129] Exhibit K (31), Order No. 96-03, pages 6-12 (AR, Volume II, on Order No. R9-2009-0002).

[130] Exhibit K (31), Order No. 96-03, pages 12-15 (AR, Volume II, Order No. R9-2009-0002).

[131] Exhibit K (31), Order No. 96-03, page 18 (AR, Volume II, Order No. R9-2009-0002).

[132] Exhibit K (31), Order No. 96-03, pages 18-19 (AR, Volume II, on Order No. R9-2009-0002).

[133] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3528 (R9-2002-0001, Fact Sheet).

over the three stages of development (planning, construction, and use or operation for municipal, industrial, commercial, and residential projects) by requiring the permittees to develop and implement a Jurisdictional Urban Runoff Management Program (JURMP) to reduce discharges of pollutants and runoff flow for each stage of development. Each copermittee was also required to collaborate with other copermittees to develop and implement a Watershed Urban Runoff Management Program that identified the highest priority water quality issues and pollutants in the watershed management area.[134] The copermittees also had to collectively develop and implement a Receiving Waters Monitoring Program that focused on the collection of monitoring data to be used for the assessment of compliance, achievement of water quality objectives, and the protection of beneficial uses.[135] And each copermittee was required to submit annual JURMP and watershed reports, and other various reports to the Regional Board as required by the prior permit.[136] The prior permit also required each copermittee to prohibit all non-stormwater discharges not specifically exempted to its MS4; reduce pollutants in urban runoff discharges into and from its MS4 to the MEP; ensure that urban runoff discharges into and from its MS4 do not cause or contribute to an exceedance of receiving water quality objectives; actively seek and eliminate all sources of illicit discharges to the MS4; and obtain, maintain, and enforce adequate legal authority to comply with all provisions of the permit.[137]

The test claim permit is the fourth term permit, and was adopted on December 16, 2009. The fact sheet states that the copermittees' jurisdictional programs are largely in compliance with the prior permit.[138] However, the following "significant challenges remain:"

- Stormwater and non-stormwater discharges from the MS4 continue to be the leading cause of water quality impairment in the San Diego region.
- The monitoring data exhibits persistent exceedances of water quality objectives in most watersheds.
- Many watersheds have conditions that are frequently toxic to aquatic life.

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[134] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3531-3532 (R9-2002-0001, Fact Sheet).

[135] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3532 (R9-2002-0001, Fact Sheet).

[136] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3532 (R9-2002-0001, Fact Sheet).

[137] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3531 (R9-2002-0001, Fact Sheet).

[138] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3519 (Test claim permit, Fact Sheet).

- Bioassessment data from the watersheds find that macroinvertebrate communities in creeks have widespread Poor to Very Poor Index of Biotic Integrity ratings.
- Health advisory and beach closure signs, which often result from high levels of bacteria in stormwater and non-stormwater, exhibit the continued threat to public health by such discharges.[139]

The following sections of the test claim permit have been pled by the claimants:

1. Section B.2., which addresses formerly exempted non-stormwater discharges that have been identified as sources of pollutants.[140]
2. Sections C. and F.4.d. and e., which address the non-stormwater dry weather action levels (NALS) established by the Regional Board for the detection and elimination of an "illicit discharge."[141]
3. Section F.4.b., which is part of the Jurisdictional Runoff Management Program (JRMP) component to prevent and eliminate illicit discharges, and requires each copermittee to use Geographic Information System (GIS) to update and submit to the Regional Board, within 365 days after adoption of the permit, a map of their entire MS4 and the corresponding drainage areas within their jurisdiction.[142]
4. Section D., which requires the copermittees to monitor major outfalls and implement BMPs to reduce the discharge of eight selected pollutants (nitrate/nitrite, turbidity, and the following metals: cadmium, chromium, nickel, zinc, lead, and copper) to the MEP standard so as not to exceed stormwater action levels (SALs).[143]

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[139] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3519 (Test claim permit, Fact Sheet).

[140] Exhibit A, Test Claim, filed June 30, 2011, pages 36, 48; Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2135-2136 (Order No. R9-2009-0002, section B.2.).

[141] Exhibit A, Test Claim, filed June 30, 2011, pages 36, 59; Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2137-2140, 2186-2187 (Order No. R9-2009-0002, sections C. and F.4.d. and e.).

[142] Exhibit A, Test Claim, filed June 30, 2011, pages 37, 96; Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2186 (Order No. R9-2009-0002, section F.4.b.).

[143] Exhibit A, Test Claim, filed June 30, 2011, pages 36, 64-67; Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2141-2142 (Order No. R9-2009-0002, section D.).

5. Section I., which imposes requirements on the County of Orange and the City of Dana Point to implement a total maximum daily load (TMDL) to control fecal indicator bacteria (total coliform, fecal coliform, and Enterococci) at Baby Beach.[144]

6. Sections F.1.d. and h., and F.3.d., which require, in the continuing effort to reduce the discharges of stormwater pollution from the MS4 to the MEP and to prevent those discharges from causing or contributing to a violation of water quality standards, an updated plan for review of priority development projects proposed by residential, commercial, industrial, mixed-use, and public project proponents; implementation of Low-Impact Development (LID) site design BMPs at new development and redevelopment projects, including a LID waiver program; the development of a hydromodification plan to manage increases in runoff discharge rates and durations from priority development projects; and the development and implementation of a retrofitting program to reduce the impacts from hydromodification and promote LID BMPs.[145]

7. Section F.1.f., which requires as part of the JRMP, that each copermittee develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance for existing municipal, industrial, commercial, and residential developments within its jurisdiction since July 2001; and verify that approved post-construction BMPs are operating effectively and have been adequately maintained as specified in the permit.[146]

8. Section J., which requires each copermittee to annually assess and review the implementation and effectiveness of its JRMP; plan program modifications and improvements when monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges and when activities and BMPs are ineffective or less effective than other comparable BMPs; and include a description and summary of the long-term effectiveness assessments within each annual report. Section J also requires each copermittee to develop and

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[144] Exhibit A, Test Claim, filed June 30, 2011, pages 36, 49-50; Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2194 (Order No. R9-2009-0002, section I.).

[145] Exhibit A, Test Claim, filed June 30, 2011, pages 36, 67-84, 97-101; Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2147-2157, 2159-2163, and 2183-2185 (Order No. R9-2009-0002, sections F.1.d., and h., and F.3.d.).

[146] Exhibit A, Test Claim, filed June 30, 2011, pages 37, 101-104; Exhibit C, Water Boards' Comments on Test Claim, filed October 21, 2016, pages 2157-2158 (Order No. R9-2009-0002, section F.1.f.).

annually update a work plan to address high priority water quality problems in an iterative manner.[147]

9. Sections F.1.d.7.i., F.3.a.4.c.: and, K.3.a. and Attachment D. only as they relate to the reporting checklist, which require that additional information be reported in the annual report to the Regional Board.[148]

10. Sections G.6. and K.1.b.4.n., which require the copermittees to annually review and update the watershed workplan during a meeting that is open to the public and adequately noticed, in order to identify needed changes to the prioritized water quality problems identified in the plan.[149]

III. Positions of the Parties

A. County of Orange, Orange County Flood Control District, and Cities of Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, and San Juan Capistrano

The claimants allege that the sections of the permit pled in this Test Claim impose reimbursable state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.

Specifically, they assert, that section B.2. removes three types of non-stormwater discharges from the previous permit's list of exempted discharges: landscape irrigation, irrigation water and lawn watering. The claimants argue that removal of these types of discharges from the list of exempted discharges, "means that Copermittees are now required to prohibit all [these types of] discharges entering the MS4." They argue that removal of these three irrigation water discharges from the list of exempted discharges, is not required by federal law, and that federal regulations (40 C.F.R.

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[147] Exhibit A, Test Claim, filed June 30, 2011, pages 36-37, 84-90; Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2195-2198 (Order No. R9-2009-0002, section J.)

[148] Exhibit A, Test Claim, filed June 30, 2011, pages 37, 93-95; Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2155, 2171, 2202, and 2235 (Order No. R9-2009-0002, sections F.1.d.7.i., F.3.a.4.c., K.3.a., and Attachment D.).

Government Code section 17553(b)(1) requires test claims to identify the specific sections of the executive order alleged to contain a mandate and a detailed description of the new activities mandated by the state. Only sections F.1.d.7.i., F.3.a.4.c.; and, K.3.a., and Attachment D only as they relate to the reporting checklist, have been properly pled.

[149] Exhibit A, Test Claim filed June 30, 2011, pages 37, 90-92; Exhibit C, Water Boards' Comments on the Test Claim filed October 21, 2016, pages 2190, 2200 (Order No. R9-2009-0002, Sections G.6. and K.1.b.4.n.).

122.26(d)(2)(iv)(B)(1)) only requires them to address these categories of non-storm water discharges, rather than prohibit these discharges. Further they argue that federal regulation "only requires that the municipality 'address' such discharges specifically where the municipality first identifies these discharges as specific sources of pollutants." And that if the Copermittee had previously identified a category or subcategory of non-stormwater discharges as a potential source of pollutants "in one discrete geographical area, this does not mean that federal law requires the Regional Board to prohibit that entire category of non-stormwater discharges throughout all of the Copermittees' jurisdictions." They further assert that none of the Copermittees have in fact determined that "prohibiting 'landscape irrigation,' 'irrigation water' in general or 'lawn watering' was or is necessary as a means of addressing the alleged pollutants in such irrigation waters." They also argue that "there is a distinction between identifying a particular discharger as a source of pollutants and identifying the entire category as a source of pollutants [and]….that the Copermittees' illicit discharge program need not prevent discharges of the 'exempt' categories into the MS4 'unless such discharges are specifically identified on a case-by-case basis as needing to be addressed.'"[150]

The claimants assert that Section I. "imposes a series of new mandates in connection with a TMDL for Baby Beach, specifically requiring the copermittees to meet both interim and final numeric limits (referenced as "Waste Load Allocations" or "WLAs" within the Permit) and to comply with monitoring and reporting requirements.[151] The claimants also argue that findings in the permit "confirm that the Permit requires compliance with the numeric effluent limits set forth …[in the] Permit (and other TMDL numeric limits to be incorporated into the Permit in the future), and that even though the Copermittees may rely upon best management practices ("BMPs") in attempting to comply with these numeric effluent limits, implementation of such BMPs does not constitute compliance with the numeric limits."[152] The claimants argue that federal law does not require strict compliance with the Waste Load Allocations (WLAs) from the Baby Beach Bacteria TMDL, nor the related monitoring and reporting requirements.[153] The claimants further assert that federal law provides only "that controls should be included in municipal NPDES Permits as needed 'to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control technique and system, design and engineering methods, and other such provisions as the Administrator or the State determines appropriate for the control of such pollutants.'…[and that] the law is clear that unless the CWA or the federal regulations expressly require a particular permit term, the Board has wide discretion in imposing

[150] Exhibit A, Test Claim, filed June 30, 2011, pages 45-48.

[151] Exhibit A, Test Claim, filed June 30, 2011, page 49.

[152] Exhibit A, Test Claim, filed June 30, 2011, page 50.

[153] Exhibit A, Test Claim, filed June 30, 2011, page 50.

permit requirements."[154] The claimants cite *Rancho Cucamonga v. Regional Water Quality Control Board, Santa Ana Region* and *Natural Resources Defense Council v. U.S. EPA* and in support of their assertion that the Regional Board has discretion to decide which provision are appropriate to control the discharge of pollutants and that municipal storm-sewer dischargers are not required to strictly comply with state water quality standards, as are industrial dischargers.[155] They further cite case law, including *Divers' Environmental Conservation Organization v. State Water Resources Control Board* and *Building Industry Association of San Diego County v. State Water Resources Control Board*, in support of their assertion that the federal CWA does not require compliance with numeric limits for storm water permittees.[156] The claimants also cite other adopted State Board Orders in support of their assertion that numeric effluent limitations are not required under federal law.[157]

The claimants argue that the provisions in sections C. and F. requiring the development of monitoring, investigation and compliance programs to meet non-stormwater dry weather action levels (NALs), set forth "very detailed programmatic action requirements…all of which will be very costly and difficult to adhere to…[and] are not required or even referenced anywhere in the CWA or in the federal regulations.[158]" The claimants concede that "NALs are not traditional 'strict' numeric effluent limits" but argue that they "are similar to strict numeric effluent limits in that they impose new mandated requirements on the Copermittee to meet such numeric limits.[159]" The claimants further argue that the "'NAL-triggered Mandates' go far beyond what is required to be imposed in a MS4 permit" because "[i]f the Copermittees' non-storm water discharges exceed the NALs, the Copermittees must thereafter implement costly measures to comply with the numeric action levels, regardless of the feasibility of complying."[160]

Similarly, the claimants argue that the programs associated with stormwater action levels (SALs) in section D. of the permit, are not required by federal law. They assert that neither the CWA nor related regulations require the inclusion of SALs in a municipal NPDES permit and that "the plain language of the CWA, as well as controlling case authority interpreting the Act, all make clear that no form of SALs or any related

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[154] Exhibit A, Test Claim, filed June 30, 2011, pages 52-53.

[155] Exhibit A, Test Claim, filed June 30, 2011, page 53.

[156] Exhibit A, Test Claim, filed June 30, 2011, page 54.

[157] Exhibit A, Test Claim, filed June 30, 2011, pages 56-57.

[158] Exhibit A, Test Claim, filed June 30, 2011, pages 58.

[159] Exhibit A, Test Claim, filed June 30, 2011, pages 63.

[160] Exhibit A, Test Claim, filed June 30, 2011, page 64.

mandates are required to be included within a municipal NPDES Permit by federal law."[161]

The claimants also argue that although SALs are not traditional strict numeric limits, they are similar to such limits "in that they are new programs imposed on the Copermittees that are tied to achieving compliance with specific numeric limits.[162]"

The claimants also challenge Part F.1.D., as applied to municipal projects only and the development of the program, and challenge section F.1.H. in its entirety.[163] The claimants assert that sections F.1.D. and F.1.H. require them to implement a new program "to ensure that new development and significant redevelopment" municipal projects comply with low impact development (LID) and hydromodification prevention requirements. They argue that the permit "requires the Copermittees to collaboratively develop and implement a Hydromodification Management Plan ("HMP")" and the following new LID requirements for each priority development project ("PDP"):

> Review and update the model and local Standard Storm Water Mitigation Plan ("SSMP"), add low impact development ("LID") BMP requirements for each priority development project ("PDP"), create a formalized review process for all PDPs, assess potential on- or off-site collection and reuse of storm water, amend local ordinances to remove barriers to LID implementation, maintain or restore natural storage reservoirs and drainage corridors, drain a portion of impervious areas into pervious areas, and construct low-traffic areas with permeable surfaces.[164]

The claimants cite the Commission's Decision in *Discharge of Stormwater Runoff*, 07-TC-09, which they assert determined that the permit's LID and hydromodification requirements exceeded federal law, but were not reimbursable mandates because the County and other permittees have the ability to assess fees for new development. They argue however, that "[w]ith the passage of California's Proposition 26 in November, 2010, it is clear that the costs associated with development and implementing LID and hydromodification programs is not recoverable through fees," because this proposition amended Article XIII C of the California Constitution to define "virtually any revenue device enacted by a local government as a tax requiring voter approval, unless it fell within certain enumerated exceptions."[165] The claimants argue that while the Commission cited the California Supreme Court's decision in *Department of Finance v.*

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[161] Exhibit A, Test Claim, filed June 30, 2011, page 63 (citing *Defenders of Wildlife; Divers Environmental; and BIA v. State Board)*.

[162] Exhibit A, Test Claim, filed June 30, 2011, page 64; see also pages 65-67.

[163] Exhibit A, Test Claim, filed June 30, 2011, page 71.

[164] Exhibit A, Test Claim, filed June 30, 2011, page 67.

[165] Exhibit A, Test Claim, filed June 30, 2011, pages 67-69.

Commission on State Mandates (Kern High School Dist.) in support of their determination that LID and hydromodification requirements are not reimbursable because the permittees are under no obligation to construct the projects that would trigger the permit requirements, "[t]he conditions that dictated the Court's decision in *Kern High School Dist.* are not present in the 2009 permit" because the permit is not voluntary.[166]

Specific to the LID requirements, the claimants assert that the "[n]ew LID BMP requirements include creating a formalized review process for all PDPs" that will require the Copermittees to add requirements to municipal projects and significantly increase the cost of design and construction.[167] With regard to the hydromodification permit requirements the claimants assert that the new requirements to develop and implement a HMP will require them to "invest significant resources to hold public hearings, hold collaborative meetings, develop an HMP, train staff, and adopt the local SSMP" and that "[t]he HMP itself is subject to 14 separate requirements."[168]

The claimants also allege that the requirements in sections J.1.b., J.2., J.3., and J.4. regarding reporting requirements, including an annual assessment of the effectiveness of the jurisdictional runoff management program, are all new requirements and go beyond the requirements of federal law.[169] The claimants cite the requirements in 40 CFR section 122.26(d)(2)(v):

> *Assessment of controls.* Estimated reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water.

And in 40 CFR section 122.42(c)(3):

> Revisions, if necessary, to the assessment of controls…reports in the permit application under § 122.26(d)(2)(iv) and (d)(2)(v) of this part.[170]

The claimants argue that these requirements "are extremely general and leave a Copermittee great latitude in the method they adopt to evaluate the effectiveness of the pollution controls they propose as part of their stormwater program.[171]"

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[166] Exhibit A, Test Claim, filed June 30, 2011, page 69; see also pages 70-71.

[167] Exhibit A, Test Claim, filed June 30, 2011, page 72; see also pages 73-77.

[168] Exhibit A, Test Claim, filed June 30, 2011, page 78.

[169] Exhibit A, Test Claim, filed June 30, 2011, pages 84-85.

[170] Exhibit A, Test Claim, filed June 30, 2011, page 85.

[171] Exhibit A, Test Claim, filed June 30, 2011, page 85.

The claimants also assert that the public meeting requirements set forth in sections G.6. and K.1.b.(4).(n)., which require claimants to conduct annual public meetings when developing any aspect of a copermittee's stormwater management program, is not required under federal law. They argue that federal regulations "allow a Permittee latitude in devising the appropriate procedures for soliciting public comment and participation in the process…."[172]

The claimants argue that permit sections F.1.d.(7).(i)., F.3.a.(4).(c)., K.3.a.(3)., and Attachment D., impose new reporting requirements, including describing all activities a Copermittee will undertake pursuant to the permit. They cite 40 CFR section 122.42(c) as the federal law relating to the annual reporting required of permittees and argue that "none of [the] new requirements can be found in the requirements for the Annual Report set forth in" the federal regulations. They also argue that the reporting requirements related to the waiver program for the LID requirements, the requirement to inventory all of a Permittees' flood control devices, and the checklist requirement in section K.3.a.(3) and Attachment D. go beyond the requirements under federal law.[173]

The claimants assert that the requirement in section F.4.b., to use a geographical information system (GIS) map of the MS4, is not required under federal law. They assert that the new permit requirements will require Copermittee to:

1) Procure GIS field equipment;
2) Digitize storm drain systems and develop a GIS storm drain layer using field equipment; and
3) Maintain an updated map in the GIS system on Copermittee computer system.[174]

The claimants argue that the requirements in section F.3.d., to identify existing developments, including municipal developments, as candidates for retrofitting, evaluate and rank candidates according to pre-established criteria, prioritize work plans for implementation according to the evaluation, cooperate with landowners to retrofit private improvements, and track and inspect retrofitting projects, are new and not required under federal law. They further assert that the 2009 permit provision is "extensively broader and more detailed than simply retrofitting flood control devices as needed," which was required under the previous permit.[175]

Finally, the claimants assert that the BMP maintenance tracking requirements in section F.1.f. are not required by federal law or in the previous version of the permit.

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[172] Exhibit A, Test Claim, filed June 30, 2011, pages 90-92.

[173] Exhibit A, Test Claim, filed June 30, 2011, pages 93-95.

[174] Exhibit A, Test Claim, filed June 30, 2011, pages 95-96.

[175] Exhibit A, Test Claim, filed June 30, 2011, pages 97-101.

Specifically they argue that the federal regulation requiring NPDES permits "to include '[a] description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers'" is nowhere near the specificity of the permit requirements "to develop, fund and implement a retroactive BMP maintenance tracking database and inspection program."[176]

In their rebuttal comments, the claimants contend that all of the eleven sections pled in the permit are mandated by the state and not by federal law, constitute a new program or higher level of service, which cannot be funded through fees or assessments.[177] The claimants argue that the State has not met its burden to show that the fee authority exception in Government Code section 17556(d) applies in this case.[178] The claimants further rely on the Commission's prior Decision in *Discharge of Stormwater Runoff*, 07-TC-09, which found that when voter approval is required, claimants do not have fee authority sufficient as a matter of law to cover the costs of the state-mandated program since the authority to impose fees resides with the electorate.[179] The claimants also contend that they cannot impose regulatory fees on private developers for the LID and hydromodification plan requirements since the claimants are seeking reimbursement for the LID requirements only for municipal projects and for developing the hydromodification plan, but not imposing the requirements on private parties. Likewise, the retrofitting program requires a program to identify, track, and encourage retrofitting opportunities, and not a program directed towards individual development.[180]

On August 25, 2023, the claimants filed comments on the Draft Proposed Decision, which are summarized and addressed in this Decision.[181]

B. State Water Resources Control Board and San Diego Regional Water Quality Control Board (Water Boards)

The Water Boards assert that the challenged provisions in the permit "do not meet the threshold requirement of imposing new programs of higher levels of service on the Copermittees" because the Copermittees are provided more flexibility in how they chose to implement "their efforts to control pollutants in storm water discharges…." They further argue that if the Commission finds some of the provisions do impose a new program or higher level of service, other exceptions in mandates law preclude

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[176] Exhibit A, Test Claim, filed June 30, 2011, page 101; see also pages 102-104.

[177] Exhibit F, Claimants' Rebuttal Comments, filed January 6, 2017, page 7.

[178] Exhibit F, Claimants' Rebuttal Comments, filed January 6, 2017, page 45.

[179] Exhibit F, Claimants' Rebuttal Comments, filed January 6, 2017, pages 45-47.

[180] Exhibit F, Claimants' Rebuttal Comments, filed January 6, 2017, page 48.

[181] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023.

reimbursement because: 1. many of the provisions were proposed by the cities and the County in their 2006 permit application or Report of Waste Discharge (ROWD); 2. the provisions are federally mandated; and 3. the local agencies have fee authority to impose fees to recover costs.[182] The Water Boards also argue that the provisions are not a state mandate because compliance with NPDES storm water permits "is required by private industry as well as state and federal government agencies…and, in fact, the requirements for industrial entities are more stringent than for local government dischargers."[183]

Distinguishing this permit from the 2001 Los Angeles permit that was the subject of the Supreme Court's recent decision, the Water Boards assert that the permit provisions mark a shift away from "proscriptive requirements toward a flexible watershed management approach, providing the Copermittees with significant flexibility in achieving the federal standards, consistent with the Copermittees' 2006 application for permit renewal in its ROWD."

The Water Boards argue that the challenged permit provisions do not impose new programs or higher levels of service because "[m]any of the provisions are very similar to those in the 2002 permit and other activities, even if not previously required, are already being carried out by some of the Copermittees."[184] Further, they argue that where the level of specificity associated with BMPs has changed, it "is consistent with the U.S. EPA's guidance that successive permits for the same MS4 must become more refined and detailed as needed."[185] They assert that "expanded or better-tailored provisions" determined by the Board to be necessary to achieve MEP, do not result in imposition of a new program or higher level of service.[186] They also argue that the permit provisions are "crafted to compel Copermittee compliance with" the Clean Water Act requirement for "permits for discharges from municipal storm sewers…includ[ing] a requirement to effectively prohibit non-storm water discharges into the storm sewers."[187]

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[182] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3.

[183] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 14.

[184] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 14.

[185] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 15.

[186] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 15.

[187] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 15.

The Water Boards argue in the alternative, that "the Commission should reject the Test Claim because, as the San Diego Water Board found, the provisions are mandated by federal law." They assert that if the Water Board had to been authorized to issue the permit, the MS4 discharges would be prohibited unless the U.S. EPA issued a similar permit to local governments and that the "U.S. EPA supported the 2009 Permit, and specifically endorsed many of the provisions challenged in the Test Claim."[188] They further argue that although the Regional Board exercised its discretion "as required by federal law, to impose requirements that comply with MEP," this "does not support the conclusion that the provisions are unfunded mandates" because "Congress mandated that the San Diego Water Board exercise discretion in determining appropriate provisions."[189]

The Water Boards also assert that unlike in prior permits considered in Commission test claim decisions, here the SWRCB "explicitly found based on the record that the Permit is based exclusively on federal law requirements and disclaimed reliance on state law." They assert that while NPDES permits issued by the State may exceed the requirements of federal law, under California law, "Claimant's assertions that the [Board] exercised exclusive state law authority in issuing the 2009 Permit are incorrect in light" of the permit findings, citing the permit finding E-6:

> This Order implements federally mandated requirements under federal Clean Water Act section 402, subdivision (p)(3)(B)….The authority exercised under this Order is not reserved state authority under the Clean Water Act's savings clause (…which allows a state to develop requirements which are not 'less stringent' than federal requirements]), but instead, is part of a federal mandate to develop pollutant reduction requirements for municipal separate storm sewer systems. To this extent, *it is entirely federal authority that forms the legal basis to establish the permit provisions….*[190]

The Water Boards further argue that the Commission should afford deference to the Regional Board's "expertise in crafting its findings upon which permit provisions are based."[191]

They further argue that reimbursement for the challenged provisions is not required because the Permit is not imposed uniquely upon local government, and that

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[188] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 16.

[189] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 17.

[190] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 18-19.

[191] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 19.

"[c]ompliance with NPDES permits, and specifically with storm water permits, is required by private industry also." They argue that the requirements on private industry are even more stringent than for government discharges and that the requirements apply to all governmental entities that operate MS4s, including state and federal facilities.[192]

Finally, the Water Boards argue that local governments do not need to spend tax monies to comply with the permit provisions, but rather have the ability "to charge fees to cover development program costs…[and] can impose the cost of compliance with hydromodification, low impact development and retrofitting obligations, on developers who impact the hydrograph and water resources." For other provisions with fees that require voter or property owner approval, they assert that "[w]hether circumstances make it impractical to assess fees is not relevant to the inquiry" and "maintain that the Copermittees have the requisite fee authority within the meaning of Government Code section 17556, subdivision (d), even if a proposal to raise fees must be considered by the electorate."[193]

The Water Boards also provide specific responses to the eleven challenged permit provisions in the test claim permit, and comments on the Draft Proposed Decision regarding fee authority, which are summarized in the analysis below.[194]

C. Department of Finance

The Department of Finance provided comments on the Test Claim stating that they defer to "the State Water Resources Control Board and the San Diego Regional Water Quality Control Board on the substance of the permit terms, on whether the 2009 permit included requirements not in the prior permit and on the impact of the Supreme Court decision on the federal law component of the state mandate determination."[195]

With regard to the ability to impose fees to cover permit compliance costs, Finance argues that "claimants have authority to impose property-related fees under their police power for alleged mandated permit activities whether or not it is politically feasible to impose such fees via voter approval," and that Proposition 26 "specifically excludes assessments and property-related fees imposed in accordance with Proposition 218 from the definition of taxes.[196] Finance cites *Clovis Unified School Dist. v. Chiang* in

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[192] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 19.

[193] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 20-21.

[194] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 21-46; Exhibit H, Water Boards' Comments on the Draft Proposed Decision, filed August 25, 2023.

[195] Exhibit B, Finance's Comments on the Test Claim, filed October 10, 2016, page 1.

[196] Exhibit B, Finance's Comments on the Test Claim, filed October 10, 2016, page 1.

support of their argument that claimant's "can choose not to put a fee to the voters, or the voters can reject a fee, but not at the state's expense.[197]" Finance also asserts that the claimants "continue to have regulatory fee authority that does not require voter approval under Propositions 218 and 26, pursuant to their police power in article XI, section 7, of the California Constitution...for the alleged mandated activities of the hydromodification plan and low-impact development.[198]" They also assert that for these activities, the claimants have sufficient fee authority under the Mitigation Fee Act and that costs related to low-impact development and hydromodification on municipal projects are discretionary, as there is "[n]o evidence of legal or practical compulsion to undertake these municipal projects…despite assertions that failure to undertake the projects can expose claimants to liability."[199]

Finance filed comments on the Draft Proposed Decision regarding fee authority, which are summarized and addressed in the Decision.[200]

IV. Discussion

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

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

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[201] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[202]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

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[197] Exhibit B, Finance's Comments on the Test Claim, filed October 10, 2016, page 2.

[198] Exhibit B, Finance's Comments on the Test Claim, filed October 10, 2016, page 2.

[199] Exhibit B, Finance's Comments on the Test Claim, filed October 10, 2016, page 2.

[200] Exhibit I, Finance's Comments on the Draft Proposed Decision, filed August 25, 2023.

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

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

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[203]

2. The mandated activity constitutes a "program" that either:

   a. Carries out the governmental function of providing a service to the public; or

   b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[204]

3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[205]

4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[206]

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[207] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[208] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[209]

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

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

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

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

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

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

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

A. The Commission Has Jurisdiction Over This Test Claim.

1. The Test Claim Was Timely Filed and Has a Potential Period of Reimbursement Beginning December 16, 2009.

Government Code section 17551 provides that local government test claims shall be filed "not later than 12 months following the effective date of a statute or executive order or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later."[210] At the time this Test Claim was filed, the Commission's regulations defined "within 12 months" as follows:

> For purposes of claiming based on the date of first incurring costs, "within 12 months" means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant.[211]

The test claim permit was adopted by the Regional Board on December 16, 2009, and became effective that day.[212] The claimants state they first incurred costs under the permit after the effective date of the permit in fiscal year 2009-2010. For example, the earliest date that costs were first incurred for the County of Orange was January 8, 2010.[213] Costs were first incurred by the City of Dana Point on December 21, 2009.[214]

Therefore, pursuant to Government Code section 17551, and the interpretation of the Commission's regulations that provides until June 30 of the fiscal year following the fiscal year in which costs were first incurred, a timely filing on the 2009 test claim permit must occur on or before June 30, 2011. The test claim was filed June 30, 2011, and is therefore timely filed.[215]

Government Code section 17557(e) requires a test claim to be "submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year." Because the Test Claim was filed on June 30, 2011, the potential period of reimbursement under Government Code section 17557 begins on July 1, 2009. However, since the test claim permit has a later effective date, the potential period of

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

[211] California Code of Regulations, title 2, former section 1183.1(b) (Register 2016, No. 38).

[212] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2207 (Order No. 2009-0002).

[213] Exhibit A, Test Claim, filed June 30, 2011, page 118 (Declaration of Chris Compton, Manager, Water Quality Compliance, Orange County Public Works).

[214] Exhibit A, Test Claim, filed June 30, 2011, page 129 (Declaration of Lisa Zawaski, Senior Water Quality Engineer for the City of Dana Point).

[215] Exhibit A, Test Claim, filed June 30, 2011, page 1.

reimbursement for this claim begins on the permit's effective date, or December 16, 2009.

2. The Orange County Flood Control District Is an Eligible Claimant.

Article XIII B, section 6 requires reimbursement only for those local entities that are subject to the tax and spend limitations of articles XIII A and B.[216] Thus, the Commission's regulations require the dismissal of a Test Claim filed by a local agency that is not eligible to seek reimbursement because it is not subject to the taxing and spending limitations of article XIII A and B of the California Constitution.[217]

Although counties and cities are subject to the tax and spend limitations, many special districts are not because they are fully funded by bond funds, fees, or assessments and not "proceeds of taxes."[218]

Article XIII B, section 9(c) specifically provides, "appropriations subject to limitation" do *not* include those appropriations of any special district that existed on January 1, 1978, and did not levy ad valorem property taxes as of the 1977-1978 fiscal year. Government Code section 7901(e) implements section 9(c) of article XIII B,[219] and clarifies that special districts that existed on January 1, 1978, and did not levy a property

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[216] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Redevelopment Agency of the City of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281-282; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1185; *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763, quoting *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283.

[217] California Code of Regulations, title 2, sections 1183.1(g) and 1187.14.

[218] Article XIII B, section 8(c) states the following: "Proceeds of taxes shall include, but not be restricted to, all tax revenues and the proceeds to an entity of government, from (1) regulatory licenses, user charges, and user fees to the extent that those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service, and (2) the investment of tax revenues. With respect to any local government, 'proceeds of taxes' shall include subventions received from the State, other than pursuant to Section 6, and, with respect to the State, proceeds of taxes shall exclude such subventions."

[219] Government Code section 7900(a) states: "The Legislature finds and declares that the purpose of this division is to provide for the effective and efficient implementation of Article XIII B of the California Constitution."

tax in excess of 12 ½ cents per $100 of assessed value in 1977-1978, are not "local agencies" for purposes of article XIII B.[220]

In this case, however, co-claimant Orange County Flood Control District was created in 1927, is an independent special district, and has the express authority to levy taxes.[221] The Orange County Board of Supervisors acts as the board of supervisors for the Flood Control District and adopts the appropriations limit for the District.[222]

Thus, the Orange County Flood Control District is an eligible claimant.

3. The Commission Does Not Have Jurisdiction Over the 2002 Permit and the Requirements Pled in the 2009 Test Claim Permit Are Compared to the Law in Effect Immediately Prior to the Adoption of the Test Claim Permit, Including the 2002 Permit, to Determine if the Activities Required by the 2009 Test Claim Permit Are New.

The claimants' comments on the Draft Proposed Decision contend that even if certain obligations were carried forward into the 2009 Permit [from the prior 2002 permit], "they still are 'new' obligations and a 'higher level of service' because: (1) The 2009 Permit's obligations cannot be compared with those in the 2002 Permit because the permittees were legally precluded from filing a test claim with respect to the obligations in the 2002 Permit [since Government Code section 17516 excluded stormwater permits from the definition of executive order]; and (2) The permittees had no obligation to continue to implement . . . the 2002 Permit once the 2002 Permit terminated."[223] Thus, the

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[220] Article XIII B, section 8(c) states: "proceeds of taxes shall include, but not be restricted to, all tax revenues and the proceeds to an entity of government, from (1) regulatory licenses, user charges, and user fees to the extent that those proceeds exceed the costs reasonably borne by that entity in providing the regulation, product, or service, and (2) the investment of tax revenues. With respect to any local government, "proceeds of taxes" shall include subventions received from the State, other than pursuant to Section 6, and, with respect to the State, proceeds of taxes shall exclude such subventions."

[221] Water Code Appendix sections 36-2(b)(8) ["The Orange County Flood Control District is hereby declared to be a body corporate and politic and has all of the following powers: … (8) to cause taxes or assessments to be levied and collected for the purpose of paying any obligation of the district in the manner provided in this act."], 36-14 ["The board of supervisors of the district may, in any year, levy a tax or assessment upon taxable real property in the district".]

[222] See, for example, Exhibit K (60), Resolution Adopting Orange County Flood Control District Appropriations Limit 2023-2024.

[223] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, page 24 (with respect to the TMDL issues), pages 30-31 (with respect

claimants are contending that all activities pled in the test claim are new and that the Commission should not be comparing the requirements from the prior permit to the test claim permit. These arguments are not legally correct.

The claimants' second point above contends that all of the requirements in the 2009 test claim permit are new because the claimants had no obligation to continue to comply with the 2002 permit once the 2002 permit terminated.[224] In other words, the claimants want the Commission to interpret stormwater permits as contracts that expire, and that every permit is a new contract. This interpretation is not consistent with article XIII B, section 6 or the courts' interpretation of these permits as executive orders.

Under the Clean Water Act, the term of an NPDES permit is five years.[225] However, states authorized to administer the NPDES program may continue the state-issued permit until the effective date of a new permit, if state law allows.[226] California's regulations provide that the terms and conditions of an expired permit are automatically continued pending issuance of a new permit if all requirements of the federal NPDES regulations on continuation of expired permits have been complied with.[227] Thus, there was no gap in time between the prior permit and the test claim permit.

The courts have found that NPDES permits are executive orders issued by a state agency within the meaning of article XIII B, section 6.[228] The purpose of article XIII B, section 6 is to prevent the state from forcing extra programs on local government each year in a manner that negates their careful budgeting of increased expenditures counted against the local government's annual spending limit and, thus, article XIII B, section 6 requires a showing that the test claim statute or executive order mandates *new* activities and associated costs compared to the prior year.[229] This was the case in

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to the Jurisdictional Runoff Management Program Effectiveness Assessment and Reporting).

[224] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, page 24.

[225] 33 United States Code section 1342(b).

[226] Code of Federal Regulations, title 40, section 122.6(d).

[227] California Code of Regulations, title 23, section 2235.4.

[228] *County of Los Angeles v. Commission on State Mandates* (2007) Cal.App.4th 898, 905, 919-920; *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 762; *Department of Finance. v. Commission State Mandates* (2021) 59 Cal.App.5th 546, 558.

[229] California Constitution, articles XIII B, sections 1, 8(a) and (b); *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1595; *County of Sonoma v. Commission on State Mandates* (2000)

Department of Finance. v. Commission on State Mandates (2021) 59 Cal.App.5th 546, where the court found that installing and maintaining trash receptacles at transit stops and performing certain inspections as required by that stormwater permit were both *new duties* that local governments were required to perform, when compared to prior law ("the mandate to install and maintain trash receptacles at transit stops is a 'new program' within the meaning of section 6 because it was not required prior to the Regional Board's issuance of the permit").[230]

Other examples include *Lucia Mar Unified School Dist.*, which addressed a 1981 test claim statute that required local school districts to pay the cost of educating pupils in state schools for the severely handicapped – costs that the state had previously paid in full until the 1981 statute became effective.[231] The court held that the requirement imposed on local school districts to fund the cost of educating these pupils was new "*since at the time [the test claim statute] became effective* they were not required to contribute to the education of students from their districts at such schools."[232] The same analysis was applied in *County of San Diego*, where the court found that the state took full responsibility to fund the medical care of medically indigent adults in 1979, which lasted until the 1982 test claim statute shifted the costs back to counties.[233] In *City of San Jose*, the court addressed a 1990 test claim statute, which authorized counties to charge cities for the costs of booking into county jails persons who had been arrested by employees of the cities.[234] The court denied the city's claim for reimbursement, finding that the costs were not shifted by the state since "*at the time [the 1990 test claim statute] was enacted*, and indeed long before that statute, the financial and administrative responsibility associated with the operation of county jails and detention of prisoners was borne entirely by the county."[235] In *San Diego Unified School District*, the court determined that the required activities imposed by 1993 test claim statutes, which addressed the suspension and expulsion of K-12 students from school, were "new in comparison with the preexisting scheme in view of the

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84 Cal.App.4th 1264, 1283; *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763.

[230] *Department of Finance. v. Commission State Mandates* (2021) 59 Cal.App.5th 546, 558.

[231] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 832.

[232] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835, emphasis added.

[233] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 91.

[234] *City of San Jose v. State* (1996) 45 Cal.App.4th 1802.

[235] *City of San Jose v. State* (1996) 45 Cal.App.4th 1802, 1812, emphasis added.

circumstances that they did not exist prior to the enactment of [the 1993 test claim statutes]."[236]

Thus, it is not legally correct or consistent with article XIII B, section 6 to ignore the requirements imposed on the claimants by the prior permit to determine what is new.

Second, the claimants suggest that the test claim permit cannot be compared to the prior 2002 permit since at the time the 2002 permit was adopted, Government Code section 17516 excluded from the definition of "executive order" any order, requirement, rule, or regulation issued by the State Water Resources Control Board or by any Regional Board and, thus, a test claim on the 2002 permit could not have been filed and the claimants could not seek reimbursement for those costs. The claimants therefore contend that they are not precluded from seeking reimbursement for the activities that were originally required by the prior 2002 permit and carried over to the test claim permit. The claimants' arguments are as follows:

> Thus, in 2002 and 2003, the permittees could not file a test claim seeking reimbursement for obligations imposed by the 2002 Permit. It is well established that a party is not precluded from pursuing a claim in a current proceeding where that party could not have pursued the claim in the past. For example, with respect to "issue preclusion" [fn. omitted] if an issue was not within a court's power to decide the issue in the first action, it is not precluded in a later action. *Strangman v. Duke* [fn. citation omitted] ("The rule of res judicata does not apply to causes or issues which were not and could not be before the court in the first proceeding.") *See also State Compensation Insurance Fund v. Ready Link Healthcare, Inc.* [fn. citation omitted] (defendant not precluded from litigating amount of premium due where such issue could not have been brought in prior administrative proceeding because insurance commissioner lacked power to hear that issue); *Hong Sang Market, Inc. v. Peng* [fn. citation omitted] ("Thus, in a situation in which a court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground ... then a second action in a competent court presenting an omitted theory or ground should be held not precluded"), quoting *Merry v. Coast Community College Dist.* [fn. citation omitted.]
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> An analogous principle applies with respect to the exhaustion of administrative remedies. Where a party is precluded from exhausting its administrative remedies, or to do so would be futile, the exhaustion requirement is not a bar to further proceedings. Moreover, it is well

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[236] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (see also page 869, footnotes 6 and 7, and page 870, footnote 9, where the court describes in detail the state of the law immediately before the enactment of the 1993 test claim statutes).

> established that the exhaustion requirement is not applicable where an effective administrative remedy is wholly Jacking. *Glendale City Employees' Association, Inc. v. City of Glendale* [fn. citation omitted] (exhaustion of administrative remedies does not apply if the remedy is inadequate). *See also Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* [fn. citation omitted] (where pursuing administrative remedies would not provide class-wide relief, failure to pursue administrative remedy does not bar such relief).[237]

The claimants are correct that Government Code section 17516(c), as originally enacted, excluded from the definition of "executive order" any order, requirement, rule, or regulation issued by the State Water Resources Control Board or by any Regional Board as follows:

> "Executive order" does not include any order, plan, requirement, rule, or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code. It is the intent of the Legislature that the State Water Resources Control Board and regional water quality control boards will not adopt enforcement orders against publicly owned dischargers which mandate major waste water treatment facility construction costs unless federal financial assistance and state financial assistance pursuant to the Clean Water Bond Act of 1970 and 1974, is simultaneously made available. "Major" means either a new treatment facility or an addition to an existing facility, the cost of which is in excess of 20 percent of the cost of replacing the facility.[238]

In 2003, the County of Los Angeles and surrounding cities filed a test claim with the Commission (*Municipal Storm Water and Urban Runoff Discharges*, 03-TC-04, 03-TC-20, and 03-TC-21) which was returned by the Executive Director for lack of jurisdiction based on the plain language of Government Code section 17516. The county and cities appealed to the Commission, and in 2004, the Commission denied the appeal on the ground that it did not have the authority to declare section 17516 unconstitutional pursuant to article III, section 3.5 of the California Constitution.[239] The county and city

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[237] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 25-26.

[238] Government Code section 17516(c) (Stats.1984, ch. 1459).

[239] *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 904. Article III, section 3.5 of the California Constitution provides that an administrative agency has no power to "declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the

filed a petition for writ of mandate under Code of Civil Procedure sections 1085 and 1094.5 directing the state to provide reimbursement or directing the Commission to hear the test claims, and a complaint for declaratory relief, requesting the court to declare Government Code section 17516 unconstitutional. The Second District Court of Appeal found that Government Code section 17516 was not consistent with article XIII B, section 6 and was therefore unconstitutional, and remanded the test claims to the Commission to hear them in the first instance.[240] In 2010, Government Code section 17516 was amended to delete the exclusionary paragraph quoted above.[241]

However, even though the Commission could not have accepted stormwater test claims until 2007, when the court determined that section 17516 was unconstitutional, the claimants were not without a remedy following the adoption of the 2002 permit. Like the County of Los Angeles, the claimants could have filed a test claim, which would have been returned, and then filed a lawsuit challenging Government Code section 17516 as unconstitutional and requesting reimbursement under article XIII B, section 6. The claimants could have also filed a lawsuit directly with the courts, bypassing the Commission's administrative process, based on futility grounds since the Commission previously returned the Los Angeles test claims on the ground that it had to presume Government Code section 17516 constitutional. The California Supreme Court explained the futility exception to the exhaustion of administrative remedies as follows:

> Ordinarily, counties seeking to pursue an unfunded mandate claim under section 6 must exhaust their administrative remedies. (Citations omitted.) However, counties may pursue section 6 claims in superior court without first resorting to administrative remedies if they "can establish an exception to" the exhaustion requirement. (Citation omitted.) The futility exception to the exhaustion requirement applies if a county can "state with assurance that the [Commission] would rule adversely in its own particular case.[242]

The futility exception was applied in the *County of San Diego* case, which sought reimbursement under article XIII B, section 6 for the Medically Indigent Adult statutes. There, the County of San Diego invoked this exception by alleging that the Commission's denial of its claim was "virtually certain" because the Commission had previously denied the claims of other counties, ruling that county medical care programs for adult medically indigent adults are not state-mandated and, therefore, counties are

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enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

[240] *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919-921.

[241] Government Code section 17516 (as amended by Stats. 2010, ch. 288).

[242] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 89.

not entitled to reimbursement.[243] Since the Commission rejected the Los Angeles Test Claim (which alleged the same claim that San Diego alleged) and appealed the judicial reversal of its decision, the trial court correctly determined that further attempts to seek relief from the Commission would have been futile.[244]

Thus, the claimants were not precluded from seeking a remedy from the courts after the 2002 permit was adopted.

Moreover, the Commission does not now have the authority to determine if the activities required by the 2002 permit are eligible for reimbursement under article XIII B, section 6. The 2002 permit was adopted on February 13, 2002, and became effective that day.[245] At that time, Government Code section 17551 did not contain a period of limitations to file a test claim; as long as the alleged mandate was adopted after January 1, 1975, a test claim could be filed at any time. Effective September 30, 2002, however, Government Code section 17551(c) was amended to require test claims to be filed "not later than three years following the date the mandate became effective, or in the case of mandates that became effective before January 1, 2002, the time limit shall be one year from the effective date of this subdivision."[246] The 2002 permit became effective on February 13, 2002, and, thus, the claimants had three years from that date, or until February 13, 2005, to file a test claim on the 2002 permit. Since the period of limitations has expired, the Commission no longer has the authority to determine if the activities originally required by the 2002 permit are eligible for reimbursement under article XIII B, section 6.[247]

Accordingly, in accordance with article XIII B, section 6 and the authorities cited above, the requirements pled in the 2009 test claim permit are compared to prior law, including the prior 2002 permit, to determine if the required activities are new.

4. The Water Boards' General Argument That the Permit Provisions Were Proposed by the Claimants in Their ROWD and, Therefore, Are Discretionary, Is Not Correct as a Matter of Law.

The Water Boards argue generally that many of the provisions were proposed by the cities and the County in their 2006 permit application or Report of Waste Discharge

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[243] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 89.

[244] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 90.

[245] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3481 (Order No. R9-2002-0001).

[246] Government Code section 17551 (Stats. 2002, ch. 1124).

[247] *American Federation of Labor v. Unemployment Insurance Appeals Bd.* (1996) 13 Cal.4th 1017, 1042, "[A]dministrative agencies have only the powers conferred on them, either expressly or by implication, by Constitution or statute."

(ROWD) and, therefore, reimbursement is not required since the activities are triggered by a discretionary decision. The Commission disagrees with this argument.[248]

The claimants are required by law to submit the NPDES permit application in the form of a Report of Waste Discharge. Submitting the ROWD is not discretionary, as shown in the following federal regulation:

> a) *Duty to apply.* (1) Any person[249] who discharges or proposes to discharge pollutants … and who does not have an effective permit … must submit a complete application to the Director in accordance with this section and part 124 of this chapter.[250]

Moreover, the ROWD (tantamount to an NPDES permit application) is required by California law, as follows: "Any person discharging pollutants or proposing to discharge pollutants to the navigable water of the United States within the jurisdiction of this state … shall file a report of the discharge in compliance with the procedures set forth in Section 13260 …"[251]

In addition, federal law requires permittees to include the following in their permit application:

> A proposed management program [that] covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. *Proposed programs will be considered by the Director*

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[248] The Commission rejected the same argument in *Discharge of Stormwater Runoff*, 07-TC-09 (Commission on State Mandates, Test Claim Decision on *Discharge of Stormwater Runoff*, 07-TC-09, adopted March 26, 2010, https://csm.ca.gov/decisions/doc14.pdf (accessed on June 28, 2023), page 35.

[249] *Person* means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof (40 CFR § 122.2).

[250] Code of Federal Regulations, title 40, section 122.21 (a). The section applies to U.S. EPA-issued permits, but is incorporated into section 123.25 (the state program provision) by reference.

[251] Water Code section 13376.

when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable.[252]

Thus, it is ultimately the Regional Board that determines which conditions or requirements to include in the permit, and the position that the ROWD proposal itself makes a permit requirement discretionary is not correct as a matter of law. Rather, the permit requirements will be interpreted individually based on the plain language of the permit, the law, and the evidence in the record.

B. Some of the Permit Provisions Impose a State-Mandated New Program or Higher Level of Service.

1. The Requirements of Section B.2., Addressing Formerly Exempted Non-Stormwater Discharges That Have Been Identified as a Source of Pollutants, Do Not Mandate a New Program or Higher Level of Service.

The claimants plead section B.2. of the test claim permit,[253] which removes landscape irrigation, irrigation water, and lawn watering from the exempt, non-prohibited discharge list.[254] Thus, claimants are now required to effectively prohibit landscape irrigation, irrigation water, and lawn watering from entering the MS4 by implementing a program to detect and remove these illicit discharges, just like other prohibited non-stormwater discharges.

As explained below, the Commission finds that section B.2. does not mandate a new program or higher level of service. Landscape irrigation, irrigation water, and lawn

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[252] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv) (emphasis added).

[253] Exhibit A, Test Claim, filed June 30, 2011, pages 36 ("New requirements involving "Non-Storm Water Discharges" as set forth in Section B of the 2009 Permit."); and page 48 ("Section B.2 of the 2009 Permit requires Copermittees to perform the following activities that are **not** required under either federal law or the 2002 Permit;" and "To comply with the prohibition against discharges from landscape irrigation, irrigation water and lawn watering set forth in Section B.2 of the 2009 Permit, the Copermittees must do the following in order to attempt to comply with this new state mandate . . . ."). No other provision in section B., of the test claim permit is addressed in the claimants' Test Claim.

[254] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2135-2136 (Order No. R9-2009-0002, section B.2., exempts the following non-stormwater discharges: diverted stream flows, rising ground water, uncontaminated ground water infiltration [as defined at 40 CFR 35.2005(20)] to MS4s, uncontaminated pumped ground water, foundation drains, springs, water from crawl space pumps, footing drains, flows from riparian habitats and wetlands, water line flushing, discharges from potable water sources not subject to NPDES Permit No. CAG679001, other than water main breaks, individual residential car washing, and dechlorinated swimming pool discharges.).

watering were identified by the permittees as sources of pollutants and, thus, under federal law, these discharges are now non-stormwater discharges that are required by federal law to be effectively prohibited.

a. Background

i. Federal law requires that if an exempt discharge is identified as a pollutant, the permittee is required to effectively prohibit the illicit discharge from entering the municipal separate storm sewer system.

Federal law distinguishes between stormwater discharges and non-stormwater discharges. Stormwater is defined as "storm water runoff, snow melt runoff, and surface runoff and drainage; events related to precipitation."[255] A discharge to a MS4 that "is *not* composed entirely of stormwater" is considered an illicit non-stormwater, or dry weather discharge.[256]

Federal law requires that, in order to achieve water quality standards and objectives, permits for discharges from MS4s "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers," unless those discharges are conditionally exempted from this prohibition.[257] Those discharge categories that are not prohibited from entering into the MS4 continue to be exempt *unless* the discharge is identified by a municipality as a source of pollutants to waters of the United States.[258] If a discharge is identified as a pollutant, the municipality is required by federal law to effectively prohibit the illicit discharge from entering the MS4 by implementing a program to detect and remove the discharge.[259]

ii. The prior permit conditionally exempted landscape irrigation, irrigation water, and lawn watering from the list of non-stormwater discharges that permittees were prohibited from discharging.

Section B.1. of the prior permit stated the following:

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

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

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

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

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

> Each Copermittee shall effectively prohibit **all** types of non-storm water discharges into its Municipal Separate Storm Sewer System (MS4) unless such discharges are either authorized by a separate NPDES permit; or not prohibited in accordance with B.2. and B.3.[260]

Section B.2. of the prior permit provided a list of non-stormwater discharges that included landscape irrigation, irrigation water, and lawn watering, which were not prohibited from being discharged into the MS4.[261] Although these discharges were exempt, the prior permit required each copermittee to "investigate and inspect any portion of the MS4 that, based on dry weather monitoring results or other appropriate information, indicates a reasonable potential for illicit discharges, illicit connections, or other sources of non-storm water (*including nonprohibited discharge(s) identified in Section B. of this Order*)."[262] If a non-prohibited discharge category was identified by a copermittee as a significant source of pollutant to the waters of the United States during the term of the permit, the copermittee was required by the prior permit to prohibit the discharge, or require the responsible parties to implement BMPs to "prevent or reduce" the pollutant to the MEP and report the findings to the Regional Board.[263] Section A. of the prior permit further reiterated that "Discharges from MS4s containing pollutants which have not been reduced to the maximum extent practicable (MEP) are prohibited."[264]

b. Section B.2. of the test claim permit removes landscape irrigation, irrigation water, and lawn watering from the exemption, but does not mandate a new program or higher level of service.

Section B.2. of the test claim permit also provides a list of non-stormwater discharges that are not prohibited from being discharged into the MS4. The test claim permit, however, removes landscape irrigation, irrigation water, and lawn watering from the exempt, non-prohibited discharge list and, thus, these discharges are now illicit.[265]

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[260] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3438 (Order No. R9-2002-0001, section B.1.), emphasis in original.

[261] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3428-3439 (Order No. R9-2002-0001, section B.2.)

[262] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3439, 3466 (Order No. R9-2002-0001, sections B.5. and F.5.C.).

[263] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3439 (Order No. R9-2002-0001, section B.3.).

[264] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3438 (Order No. R9-2002-0001, section A.3.).

[265] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2135-2136 (Order No. R9-2009-0002, section B.2. exempts the following non-stormwater discharges: diverted stream flows, rising ground water, uncontaminated

Thus, claimants are now required to effectively prohibit landscape irrigation, irrigation water, and lawn watering from entering the MS4 by implementing a program to detect and remove these illicit discharges, just like other prohibited non-stormwater discharges.

The Fact Sheet for the test claim permit explains that removal of landscape irrigation, irrigation water, and lawn watering discharges from the exemption was based on the claimants' identification of these discharges as sources of pollutants for fecal coliform bacteria, and nitrogen and phosphorus to the waters of the United States, including to waters that were already designated as impaired for these pollutants:

> The following exemptions have been removed from Section B, per identification as a source and conveyance of pollutants to waters of the United States when discharged from the MS4: landscape irrigation, irrigation water and lawn watering. Therefore, these illicit discharges must be addressed per 40 CFR 122.26(B). These previously exempted discharges have been identified by Permittees as a source of pollutants and conveyance of pollutants to waters of the United States in the following:
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> The County of Orange conducted, per requirements of 401 Water Quality Certification 02C-055, a Drainage Area Reconnaissance and Urban Runoff Characterization study. From the reconnaissance and characterization, the County of Orange determined that "water quality results provided two important findings." First, "analytical data strongly indicates that irrigation overspray and drainage constitutes a very substantial source and conveyance mechanism for fecal indicator bacteria into Aliso Creek, and suggests that reduction measures for this source of urban runoff could provide meaningful reduction in bacteria loading to the stream." Aliso Creek, currently 303(d) listed as impaired for Indicator Bacteria, is included in the Bacteria Project I TMDL adopted by the San Diego Regional Board on December 12, 2007. Secondly, reclaimed water high in electrical conductivity and Nitrate was indicated as "the source water at three of the excessive runoff locations (P1, P2, J01P02). These dissolved nitrogen concentration and flow rates create relatively high nitrogen loadings, which have the potential to contribute to undesirable levels of periphytic algal growth in Aliso Creek".

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ground water infiltration [as defined at 40 CFR 35.2005(20)] to MS4s, uncontaminated pumped ground water, foundation drains, springs, water from crawl space pumps, footing drains, flows from riparian habitats and wetlands, water line flushing, discharges from potable water sources not subject to NPDES Permit No. CAG679001, other than water main breaks, individual residential car washing, and dechlorinated swimming pool discharges.).

The County of Orange, Cities of Orange County and Orange County Flood Control District on November 15, 2007 submitted their Unified Annual Progress Report for the 2006-2007 reporting period. Within the report, the Copermittees demonstrate that a “wide range of constituents exceeded the tolerance interval bounds”, including orthophosphate. “These high levels of orthophosphate concentration are most likely the result of fertilizer runoff or reclaimed water runoff”. Aliso Creek is currently 303(d) listed as impaired for phosphorous. The County of Orange, Orange County Flood Control District and Permittees within the San Juan Creek, Laguna Coastal Streams, Aliso Creek, and Dana Point Coastal Streams Watersheds on November 15, 2007 submitted their Watershed Action Plan Annual Reports for the 2006-2007 reporting period. San Juan Creek, Laguna Coastal Streams, Aliso Creek and Dana Point Coastal Streams are all currently 303(d) listed as impaired for Indicator Bacteria within the watershed and/or Pacific Ocean at the discharge point of the watershed. These locations are included in the Bacteria Project I TMDL adopted by the San Diego Regional Board on December 12, 2007. The Copermittees, within their Watershed Action Strategy Table for Fecal Indicator Bacteria “Support programs to reduce or eliminate the discharge of anthropogenic dry weather nuisance flow throughout the […] watershed. Dry weather flow is the transport medium for bacteria and other 303(d) constituents of concern.” Additionally, they state that “conditions in the MS4 contribute to high seasonal bacteria propagation in-pipe during warm weather. Landscape irrigation is a major contributor to dry weather flow, both as surface runoff due to over-irrigation and overspray onto pavements; and as subsurface seepage that finds its way into the MS4.

In 2006, the State Water Quality Control Board allocated Grant funding to the Smarttimer/Edgescape Evaluation Program (SEEP). Project partners include the cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Nigel, Laguna Woods, Lake Forest, Mission Viejo, Rancho Santa Margarita and San Juan Capistrano as well as the Metropolitan Water District of Southern California, the Department of Agriculture and ten south Orange County water districts. The project targets irrigation runoff by retrofitting existing development and documenting the conservation and runoff improvements. The Grant Application states that “Irrigation runoff contributes flow & pollutant loads to creeks and beaches that are 303(d) listed for bacteria indicators.” Furthermore, the grant application states that “Regional program managers agree that the reduction and/or elimination of irrigation-related urban flows and associated pollutant loads may be key to successful attainment of water quality and beneficial use goals as outlined in the San Diego Basin Plan and Bacteria TMDL over the long term.” This is reinforced in the project descriptions and objectives: “Elevated dry-weather storm drain flows, composed primarily in the South

> Orange County Region of landscape irrigation water wasted as runoff, carry pollutants that impair recreational use and aquatic habitats all along Southern California's urbanized coastline. Storm drain systems carry the wasted water, along with landscape derived pollutants such as bacteria, nutrients and pesticides, to local creeks and the ocean. Given the local Mediterranean climate, excessive perennial dry season stream flows are an unnatural hydrologic pattern, causing species shifts in local riparian communities and warm, unseasonal contaminated freshwater plumes in the nearshore marine environment." The basis of this grant project, conducted by the Permittees and additional water use partners, is that over-irrigation (landscape irrigation, irrigation water and lawn watering) into the MS4 is a source and conveyance of pollutants. In addition, they indicate that the alteration of natural flows is impacting the Beneficial Uses of waters of the State.[266]

The claimants contend that by removing landscape irrigation, irrigation water, and lawn watering from the list of exempted non-stormwater discharges, the Regional Board is now requiring that "each Copermittee take steps to 'prohibit' all discharges resulting from landscape irrigation, irrigation water and lawn watering of any type or quantity, from entering the Copermittees MS4, e.g. from entering the public streets, gutters, or any portion of the storm water conveyance system."[267] The claimants contend that the following activities are now mandated by the state and require reimbursement: "create new public education and outreach materials; extend significant staff time to amend each Copermittee's Water Quality Ordinance; expend significant staff time to track and respond to calls of over-irrigation, enforce, and monitor compliance; and improve, monitor and aggressively maintain irrigation systems and landscaping through each Copermittee's jurisdiction."[268]

The claimants further assert that even if the copermittees previously identified a specific category or subcategory of non-stormwater discharges as a potential source of pollutants in one discrete geographical area, this does not mean that federal law requires the Regional Board to prohibit that entire category of non-stormwater discharges throughout all of the copermittees' jurisdictions. The discharges just needed to be "addressed." The claimants state the following:

> The Regional Board provides no legal justification or authority for requiring the Copermittee to impose such outright prohibition on all such irrigation waters.

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[266] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2410-2412 (Order No. R9-2009-0002, Fact Sheet).

[267] Exhibit A, Test Claim, filed June 30, 2011, page 47.

[268] Exhibit A, Test Claim, filed June 30, 2011, page 47; Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, page 7.

Neither the 2009 Permit, nor any of its supporting documents, identify any federal regulations as authority for prohibiting all such discharges as required in Section B.2 of the 2009 Permit. As such, the removal of these three irrigation water discharges from the list of exempted discharges is not something required anywhere by federal law.

40 C.F.R. 122.26(d)(2)(iv)(B)(l) provides that "the following categories of non-storm water discharges or flows *shall be addressed* where such discharges are identified by the *municipality* as sources of pollutants to waters of the United States: . . . landscape irrigation . . . irrigation water . . . [and] lawn watering." (Emphasis added). This section of the federal regulations thus provides that a municipality must *"address"* such categories of non-storm water discharges, but not that it must "prohibit" all such discharges regardless of the quality or quantity of the irrigation water. Further evidence of the fact that federal law does not require an outright prohibition of all such waters from entering the MS4 is the 2002 Permit which plainly did not require that such discharges "prohibited," and there has been no subsequent change in the CWA or the federal regulations in this regard since then.

Moreover, 40 C.F.R. 122.26(d)(2)(iv)(B)(l) only requires that the municipality "address" such discharges specifically where the municipality first identifies these discharges as specific sources of pollutants. Nowhere in this C.F.R. section does it state that any such discharges must be prohibited. Even if the Copermittees previously identified a specific category or subcategory of non-storm water discharges as a potential source of pollutants in one discrete geographical area, this does not mean that federal law requires the Regional Board to prohibit that entire category of non-storm water discharges throughout all of the Copermittees' jurisdictions. In this case, outside of possibly revising their respective municipal or county codes to provide legal authority as believed needed by the Copermittees to ensure compliance with this new 2009 Permit requirement, none of the Copermittees have determined that prohibiting "landscape irrigation,"-"irrigation water" in general or "lawn watering" was or is necessary as a means of addressing the alleged pollutants in such irrigation waters.[269]

The claimants also contend that the preamble to the federal regulations (55 Fed.Reg. at 47995) “makes clear that the Copermittees’ illicit discharge program need not prevent discharges of the ‘exempt’ categories into the MS4 ‘unless such discharges are specifically identified on a case-by-case basis as needing to be addressed.’”[270] Thus, claimants agree that “individual discharges within exempt categories must be addressed

[269] Exhibit A, Test Claim, filed June 30, 2011, pages 45-46; see also, Exhibit J, Claimants’ Comments on the Draft Proposed Decision, filed August 25, 2023, pages 7-8.

[270] Exhibit A, Test Claim, filed June 30, 2011, page 46.

when the particular discharge is a source of pollutants to waters of the U.S.," but assert that "federal regulations do not allow for removing entire categories of exempt non-storm water discharges."[271]

In comments on the Draft Proposed Decision, the claimants argue that the federal regulations give claimants the discretion on how to address non-stormwater discharges when those discharges have been identified as a source of pollution, and that federal law does not require the "wholesale prohibition" of those discharges, as follows:

> Here, when the Regional Board ordered the wholesale prohibition of landscape irrigation, irrigation water and lawn water from being discharged into the MS4, the Regional Board usurped the Claimants' ability to address these discharges through less-costly means such as public education and information or on a case-by-case basis when a site discharge is determined to be a source of pollution. Where a state agency usurps the discretion of a local government agency and mandates specific requirements, a state mandate is created. [Fn. omitted.][272]

The Water Boards contend that removing the previously exempted categories of discharges is required by federal law once a municipality has identified the discharge as a source of pollution. "Where, as here, a municipality has identified previously exempt categories of non-storm water discharge as sources of pollutants, the categories represent illicit discharges and must be prohibited in compliance with the CWA."[273] The Water Boards also cite the permit's Fact Sheet (quoted above) to argue that the claimants disregard the factual information in the record, and that the Regional Board considered the municipalities' Drainage Area Reconnaissance and Urban Characterization study, the 2006-2007 Watershed Action Plan Annual Report, and the grant application, which identified these categories as contributors of pollutants into the MS4, when deciding to remove the exemption. The Water Boards further state that

> The record also suggests pollution in irrigation waters is ubiquitous and would be extremely difficult to isolate and address on a site by site basis. Therefore, requiring Claimants to address only individual sites, rather than the categories of irrigation waters, as they suggest, would not satisfy the federal requirements.[274]

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[271] Exhibit A, Test Claim, filed June 30, 2011, page 46.

[272] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, page 8.

[273] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 22 [citing to CWA Section 402(p)(3)(B)(ii)].

[274] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 23.

The Commission finds that Section B.2. of the test claim permit does not mandate a new program or higher level of service.

First, the CWA distinguishes the requirement to effectively prohibit non-stormwater discharges from the requirement to implement pollution controls to the maximum extent practicable; both are separately required: "Permits for discharges from municipal storm sewers ... (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; *and* (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable...."[275] Federal regulations that implement and interpret the CWA expressly state that the program to detect and remove illicit discharges into the MS4 shall address "all types of illicit discharges," including the following "*categories*" of non-stormwater discharges "*where such discharges are identified by the municipality as sources of pollutants to waters of the United States*: . . ., "landscape irrigation," . . ., "irrigation water," . . . [and] "lawn watering."[276] The preamble to the Federal regulations refers to "components of discharges" that are not prohibited from entering the MS4 *unless* "such discharges are specifically identified on a case-by-case basis as needing to be addressed":

> … in general, municipalities will not be held responsible for prohibiting some specific components of discharges or flows listed below through their municipal separate storm sewer system, even though their such components may be considered non-storm water discharges, unless such discharges are specifically identified on a case-by-case basis as needing to be addressed.[277]

The preamble to the regulations also states that it is unlikely Congress intended to require municipalities to effectively prohibit "seemingly innocent flows" and refers to the "classes" of non-stormwater discharges that are not prohibited in all cases, but are allowed to enter the MS4 when they do not pose significant environmental problems:

> Several commenters suggested that either the definition of "storm water" should include some additional classes of nonprecipitation sources, or that municipalities should not be held responsible for "effectively prohibiting" some classes of nonstorm water discharges into their municipal storm sewers. The various types of discharges addressed by these comments include . . . landscape irrigation, . . . irrigation waters, . . . lawn watering . . . . Most of these comments were made with regard to the concern that these were commonly occurring discharges which did not pose significant environmental problems.

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[275] United States Code, title 33, section 1342(P)(3)(B), emphasis added.

[276] Code of Federal Regulations, title 40, section 122.26(d)(2)(IV)(B)(1), emphasis added.

[277] Exhibit K (1), 55 Federal Register 47995, November 16, 1990.

> EPA disagrees that the above described flows will not pose, in every case, significant environmental problems. At the same time, it is unlikely Congress intended to require municipalities to effectively prohibit . . . seemingly innocent flows that are characteristic of human existence in urban environments and which discharge to municipal separate storm sewers. It should be noted that the legislative history is essentially silent on this point. Accordingly, EPA is clarifying that section 402(p)(3)(B) of the CWA (which requires permits for municipal separate storm sewers to "effectively" prohibit non-storm water discharges) does not require permits for municipalities to prohibit certain discharges or flows of nonstorm water to waters of the United States through municipal separate storm sewers in all cases.[278]

Accordingly, under federal law, when one of the specified categories of non-stormwater discharges, including landscape irrigation, irrigation waters, and lawn watering, is not a source of pollution, the discharge is exempt from the prohibition and is allowed to enter the MS4. The permittees are still required to monitor dry weather discharges during the term of the permit and if an exempt category of discharge is determined to be a source of pollution to the waters of the United States, the permittees are required to address the discharge on a case-by-case basis.[279] Under these circumstances, both the prior permit and the test claim permit provide that the permittee may either prohibit the category of the discharge or ensure that appropriate controls or BMPs are implemented to the MEP to prevent the discharge from entering the MS4.[280]

However, when a previously exempted category of discharge is identified by the permittee as a source of pollution, then the Regional Board is required by federal law when approving a jurisdiction-wide NPDES permit to effectively prohibit that category of non-stormwater discharge from entering the MS4: "Permits for discharges from municipal storm sewers ... shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers. . . .", and "the program to detect and remove illicit discharges into the MS4 shall address "all types of illicit discharges," including the following "*categories*" of non-stormwater discharges "*where such discharges are identified by the municipality as sources of pollutants to waters of the United States*: . . ., "landscape irrigation," . . ., "irrigation water," . . . [and] "lawn

[278] Exhibit K (2), 55 Federal Register 48306-48037, November 16, 1990, page 2.

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

[280] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2135, 3439 (Order No. R9-2002-0001, sections B.3., B.5.; Order No. R9-2009-0002, section B.2.).

watering."[281] The prior permit clearly explained federal law as follows: "Pursuant to 40 CFR 122.26(d)(2)(iv)(B)(1), the following categories of non-storm water discharges need only be prohibited from entering an MS4 if such categories of discharges are identified by the Copermittee as a significant source of pollutants to waters of the United States."[282] Thus, when adopting a new permit, federal law does not give the Water Boards discretion to allow permittees to address these non-stormwater discharges on a case-by-case basis when those discharges have been identified as a source of pollution, as argued by the claimants. Instead, the entire category is now an illicit discharge prohibited from entering the MS4.

In this case, the record shows that all of the copermittees identified landscape irrigation, irrigation water, and lawn watering as sources of non-stormwater pollution before the test claim permit was adopted. The grant application and final report submitted in September 2008 by the Municipal Water District of Orange County and ten of the thirteen copermittees (the Cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Laguna Woods Village, Lake Forest, Rancho Santa Margarita, Mission Viejo, and San Juan Capistrano), to the State Board, for the SmarTimer/Edgescape Evaluation Program (SEEP; a program which was in part intended to reduce dry weather runoff and pollutant loads for constituents of concern),[283] shows that irrigation runoff contributes pollutant loads to creeks and beaches that are 303(d) listed for bacteria indicators. The report states the following:

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[281] United States Code, title 33, section 1342(P)(3)(B)(ii); Code of Federal Regulations, title 40, section 122.26(d)(2)(IV)(B)(1). (Emphasis added.)

[282] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3438 (Order No. R9-2002-0001, section B.2.)

[283] Exhibit K (37), SEEP Final Report Submitted by Municipal Water District of Orange County, page 5 (AR, Volume IV, for Order No. R9-2009-0002, which describes the purpose of the project as follows: "The purpose of the SmarTimer/Edgescape Evaluation Project (SEEP) was to retrofit specific groups of "structural" landscape Best Management Practices (BMPs) to improve water use efficiency of landscape irrigation across a set of residential and non-residential sub-watershed assessment areas in southern Orange County, California; and to evaluate the BMPs' effectiveness in reducing water consumption, dry weather runoff and pollutant loads for constituents of concern. "Structural" landscape BMPs, for the purpose of this project, include weather-based irrigation controllers (aka "SmarTimers"), "Edgescaping" where existing irrigated lawn area along the edge of a public sidewalk, street curb, driveway and/or private walkway is replaced with lower impact landscaping and permeable ground covering, and other irrigation enhancements & adjustments to further improve water efficiency and reduce runoff by eliminating overspray onto pavements and improve distribution uniformity. A by-product of the SEEP was the ability to determine the effectiveness of

In recent years, weather-based irrigation controllers (AKA SmarTimers) that automatically control the frequency and duration of watering based on actual need (typically calculated as a function of the current evapotranspiration rate, precipitation, humidity, wind, local soil and slope conditions, and/or plant types) have become available on the market. Other irrigation products that improve water distribution uniformity and efficiency, such as low-precipitation rate 'rotating' sprinkler nozzles and drip irrigation, are also available. Local water agencies are making continuing efforts, with limited success so far, to promote these new SmarTimer and other high-efficiency irrigation products, as well as encouraging the use of California-friendly or native plants in lieu of water-thirsty lawn grasses to reduce consumption and regional dependence on imported water supplies. At the same time, local cities have been conducting public education under their National Pollutant Discharge Elimination System (NPDES) programs to encourage Best Management Practices (BMPs) such as optimizing landscape water and fertilizer application rates and keeping irrigation systems properly adjusted. For most cities, however, 'non-structural' landscape maintenance BMP compliance is difficult to enforce consistently; and requirements for 'structural' landscape design BMPs cannot typically be legally imposed on 'grandfathered' pre-existing developments.

Storm drain systems carry any wasted water as runoff, along with landscape-derived pollutants such as bacteria, nutrients and pesticides, to local creeks and the ocean and beaches. South Orange County's creeks are designated in the San Diego Region Basin Plan for beneficial use for REC-1 (contact) and REC-2 (non-contact) recreation, wildlife and warm water aquatic habitat, and industrial/agricultural use. South Orange County's coastal waters are designated with a wide range of beneficial uses, including: industrial water supply, navigation, contact and noncontact recreation, commercial and sport fishing, preservation of Areas of Special Biological Significance (ASBS), wildlife, rare and endangered species, mariculture, aquaculture, fish migration, fish spawning, and shellfish harvesting, per the 2005 California Ocean Plan.

Given the local Mediterranean climate, excessive perennial dry-season stream flows driven by irrigation runoff are an unnatural hydrologic pattern causing species shifts in local riparian communities and warm, unseasonal contaminated freshwater plumes in the near-shore marine environment. All the major watersheds in the SEEP study area drain to ocean beaches that are 303(d)-listed by the Environmental Protection Agency as impaired

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residential rebate outreach programs. Costs of implementation of selected BMPs in relation to benefits realized in the storm drain system were also analyzed."

> for recreational use due to elevated fecal indicator bacteria. A Total Maximum Daily Load (TMDL) for fecal bacteria has been approved locally for all the impaired waters; the Bacteria Load Reduction Planning process is expected to occur in 2008-2009. Additionally, two of the runoff-receiving creeks are listed as impaired for nutrients and toxicity, which can be expected to impact their beneficial use for aquatic habitat.
>
> The purpose of the SmarTimer/Edgescape Evaluation Project (SEEP) was to implement three (3) specific groups of BMPs to improve water use efficiency of landscape irrigation across a set of residential and non-residential sub-watershed assessment areas, and to evaluate the BMPs' effectiveness in reducing water usage, dry weather runoff and pollutant loads for constituents of concern.[284]

The claimants' Annual Progress Report for 2006-2007, dated November 15, 2007, recognizes that high levels of orthophosphate concentration are most likely caused by fertilizer runoff or reclaimed water runoff:

> For example, three drains in the the [sic] Aliso Creek watershed (AVJ01P26, AVJ01P27, and AVJ01P28) all discharge to the Creek within a mile of each other. All showed consecutive exceedances of the reactive orthophosphate tolerance interval bound. These high levels of orthophosphate concentration are most likely the result of fertilizer runoff or reclaimed water runoff.[285]

The claimants' Watershed Action Plan Strategy contained in the 2006-2007 Watershed Action Plan Annual Report, dated November 15, 2007, states that landscape irrigation is a major contributor to dry weather flow, which transports bacteria and other 303(d) constituents of concern:

> Dry weather flow is the transport medium for bacteria and other 303(d) constituents of concern. Moist conditions in the MS4 contribute to high seasonal bacteria propagation in-pipe during warm weather. Landscape irrigation is a major contributor to dry weather flow, both as surface runoff due to over-irrigation and overspray onto pavements; and as subsurface seepage that finds its way into the MS4.[286]

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[284] Exhibit K (37), SEEP Final Report Submitted by Municipal Water District of Orange County, pages 20-21 (AR, Volume IV, for Order No. R9-2009-0002), emphasis added.

[285] Exhibit K (7), 2006-07 Unified Annual Progress Report, Program Effectiveness Assessment, Section C-11, page 32 (AR, Volume IV, for Order No. R9-2009-0002).

[286] Exhibit K (56), Watershed Action Plan, 2006-07 Annual Report, Dana Point Watershed (Exhibit 14), page 60 (AR, Volume IV, for Order No. R0-2009-0002, Watershed Action Plan Strategy Table [Fecal Indicator Bacteria] Attachment D-1-7.).

And, in August 2007, the County of Orange conducted a limited drainage area reconnaissance and urban runoff characterization in the contributory area within the Aliso Creek watershed to identify significant sources of runoff and potential pollutants, with special interest in fecal indicator bacteria and trash and debris.[287] According to the County's report, dated January 2008, the County found several incidences of runoff generation from irrigation overspray and drainage, the levels of which "were well beyond reasonable or acceptable levels."[288] The County's analysis concluded that irrigation overspray and drainage constitutes a very substantial source and conveyance mechanism for fecal indicator bacteria into Aliso Creek, as follows:

> High concentrations of all three forms of fecal indicator bacteria were measured in virtually all samples. Concentrations were generally higher than historical daytime measurements at the Munger Drain outfall, and much higher than non-contact recreation (REC-2) water quality objectives (e.g. fecal coliform of 2,000 - 4,000 CPU/100 ml) for inland receiving waters. Analytical data strongly indicates that irrigation overspray and drainage constitutes a very substantial source and conveyance mechanism for fecal indicator bacteria into Aliso Creek, and suggests that reduction measures for this source of urban runoff could provide meaningful reductions in bacteria loading to the stream.[289]

Accordingly, with this information, the Regional Board had no discretion, but was required by federal law to remove the exemption and require the claimants to effectively prohibit non-stormwater discharges from landscape irrigation, irrigation water, and lawn watering from entering the MS4. Reimbursement under article XIII B, section 6 of the California Constitution is not required if the statute or executive order imposes a requirement that is expressly mandated by federal law.[290]

Moreover, the loss of a conditional exemption from the federal law requirement to prohibit landscape irrigation, irrigation water, and lawn watering does not constitute a

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[287] Exhibit K (15), Drainage Area Reconnaissance and Urban Runoff Characterization, County of Orange, January 2008 (AR, Volume IV, for Order No. R9-2009-0002).

[288] Exhibit K (15), Drainage Area Reconnaissance and Urban Runoff Characterization, County of Orange, January 2008, page 7 (AR, Volume IV, for Order No. R9-2009-0002).

[289] Exhibit K (15), Drainage Area Reconnaissance and Urban Runoff Characterization, County of Orange, January 2008, page 9 (AR, Volume IV, for Order No. R9-2009-0002).

[290] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 71; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1592; *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 816; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 879-880; *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763; Government Code section 17556(c).

new program or higher level of service. The Supreme Court has clarified that "simply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting 'service to the public' under article XIII B, section 6, and Government Code section 17514."[291] Rather, the new program or higher level of service must "increase the actual level or quality of governmental services provided."[292] In this case, federal law has long required that all dischargers, including private industrial dischargers and local governments, effectively prohibit "all types" of non-stormwater discharges identified as sources of pollutants to waters of the United States.[293] The requirements associated with effectively prohibiting landscape irrigation, irrigation water, and lawn watering, which are known sources of non-stormwater pollutants, do not change or increase the level or quality of service already required by law to be provided to the public; they simply make the claimants comply with existing federal law to prohibit non-stormwater discharges.

Finally, the analysis here is not at all like the arguments made by the State and rejected by the court in *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, as asserted by the claimants.[294] There, the State argued that no stormwater permit would ever impose a new program or higher level of service because permit conditions are not imposed to provide a service to the public, but are imposed to enforce a general ban on pollution and that permit conditions are not unique to government since both public and private parties discharge pollutants and are required to obtain a permit to do so.[295] The court disagreed that reimbursement for *all* stormwater permit conditions would be denied under article XIII B, section 6 and held, as several prior courts have done, that to determine "whether a program imposed by the permit is new, we compare the legal requirements imposed by the new permit with those in effect before the new permit became effective. This is so even though the

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[291] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877. (Emphasis in original.)

[292] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877.

[293] United States Code, title 33, section 1342(p)(3)(B)(ii) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1). In addition, MS4 dischargers must demonstrate adequate legal authority, through ordinance, permit, or other means, to prohibit illicit discharges from others to the MS4. Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(B).

[294] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, page 8.

[295] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 557-579.

conditions were designed to satisfy the same standard of performance."[296] Here, federal law has long required that illicit, non-stormwater discharged be prohibited.

Accordingly, the Commission finds that Section B.2. of the test claim permit does not mandate a new program or higher level of service.

2. Sections C. and F.4.d. and e. of the Test Claim Permit, Which Address Dry Weather Non-Stormwater Action Levels (NALs), Do Not Mandate a New Program or Higher Level of Service Because the Requirements Are Not New, But Simply Implement Existing Federal Law.

The claimants plead sections C. and F.4.d. and e. of the test claim permit,[297] which address the dry weather, non-stormwater action levels (NALs) for various pollutants. These sections generally require monitoring and field screening for the pollutants as specified in the permit, and if a pollutant is shown to exceed the NAL, which is based on existing water quality standards, then the claimants are required to investigate, identify and remove the source of the illicit, non-stormwater discharge.[298]

As explained below, the Commission finds that sections C., and F.4.d., and e., do not mandate a new program or higher level of service. Instead, the test claim permit simply identifies action levels for each pollutant consistent with existing water quality standards that, if detected in dry weather monitoring and field screening to be in excess of the action level, triggers the investigation, identification of the discharge, removal, and reporting activities required by existing federal law. The claimants do not violate the permit by exceeding the action level, as implied by the claimants; rather a violation occurs only if a permittee fails to timely implement the required actions following an exceedance of an action level.[299] In this sense, the action levels established in the test claim permit function the same as the prior permit, which required the claimants to identify criteria to determine if significant sources of pollutants were present in dry

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[296] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579.

[297] Exhibit A, Test Claim, filed June 30, 2011, pages 36 ("New requirements involving implementation of non-storm water dry weather numeric action levels ["NAL"] as set forth in Section C of the 2009 Permit."); and page 59 ("The NAL-Triggered Mandates are contained in Section C [pages 21-24] and Section F.4(d) and (e) [pages 70-71] of the 2009 Permit.").

[298] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2137-2140, 2186-2187 (Order No. R9-2009-0002, sections C. and F.4.d. and e.).

[299] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2138 (Order No. R9-2009-0002, section C.3.).

weather non-stormwater discharges consistent with water quality objectives.[300] Under both permits, the action levels or criteria are intended to determine the presence of an illicit discharge, which then triggers the federal requirements to investigate, identify, and remove the illicit discharge, and report the findings to the Regional Board.

a. Background

i. Federal law requires permittees to effectively prohibit non-stormwater discharges into the storm sewers by implementing a program to detect and remove illicit discharges.

To achieve water quality standards, federal law requires that permits for discharges from MS4s "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers," unless those discharges are conditionally exempted from this prohibition.[301] According to a fact sheet issued by EPA, illicit non-stormwater discharges may contribute to high levels of pollutants, including heavy metals, toxics, oil and grease, solvents, nutrients, viruses, and bacteria to receiving waterbodies:

> Illicit discharges enter the MS4 system through either direct connections (e.g., wastewater piping either mistakenly or deliberately connected to the storm drains) or indirect connections (e.g., infiltration into the MS4 from cracked sanitary systems, spills collected by drain outlets, or paint or used oil dumped directly into the drain). The result is untreated discharges that contribute high levels of pollutants, including heavy metals, toxics, oil and grease, solvents, nutrients, viruses, and bacteria to receiving waterbodies. Pollutant levels from these illicit discharges have been shown in EPA studies to be high enough to significantly degrade receiving water quality and threaten aquatic, wildlife, and human health.[302]

Examples of illicit non-stormwater discharges include sanitary wastewater, effluent from septic tanks, car wash wastewater, improper oil disposal, radiator flushing disposal, laundry wastewaters, spills from roadway accidents, and improper disposal of automobile and household toxics.[303]

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[300] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3466, 3510 (Order No. R9-2002-0001, section F.5.c.; sections E-3. and E.4.d.(4) of Attachment E.)

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

[302] Exhibit K (40), Stormwater Phase II Final Rule, Illicit Discharge Detection and Elimination, USEPA Fact Sheet 2.5.

[303] Exhibit K (40), Stormwater Phase II Final Rule, Illicit Discharge Detection and Elimination, USEPA Fact Sheet 2.5.

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

- A program, including inspections, to implement and enforce an ordinance to prevent illicit non-stormwater discharges to the MS4.[304]
- Procedures to conduct on-going field screening activities during the life of the permit, including areas or locations to be evaluated.[305]
- Procedures to investigate portions of the MS4 that, based on field screening or other information, indicate a reasonable potential for containing illicit discharges or other sources of non-storm water pollution.[306]
- Procedures to prevent, contain, and respond to spills that may discharge into the MS4;
- A program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from MS4s;
- Educational activities, public information activities, and other activities to facilitate the proper management and disposal of oil and toxic materials; and
- Controls to limit infiltration of seepage from municipal sanitary sewers to MS4s where necessary.[307]

In addition, to meet water quality standards federal law also requires dischargers to monitor compliance with the effluent limitations identified in an NPDES permit, and report monitoring results at least once per year, or within 24 hours for any noncompliance which may endanger health or the environment.[308] An NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance.[309]

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

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

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

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

[308] Code of Federal Regulations, title 40, sections 122.41 (conditions applicable to all permits, including monitoring and reporting requirements); section 122.44(i) (monitoring requirements to ensure compliance with permit limitations); section 122.48 (requirements for recording and reporting monitoring results); and Part 127 (electronic reporting).

[309] Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(F); see also *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1209.

Federal law also requires that NPDES permits include specific requirements for the proper collection, management, and electronic reporting of data about the NPDES program to ensure that there is timely, complete, accurate, and nationally-consistent set of data about the NPDES program.[310] All NPDES permits must also specify requirements for recording and reporting monitoring results.[311]

If a permittee fails to comply with these federal requirements, or otherwise violates the conditions in an NPDES permit, it may be subject to state and federal enforcement actions and private citizen lawsuits for injunctive relief and civil penalties.[312]

ii. The prior permit required the permittees to develop or revise a dry weather monitoring program to include specified monitoring, investigation, inspection, follow-up and reporting requirements; and if an exceedance was detected, the permittee was required to immediately eliminate all detected illicit discharges, discharge sources, and connections.

Before the adoption of the test claim permit, the claimants were subject to Order R9-2002-0001 (the prior permit).[313] The prior permit recognized that:

> Urban runoff discharges from MS4s are a leading cause of receiving water quality impairment in the San Diego Region and throughout the United States. As runoff flows over urban areas, it picks up harmful pollutants such as pathogens, sediment (resulting from human activities), fertilizers, pesticides, heavy metals, and petroleum products. These pollutants often become dissolved or suspended in urban runoff and are conveyed and discharged to receiving waters, such as streams, lakes, lagoons, bays, and the ocean without treatment. Once in receiving waters, these pollutants harm aquatic life primarily through toxicity and habitat degradation. Furthermore, the pollutants can enter the food chain and may eventually enter the tissues of fish and humans.[314]

The prior permit further recognized that the "most common categories of pollutants in urban runoff include total suspended solids, sediment (due to anthropogenic activities); pathogens (e.g., bacteria, viruses, protozoa); heavy metals (e.g., copper, lead, zinc and cadmium); petroleum products and polynuclear aromatic hydrocarbons; synthetic

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[310] Code of Federal Regulations, title 40, sections 122.44 and 122.48, and part 127.

[311] Code of Federal Regulations, title 40, section 122.48.

[312] United States Code, title 33, sections 1319, 1342(b)(7), 1365(a).

[313] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3431 et seq. (Order No. R9-2002-0001).

[314] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3431 (Order No. R9-2002-0001, Finding 3.).

organics (e.g., pesticides, herbicides, and PCBs); nutrients (e.g., nitrogen and phosphorus fertilizers), oxygen-demanding substances (decaying vegetation, animal waste), and trash."[315]

The prior permit also contained the following receiving water limitations and discharge prohibitions:

- Discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance (as defined in CWC § 13050), in waters of the state are prohibited.
- Discharges from MS4s that cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater are prohibited.
- Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses) are prohibited.
- Each Copermittee shall effectively prohibit all types of non-stormwater discharges into its MS4 unless such discharges are either authorized by a separated NPDES permit; or not prohibited.[316]

Section B.5. of the prior permit stated the following:

> Each Copermittee shall examine all dry weather monitoring results collected in accordance with section F.5. and Attachment E of this Order to identify water quality problems which may be the result of any non-prohibited discharge category(ies) identified above in Non-Storm Water Discharges to MS4s Prohibition B.2. Follow-up investigations shall be conducted as necessary to identify and control any non-prohibited discharge category(ies) listed above.[317]

Section F.5. of the prior permit required each copermittee to develop and implement an Illicit Discharge and Elimination Component, which shall include a dry weather monitoring program containing measures to actively seek and eliminate illicit discharges and connections to the MS4.[318] The permit required dry weather monitoring (which included inspections, field screening, and analytical monitoring of MS4 outfalls to detect

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[315] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3433 (Order No. R9-2002-0001, Finding 7.).

[316] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3438-3439 (Order No. R9-2002-0001, sections A.1., A.2., B.1., and C.1.).

[317] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3438 (Order No. R9-2002-0001, section B.1.).

[318] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3439, 3465-3467 (Order No. R9-2002-0001, sections B.5., F.5.).

illicit discharges or connections in accordance with Attachment E.); investigation, inspection, and follow-up activities to identify sources of potential illicit discharges or connections; the timely elimination of the illicit discharge and connections; and a reporting requirement.[319] Attachment E. of the prior permit is entitled the "Dry Weather Monitoring Program Specifications – Urban Runoff" and contains the specifications for the dry weather monitoring program.[320] Attachment E. states that the dry weather program shall be designed and implemented with objectives to assess compliance with the permit, detect and eliminate illicit discharges and illegal connections to the MS4, and characterize urban runoff within the MS4 system with respect to water quality constituents that may cause or contribute to exceedances of receiving water quality objectives when discharged to receiving waters.[321]

The requirements of the dry weather monitoring program are stated in section F.5. and Attachment E.4. of the prior permit, and required the monitoring of the following constituents: total dissolved solids, turbidity, pH, reactive phosphorous, nitrate nitrogen, ammonia nitrogen, phenol, and surfactants (MBAS); total hardness, oil and grease, diazinon and chlorpyrifos, cadmium, copper, lead, zinc, enterococcus bacteria, total coliform bacteria, and fecal coliform bacteria.[322] The dry weather monitoring program requirements are summarized as follows:

1. Dry weather monitoring requirements:
    a. Develop MS4 map: Develop or obtain an up-to-date labeled map of the entire MS4 system and the corresponding drainage watersheds within the permittee's jurisdiction. The use of GIS is "highly recommended, but not required." The accuracy of the MS4 map shall be confirmed and updated at least annually during monitoring activities.[323]
    b. Monitoring stations:
        1) Select at least one dry weather monitoring station at each major drainage area within the copermittee's jurisdiction (either major outfalls or other

[319] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3465-3467, 3508-3510 (Order No. R9-2002-0001, section F.5., and Attachment E.).

[320] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3508-3510 (Order No. R9-2002-0001, Attachment E.).

[321] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3508 (Order No. R9-2002-0001, Attachment E.1.).

[322] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3509-3510 (Order No. R9-2002-0001, Attachment E.4.d.1.d. and e.).

[323] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3508 (Order No. R9-2002-0001, Attachment E.4.a.).

outfall points such as manholes) to adequately cover the entire MS4 system.

2) Describe the rationale used to determine the number and locations of the stations necessary to comply with the order.

3) Clearly identify each dry weather monitoring station on the MS4 map as either a separate GIS layer or a map overlay.[324]

c. Sampling frequency:

1) Dry weather analytical and field screening monitoring shall be conducted at each identified station at least twice between May 1st and September 30th of each year, or as more frequently as the Copermittee determines is necessary to comply with the order.

2) Develop or revise written procedures that describe the criteria and process used to determine the number and frequency of inspections, field screening, and analytical monitoring to be performed.

3) Annually report in detail, in the Jurisdictional Urban Runoff Management Program [JRUMP] Report, any changes in the dry weather monitoring inspection or sampling frequency.[325]

d. Develop or revise written dry weather analytical monitoring procedures, which shall include field observations, field screening monitoring, and analytical monitoring, and conduct such procedures as follows:

1) The program shall be designed to emphasize frequent, geographically widespread inspections, monitoring, and follow up investigations to detect illicit discharges and illegal connections. At a minimum, the procedures shall incorporate the following guidelines and criteria:

i. At each site inspected or sampled, record general information, such as time since last rain, quantity of last rain, site descriptions (i.e., conveyance type, dominant watershed land uses), flow estimation (i.e., width of water surface, approximate depth of water, approximate flow velocity, flow rate), and visual observations (e.g., odor, color, clarity, floatables, deposits/stains, vegetation condition, structural condition, and biology);

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[324] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3466, 3509 (Order No. R9-2002-0001, section F.5.b., Attachment E.4.b.).

[325] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3509 (Order No. R9-2002-0001, Attachment E.4.c.).

ii. If flow or ponded runoff is observed at a station and there has been 72 hours of dry weather, make observations and collect at least one set of grab samples as follows:

- At a minimum, conduct field screening analysis of the following constituents: specific conductance (calculate estimated total dissolved solids), turbidity, pH, reactive phosphorous, nitrate nitrogen, ammonia nitrogen, phenol, and surfactants (MBAS).
- At a minimum, collect samples for analytical laboratory analysis of the following constituents: total hardness, oil and grease, diazinon and chlorpyrifos, cadmium, copper, lead, zinc, enterococcus bacteria, total coliform bacteria, and fecal coliform bacteria.

2) If the station is dry, make and record all applicable observations and select another station from the list of alternate stations for monitoring. Monitoring stations identified to exceed dry weather monitoring criteria for any constituents shall continue to be screened in subsequent years.[326]

2. Investigation, Inspection, and Follow-up:

a. Each Copermittee shall establish procedures and criteria for source identification follow-up investigations in the event of any exceedance of dry weather analytical and field screening monitoring results.

b. Each Copermittee shall investigate and inspect any portion of the MS4 that, based on dry weather monitoring results or other appropriate information, indicates a reasonable potential for illicit discharges, illicit connections, or other sources of non-stormwater (including non-prohibited discharges).[327]

3. Elimination of Illicit Discharges and Connections:

a. Each Copermittee's dry weather monitoring program shall include procedures to eliminate detected illicit discharges and connections.

b. Each Copermittee shall eliminate all detected illicit discharges, discharge sources, and connections immediately.[328]

4. Summarize and Report Dry Weather Monitoring Results:

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[326] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3509-3510 (Order No. R9-2002-0001, Attachment E.4.d.).

[327] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3466, 3510 (Order No. R9-2002-0001, section F.5.c., Attachment E.4.d.4.).

[328] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3466, 3510 (Order No. R9-2002-0001, section F.5.d., Attachment E.4.d.5.).

a. Each Copermittee shall summarize and report inspection, field screening, and analytical monitoring results, in a tabular and graphical form.

b. Each Copermittee shall also report all follow up and elimination activities for potential illicit discharges and connections during the year.

c. The Principal Permittee shall submit to the Regional Board the individual dry weather monitoring reports as part of the unified Jurisdictional URMP annual report.[329]

The claimants' Dry Weather Monitoring Program, developed pursuant to Order R9-2002-0001, was summarized in their Drainage Area Management Plan (DAMP), dated July 1, 2003.[330] The claimants' program consisted of three main elements: 1) a set of 30 randomly located stations in each watershed (Los Trancos, Laguna Canyone, Aliso Creek, Salt Creek, San Juan Creek, and Prima and Segunda Deshecha), sampled three times during the five-month dry season, intended to characterize the average area-wide conditions in urban runoff; 2) a set of 18 rotating targeted stations, sampled five times during the five-month dry season, intended to provide additional information about specific sites thought to have a high potential for contaminated runoff and to provide coverage of the entire MS4 system over the period of the permit term; and 3) a set of criteria that will trigger focused illicit discharge and illegal connection studies by the claimant when the monitoring data indicate the presence of a problem.[331] If flow or ponded runoff is observed at a site and there has been at least 72 hours of dry weather, a grab sample was required to be collected for an on-site analysis (field screening) of turbidity; pH, specific conductance, dissolved oxygen, water temperature; reactive phosphorus; nitrate nitrogen; ammonia nitrogen; phenol; surfactants; and total hardness. In addition, a grab sample was required to be collected for laboratory analysis for the following constituents: oil and gas; diazinon and chlorpyrifos; cadmium; copper; lead; zinc; fecal coliform bacteria; enterococcus bacteria; total coliform bacteria; total suspended solids; and total chlorine (not specified in the permit). If a designated site was dry (with no flow or ponded runoff), then all observations were recorded and

[329] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3439, 3510 (Order R9-2002-0001, section B.5., and Attachment E.5.).

[330] Exhibit K (5), 2003 Drainage Area Management Plan, Exhibit 11.II SD Dry Weather, https://ocerws.ocpublicworks.com/sites/ocpwocerws/files/import/data/files/9809.pdf (accessed on January 31, 2023).

[331] Exhibit K (5), 2003 Drainage Area Management Plan, Exhibit 11.II SD Dry Weather, https://ocerws.ocpublicworks.com/sites/ocpwocerws/files/import/data/files/9809.pdf (accessed on January 31, 2023), pages 1, 4.

sampling would be attempted at the alternate site for the watershed.[332] County monitoring staff used a global positioning system (GPS) unit to record the coordinates of each site on the first sampling event. These coordinates were then compared to those in the County's GIS system to verify the accuracy of the database and update it if necessary.[333]

The claimants' program also identified the following criteria to determine the presence of an illicit discharge and, thus, the need for a follow-up investigation at a site when:

- One or more constituents at a site "exceed[ed] the overall regional average by a substantial amount," or
- When a site "exhibit[ed] substantial changes in characteristics over time that could be indicative of worsening or improving conditions.[334]

To establish the criteria, tolerance intervals for each monitored pollutant at random sites were identified, which were applied to data from the entire region to determine whether a pollutant exceeded the overall regional average for the pollutant. Claimants also took data from all sites to establish site-specific control charts for each pollutant. The control charts were applied to data on a site by site basis to identify sites whose characteristics change substantially over time. Data that exceeded either the tolerance level or a control chart were confirmed with data from the next sampling event. If the second sample did not confirm the exceedance, then routine sampling would continue. If the exceedance was confirmed, then claimants evaluated the data by comparison to guidance levels and with professional judgment. Professional judgment was "based on knowledge of and past experience with past contamination patterns."[335] When the county identified a site that met the criteria for an exceedance or substantial change, it notified the appropriate city within 21 days that follow up illicit connection/discharge efforts should be initiated. If the monitoring program found extreme conditions that represent a clear and immediate risk to human health or receiving water quality, or that

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[332] Exhibit K (5), 2003 Drainage Area Management Plan, Exhibit 11.II SD Dry Weather, https://ocerws.ocpublicworks.com/sites/ocpwocerws/files/import/data/files/9809.pdf (accessed on January 31, 2023), page 4.

[333] Exhibit K (5), 2003 Drainage Area Management Plan, Exhibit 11.II SD Dry Weather, https://ocerws.ocpublicworks.com/sites/ocpwocerws/files/import/data/files/9809.pdf (accessed on January 31, 2023), page 9.

[334] Exhibit K (5), 2003 Drainage Area Management Plan, Exhibit 11.II SD Dry Weather, https://ocerws.ocpublicworks.com/sites/ocpwocerws/files/import/data/files/9809.pdf (accessed on January 31, 2023), page 11.

[335] Exhibit K (5), 2003 Drainage Area Management Plan, Exhibit 11.II SD Dry Weather, https://ocerws.ocpublicworks.com/sites/ocpwocerws/files/import/data/files/9809.pdf (accessed on January 31, 2023), page 15.

provided unambiguous evidence of a substantial upstream problem, then the county notified the relevant inspector for that city immediately. If the site extended into the neighboring jurisdiction, the county notified both the jurisdiction containing the site and the jurisdiction containing that upstream portion of the drainage network. The plan required the county to deliver monitoring data to the cities within 45 days of sampling.[336]

iii. Based on information in the claimants' application for renewal of the permit, which showed persistent violations of water quality standards, the tentative order (which was never adopted by the Regional Board) imposed numeric effluent limits on non-stormwater discharges.

In 2006, the claimants submitted a Report of Waste Discharge (ROWD), as required before the expiration of the 2002 permit, which discusses the 2002 Permit compliance activities, and includes a description of accomplishments, an assessment of program effectiveness, and a proposed management program for renewal of its NPDES permit. With respect to the dry weather monitoring program required by the prior permit, the claimants' ROWD states the following:

> The San Diego Dry Weather Monitoring Program has been conducted over 3 summers. Over this period there have been 585 site visits to 67 locations comprising 3 visits to the random sites and five visits to the targeted sites each season. Investigations, prompted by findings of elevated contaminant concentrations, were triggered on 18 occasions. These results show that approximately 25% of the 67 monitoring sites have exhibited evidence of contamination in dry weather flow at levels significantly above background levels.[337]

The ROWD further includes the claimants' proposal for the next NPDES permit was to require themselves to "[p]repare a defined expertise and competencies for Authorized Inspector positions and develop a training program to meet these requirements," as follows:

> The Permittees' program for responding to complaints regarding ID/IC is a long established element of the Program. The major efforts regarding this element over the period of the Third Term Permits relate to the Dry Weather Reconnaissance Program, the continued facilitation of public reporting of complaints, the designation and training of designated Authorized Inspectors, and the development of TASC. The incidence of complaints appears to have peaked in the 2003-04 reporting period and

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[336] Exhibit K (5), 2003 Drainage Area Management Plan, Exhibit 11.II SD Dry Weather, https://ocerws.ocpublicworks.com/sites/ocpwocerws/files/import/data/files/9809.pdf (accessed on January 31, 2023), page 13.

[337] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3022 (2006 ROWD, July 21, 2006, Section 10.3.1).

subsequently declined, which suggest a positive overall Program impact. Based primarily upon the interest of the Permittees and of RWQCB staff, the sole commitment arising out of the effectiveness assessment is for the development of defined experience and competencies for Authorized Inspector positions and development of a training program to meet these requirements.[338]

On October 20, 2006, the Regional Board provided written comments on the ROWD stating the following:

> [¶]
>
> 2. The ROWD lacks an evaluation of findings from local illegal discharge and illicit connection activities, and the DAMP lacks any proposed modifications for this section. Therefore, it is difficult to assess the effectiveness of the current requirements. Permittees must provide these assessments in order to make program modifications at the local level to this program element.
>
> 3. We are considering revisions to the dry-weather monitoring and response requirements. The Permittees should review the existing set of criteria that trigger focused illegal discharge and illicit connection studies. The criteria and responses should be evaluated to determine whether lowering the thresholds toward water quality objectives would likely result in increased elimination of illegal discharges. Furthermore, the Permittees should evaluate whether analytical results are providing useful information. We are interested in recommendations for improving usefulness of dry-weather monitoring data.[339]

The first draft of the test claim permit, Tentative Order R9-2007-0002, dated February 9, 2007, contains similar dry weather monitoring requirements to those in the prior permit.[340] However, the tentative order required that dry weather screening and analytical monitoring be conducted at each monitoring station at least three times between May 1st and September 30th of each year, instead of twice as required by the prior permit. It also specifically required that each copermittee develop and use numeric action level criteria for determining when to conduct investigations in response to water quality monitoring, which must include evaluation of the California Toxics Rule, U.S. EPA National Recommended Ambient Water Quality Criteria, the San Diego Basin

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[338] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3024 (2006 ROWD, July 21, 2006, Section 10.4).

[339] Exhibit K (32), Regional Board Comments on 2006 ROWD dated October 20, 2006, page 6 (AR, Volume 1, for Order R9-2009-0002).

[340] Exhibit K (43), Tentative Order No. R9-2007-0002, pages 63-64 (AR, Volume 1, for Order R9-2009-0002).

Plan, LC_{50} levels for toxicity to appropriate test organisms, and statistical evaluations of existing data from south Orange County. The tentative order also added specific timeframes for follow-up investigations when dry weather action levels are exceeded; added language requiring the copermittees to resolve each reported incident and to "take immediate action to eliminate all detected illicit discharges, illicit discharge sources, and illicit connections as soon as practicable after detection;" and modified the annual reporting requirements to clarify information required to evaluate compliance.[341] To support these changes, Finding C.7. of the Fact Sheet/Technical Report notes that water quality monitoring data show persistent violations of Basin Plan water quality objectives for urban run-off pollutants at monitoring stations, as follows:

> The Copermittees' water quality monitoring data submitted to date documents persistent violations of Basin Plan water quality objectives for various urban runoff-related pollutants (fecal coliform bacteria, total suspended solids, turbidity, metals, etc.) at various watershed monitoring stations. Persistent toxicity has also been observed at some watershed monitoring stations. In addition, bioassessment data indicates that the majority of urbanized receiving waters have Poor to Very Poor Index of Biotic Integrity ratings. In sum, the above findings indicate that urban runoff discharges are causing or contributing to water quality impairments, and are a leading cause of such impairments in Orange County.[342]

The Discussion of Finding C.7. further states the following:

> The Copermittees have produced data that demonstrates water quality objectives are frequently not met during dry and wet weather. The 2006 Report of Waste Discharge and the 2005-06 Annual Reports document that receiving water monitoring stations often fail to meet water quality objectives established in the Basin Plan. Similar conclusions are found in monitoring reported to the Regional Board pursuant to Investigative Orders issued between 2001 and 2006 for Aliso Creek, Salt Creek [footnote omitted], Prima Deshecha [footnote omitted], and North Creek at Doheny Beach [footnote omitted]. Monitoring reported to the State Board pursuant to funding grant agreements also demonstrates that discharges from MS4s routinely exceed water quality objectives. [footnotes omitted].
>
> Water quality in receiving waters downstream of MS4 discharges fail to meet Ocean Plan standards [footnote omitted], California Toxics Rule standards [footnote omitted], and Basin Plan objectives. Data submitted

[341] Exhibit K (43), Tentative Order No. R9-2007-0002, pages 63-64 (AR, Volume 1, for Order No. R9-2009-0002).

[342] Exhibit K (20), Fact Sheet for Tentative Order No. R9-2007-0002, page 26 (AR, Volume I, for Order No. R9-2009-0002).

> in the MS4 Annual Reports indicate that at various times chemical, bacteria, pesticide, and metal concentrations may exceed water quality objectives in marine and fresh water receiving waters in both wet and dry weather conditions. Although wet weather MS4 effluent data is not generally reported, dry-weather MS4 effluent data demonstrates that the effluent contains concentrations of pollutants that would exceed receiving water quality objectives.
>
> In most of these watersheds, there are no other significant NPDES permits discharging to the creeks. For instance, there are no live-stream discharges of treated waste water in south Orange County. The few NPDES permits in the watersheds are mainly for recycled water which only discharges occasionally during the rainy season. Because the water quality monitoring indicates exceedances of water quality standards and urban runoff is the main source of pollutants in the watersheds, it can be inferred that the urban runoff discharges are causing or contributing to water quality impairments, and are a leading cause of such impairments in Orange County.[343]

A revised tentative order was issued on December 12, 2007 (Revised Tentative Order No. R9-2008-0001).[344] The revised tentative order made no change to the dry weather monitoring requirements.[345]

A hearing was held on the revised tentative order on February 13, 2008. Dr. Cindy Lin on behalf of EPA testified that EPA did not support the issuance of the revised tentative permit as drafted, and recommended that EPA work with staff to ensure that the permit is consistent with the specificity and direction taken elsewhere in Region 9.[346] Dr. Lin states the following:

> In this particular situation, this MS4 permit, before us, is more akin to those of ten years ago, where the permittee will return a year hence to implement some future program without further Board review. As our many audits of MS4 permit implementation have shown, there is an imperative for the permits to be clear about the control measures, per the

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[343] Exhibit K (20), Fact Sheet for Tentative Order No. R9-2007-0002, page 27 (AR, Volume 1, for Order R9-2009-0002).

[344] Exhibit K (44), Tentative Order No. R9-2008-0001, page 1 (AR, Volume 1, for Order R9-2009-0002).

[345] Exhibit K (44), Tentative Order No. R9-2008-0001, page 115 (AR, Volume 1, for Order R9-2009-0002).

[346] Exhibit K (16), Excerpts from Regional Board Hearing Transcript, February 13, 2008, page 7 (AR, Volume 1, for Order R9-2009-0002).

> various Court of Appeals decisions, for the permit conditions to be clear at the time of permit adoption.[347]

Ms. Lin further testified that:

> We know that commenters continue to argue that many of the permit requirements are unfunded mandates because they allegedly go beyond EPA requirements for maximum and [sic] extent practicable. We disagree. We believe you can find a basis for all the requirements in the EPA storm water regulations. And therefore, the requirements are not unfunded mandates…[348]
>
> [¶¶]
>
> The bar has been raised in recent years and we can no longer go with having the type of flexibility we've been seeing. We need to have more specific language, and performance outcomes, and measures.[349]

The Regional Board did not adopt the tentative order in February 2008, but asked staff to "seek greater emphasis on measurable performance based criteria" in the revisions of the tentative order.[350]

On March 13, 2009, a revised tentative order was issued for comment (R9-2009-0002).[351] This tentative order was revised to include non-stormwater numeric effluent limitations to assure that non-stormwater, dry weather discharges from the MS4 into receiving waters are not causing, or threatening to cause, a condition of pollution in the receiving waters and to protect the designated beneficial uses of the waters.[352] The revised tentative order required that each copermittee begin non-stormwater dry weather numeric effluent monitoring of effluent "at the end of pipe prior to discharge into the receiving waters at all Major Outfalls" to determine levels of pollutants in effluent

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[347] Exhibit K (16), Excerpts from Regional Board Hearing Transcript, February 13, 2008, pages 7-8 (AR, Volume 1, for Order R9-2009-0002).

[348] Exhibit K (16), Excerpts from Regional Board Hearing Transcript, February 13, 2008, page 8 (AR, Volume 1, for Order R9-2009-0002).

[349] Exhibit K (16), Excerpts from Regional Board Hearing Transcript, February 13, 2008, page 9 (AR, Volume 1, for Order R9-2009-0002).

[350] Exhibit K (33), Regional Board Hearing Transcript, July 1, 2009, page 227(AR, Volume I, for Order R9-2009-0002).

[351] Exhibit K (36), Revised Tentative Order No. R9-2009-0002, March 13, 2009 (AR, Volume 1, for Order R9-2009-0002).

[352] Exhibit K (36), Revised Tentative Order No. R9-2009-0002, March 13, 2009, pages 24-25 (AR, Volume 1, for Order R9-2009-0002).

discharges from the MS4 into receiving waters.[353] This tentative order stated that "Each copermittee shall monitor for and attain the non-storm water dry weather numeric limits, which are incorporated into this Order as Basin Plan Water Quality Objectives, California Toxic Rule and/or USEPA Criteria," and were identified in Table 3 of the tentative order.[354] Analytical monitoring had to be conducted at least twice each year during dry weather (as in the prior permit), and samples analyzed for constituents in Table 1(Analytical Testing for Mass Loading, Urban Stream Bioassessment, and Ambient Coastal Receiving Waters Stations), and for all 303(d) listed pollutants for which the receiving water of the effluent is impaired.[355] The tentative order also required the copermittees to develop or update procedures for source identification and investigation in the event of an exceedance of the numeric effluent limit, and procedures to eliminate the illicit discharges and connections.[356]

On June 18, 2009, the revised tentative order R9-2009-0002 was amended by Regional Board staff, for presentation to the Board on July 1, 2009.[357] Changes were made to clarify that the effluent limits for non-stormwater discharges from the MS4 were established for pollutants which have the reasonable potential to cause or contribute to an excursion of numeric or narrative water quality criteria as outlined in the Basin Plan; the Ocean Plan; the federal California Toxics Rule; and the State Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP).[358] The changes in Finding E.13. further state that the numeric effluent limits are consistent with existing Regional Board requirements in other orders.[359] The revised order also changed the requirement to monitor all major outfalls, to a requirement to monitor a representative percentage of

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[353] Exhibit K (36), Revised Tentative Order No. R9-2009-0002, March 13, 2009, page 24; see also page 143 (AR, Volume 1, for Order R9-2009-0002).

[354] Exhibit K (36), Revised Tentative Order No. R9-2009-0002, March 13, 2009, pages 24-25 (AR, Volume 1, for Order R9-2009-0002).

[355] Exhibit K (36), Revised Tentative Order No. R9-2009-0002, March 13, 2009, page 144 (AR, Volume 1, for Order R9-2009-0002).

[356] Exhibit K (36), Revised Tentative Order No. R9-2009-0002, March 13, 2009, pages 144-145 (AR, Volume 1, for Order No. R9-2009-0002).

[357] Exhibit K (14), Draft Updates of Revised Tentative Order No. R9-2009-0002, June 18, 2009 (AR, Volume 1, for Order No. R9-2009-0002).

[358] Exhibit K (14), Draft Updates of Revised Tentative Order No. R9-2009-0002, June 18, 2009, page 77 (AR, Volume 1, for Order R9-2009-0002).

[359] Exhibit K (14), Draft Updates of Revised Tentative Order No. R9-2009-0002, June 18, 2009, page 77 (AR, Volume 1, for Order R9-2009-0002).

major outfalls and identified stations within each hydrologic subarea.[360] The Fact Sheet clarifies that:

> While it is important to assess all major outfall discharges from the MS4 into receiving waters, to date the Copermittees have implemented a dry-weather monitoring program that has identified major outfalls that are representative of each hydrologic subarea and have randomly sampled other major outfalls. Thus, it is expected that the Copermittees will utilize past dry weather monitoring in the selection and annual sampling of a representative percentage of major outfalls in accordance with the requirements under Section C.4.[361]

The June 18, 2009 revisions further required the copermittees to monitor for (through grab samples and analysis) and attain the following non-stormwater dry weather numeric limits for pollutants in inland surface waters, bays and harbors, and the surf zone:

1. Non-stormwater discharges from the MS4 *to inland surface water* shall not contain pollutants in excess of the effluent limitations for the following general constituents: fecal coliform, enterococci, turbidity, pH, dissolved oxygen, total nitrogen, total phosphorus, methylene blue actives substances, total dissolved solids, sulfate and chloride, in accordance with the Basin Plan and Ocean Plan. Effluent limits for the priority pollutants of cadmium, copper, chromium III, chromium IV, lead, nickel, silver, zinc, in saltwater are based on the California Toxic Rule. The priority pollutants for freshwater will be developed on a case-by-case basis (based on stated equations) because the freshwater criteria are based on site-specific water quality data.
2. Non-stormwater discharges from the MS4 *to bays and harbors* (Dana Point Harbor) shall not contain pollutants in excess of the effluent limitations for total coliform, fecal coliform, enterococci, turbidity, pH, and the priority pollutants of cadmium, copper, chromium III, chromium IV, lead, nickel, silver, and zinc, in accordance with the Basin Plan and Ocean Plan.
3. Non-stormwater discharges from the MS4 *to the surf zone* shall not contain pollutants in excess of the effluent limitations for total coliform, fecal coliform, enterococci, turbidity, and pH, and the priority pollutants of cadmium, copper,

[360] Exhibit K (14), Draft Updates of Revised Tentative Order No. R9-2009-0002, June 18, 2009, page 10 (AR, Volume 1, for Order No. R9-2009-0002).

[361] Exhibit K (14), Draft Updates of Revised Tentative Order No. R9-2009-0002, June 18, 2009, page 88 (AR, Volume 1, for Order R9-2009-0002).

chromium III, chromium IV, lead, nickel, silver, and zinc, in accordance with the Ocean Plan.[362]

If an exceedance is detected, the June 18, 2009 revision required the following:

> Compliance with NELs [numeric effluent limits] provides an assessment of the effectiveness of the prohibition of non-storm water discharges and of the appropriateness of exempted non-storm water discharges. Compliance with Section C of the permit requires that exceedances of NELs result in one of the following outcomes:
>
> a. Copermittees investigate the source of the exceedance and determine that is natural (non-anthropogenically influenced) in origin and conveyance. The findings are to be conveyed to the Regional Board for review and acceptance.
>
> b. Copermittees investigate the source of the exceedance and determine that the source is an illicit discharge or connection. The Copermittees are to remove the discharge to the MS4 and report the findings, including any enforcement action(s) taken, to the Regional Board. Those seeking to continue such a discharge must become subject to a separate NPDES permit.
>
> c. Copermittees investigate the source of the exceedance and determine that the source is an exempted non-storm water discharge. The Copermittees shall investigate the appropriateness of the discharge continuing to be exempt and report the findings to the Regional Board.[363]

The Fact Sheet further explains that "Dischargers shall be deemed out of compliance with an effluent limitation if the concentration of the priority pollutant in the monitoring sample is greater than the effluent limitation and greater than or equal to the reported Minimum Level."[364]

The Regional Board accepted written comments on the revised tentative order and held a public hearing on July 1, 2009. The summary report prepared for the public hearing states that the key issues regarding the numeric effluent limits for non-stormwater discharges were as follows:

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[362] Exhibit K (14), Draft Updates of Revised Tentative Order No. R9-2009-0002, June 18, 2009, pages 11-12 (AR, Volume 1, for Order No. R9-2009-0002).

[363] Exhibit K (14), Draft Updates of Revised Tentative Order No. R9-2009-0002, June 18, 2009, page 10 (AR, Volume 1, for Order No. R9-2009-0002).

[364] Exhibit K (14), Draft Updates of Revised Tentative Order No. R9-2009-0002, June 18, 2009, page 98 (AR, Volume 1, for Order R9-2009-0002).

> Numeric Effluent Limitations – Copermittees are concerned with potential Regional Board enforcement actions resulting from violation of the effluent limitations. Copermittees are opposed to using numeric effluent limitations as a measurable performance based criteria. The USEPA supports the proposed numeric effluent limitations for non-stormwater discharges.[365]

The copermittees testified that numeric effluent limitations exceed federal law, and result in unfunded state mandates; that discharge limitations should be expressed as best management practices, rather than numeric effluent limitations; and that the limitations will place the copermittees in violation of the permit.[366] For example, the City of Laguna Nigel stated the following:

> The Draft Storm Water Permit proposed to incorporate enforceable numeric effluent limits at the end of every pipe for both dry weather and storm flows for numerous constituents, including those subject to TMDLs. Available data already suggest that these provisions will place the Co-Permittees in immediate and continuous violation of the Permit. This situation leaves the Co-Permittees responsible for greatly expanded monitoring, as well as vulnerable to penalties and third-party litigation. It is unknown and uncertain whether it is technically or economically feasible to bring all discharges into full compliance. The City believes that these proposed new requirements greatly exceed and overreach the Co-Permittee's basic legal obligations under the Clean Water Act to implement an iterative sequence of BMPs to reduce the discharge of pollutants to receiving waters to the maximum extent practicable. It is our understanding that no other MS4 permit in the entire country imposes numeric effluent limits at the end-of-pipe for such a broad range of constituents. The City requests that the Regional Board delete these provisions from the Permit.[367]

And EPA filed comments supporting the use of numeric effluent limits for non-stormwater discharges.

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[365] Exhibit K (19), Executive Officer Summary Report, July 1, 2009, page 7 (AR, Volume 1, for Order R9-2009-0002).

[366] Exhibit K (41), Summary of Comments to the Regional Board, May 15, 2009, page 7 (AR, Volume 1, for Order R9-2009-0002); Exhibit K (33), Regional Board Hearing Transcript, July 1, 2009, pages 134-135, 139-140 (AR, Volume 1, for Order No. R9-2009-0002; testimony from the County Counsel for the County of Orange; testimony from the City Attorney's Office for the City of Dana Point).

[367] Exhibit K (41), Summary of Comments to the Regional Board, May 15, 2009, page 7 (AR, Volume 1, for Order No. R9-2009-0002).

> You also asked for our views on whether numeric effluent limits would be appropriate for non-stormwater discharges. As noted above in our comments on LID and TMDLs, we are seeking to ensure that permits include clear, measurable and enforceable requirements. We believe that the use of numeric effluent limits for non-stormwater discharges would be a significant step in the right direction and we support the proposed limits. In previous MS4 permits, the non-stormwater discharges addressed in the permits have typically been regulated through best management practices (BMPs) pursuant to 40 CFR 122.44(k) for the same reason that stormwater discharges themselves are often regulated by BMPs, which is the lack of good information about the discharges and the difficulty of deriving appropriate numeric effluent limits. This issue was recognized in a 1996 EPA guidance on water quality-based effluent limits for stormwater discharges which is cited by the fact sheet. However, the guidance also indicates that as additional information becomes available, more specific limits should be considered. As noted in the fact sheet, additional information has become available to the Board about the discharges over the years, and we agree that numeric effluent limits are now appropriate.[368]

At the July 1, 2009 hearing, Regional Board staff recommended the adoption of numeric effluent limitations for non-stormwater as follows:

> [T]he Regional Board has included non-stormwater water-quality based effluent limitations on this discharge of non-stormwater from the MS4 into receiving waters. So the question is, why numeric limitations? The numeric limitations will ensure: One, that non-stormwater discharges to the MS4 are being prohibited; two, that any exempted categories of discharge are not a source of pollutants to the waters of the United States;

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[368] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 4990 (EPA letter dated May 19, 2009); page 4997 (EPA letter dated September 28, 2009); pages 5094-5096 (EPA testimony at November 18, 2009 Regional Board Hearing, where John Kemmer, associate director of the water division in EPA Region 9, stated that EPA supported the numeric effluent limits for non-stormwater discharges "because these discharges are subject to the prohibition [in the CWA] against non-stormwater discharges to the MS4", and that EPA "strongly agree[s] with the State Board's August 4th conclusions in this matter in which the state board agreed that the inclusion of numeric limits for dry weather discharges in the L.A. County MS4 permit was appropriate.").

> and three, that discharges that are covered under a separate NPDES Permit are in compliance with that permit.[369]

Regional Board staff further stated the following:

> So for the past 19 years, co-permittees have utilized the best management practices for non-stormwater discharges, in order to protect water quality standards. These include: prohibiting non-stormwater discharges; conducting inspections; illicit connection-illicit detection – or illicit discharge detection programs, including, monitoring and source identification; education; and enforcement actions.
>
> However, the co-permittees' efforts for the last 19 years have not and are not protecting water quality standards. This can be evidenced in the waters that are 303(d) listed for indicator bacteria, nutrients, toxicity, pesticides, and total dissolved solids to name a few. And non-stormwater MS4 effluent monitoring has shown consistent exceedances of these 303(d) listed pollutants, as well as others.
>
> Furthermore, as part of the required reasonable potential analysis, the Regional Board must consider the sensitivity of the receiving waters, including any endangered species presence, and designated rare and wild, beneficial uses. One example would be the endangered Southern Steelhead, shown in this picture in San Juan Creek.
>
> Further, bioassessment IBI scores in the San Juan Hydrologic Unit have been dominantly very poor and poor. An example of some of these IBI scores are on this slide. As such, Regional Board staff has developed water quality based effluent limitations for non-stormwater discharges from the MS4, or WQBELs.[370]

At the conclusion of the July 1, 2009 public hearing, the Regional Board requested Board counsel to respond to the public comments regarding regulation of non-stormwater discharges and whether the tentative order imposed unfunded state mandates.[371] A legal memorandum was prepared by Regional Board counsel on November 5, 2009, concluding that non-stormwater discharges from the MS4 can be regulated, consistent with federal law, by numeric effluent limitations, and that regulation of non-stormwater discharge is not limited to the MEP standard. Regional Board

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[369] Exhibit K (33), Regional Board Hearing Transcript, July 1, 2009, page 84 (AR, Volume 1, for Order No. R9-2009-0002).

[370] Exhibit K (33), Regional Board Hearing Transcript, July 1, 2009, pages 84-86 (AR, Volume 1, for Order No. R9-2009-0002).

[371] Exhibit K (33), Regional Board Hearing Transcript, July 1, 2009, pages 228, 236 (AR, Volume 1, for Order No. R9-2009-0002).

counsel also concluded that the tentative order did not impose a state-mandated program.[372]

The Regional Board scheduled a hearing on November 18, 2009, to adopt the tentative order. Written comments and testimony expressed continued concerns with the penalties attached with an exceedance of a numeric effluent limitation.

The Regional Board did not adopt the order, and instead directed staff to remove the threat of a mandatory minimum penalty and to change numeric effluent limitations to *numeric action levels* that would trigger further action, as described below.[373]

b. Sections C and F.4.d. and e. of the 2009 Test Claim Permit Do Not Mandate a New Program or Higher Level of Service.

i. The requirements imposed by sections C and F.4.d. and e. of the test claim permit.

The test claim permit contains the same receiving water limitations and discharge prohibitions as the prior permit; specifically that:

- Discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in waters of the state are prohibited.
- Discharges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses) are prohibited.
- Each Copermittee shall effectively prohibit all types of non-stormwater discharges into its MS4 unless such discharges are either authorized by a separated NPDES permit; or not prohibited.[374]

The test claim permit also requires the permittees to have a non-stormwater dry weather program, which is addressed in sections C. and F.4.d. and e., and the claimants have pled these sections alleging they create a reimbursable state-mandated program.[375] Section C.5. of the test claim permit establishes numeric action levels or

[372] Exhibit K (25), Regional Board Counsel Memo Dated November 5, 2009.

[373] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 5150-5151 (Regional Board Hearing Transcript, November 18, 2009).

[374] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2134-2135 (Order No. R9-2009-0002, sections A.1.,3., and B.1.).

[375] Exhibit A, Test Claim, filed June 30, 2011, pages 36 ("New requirements involving implementation of non-storm water dry weather numeric action levels ("NAL") as set forth in Section C of the 2009 Permit."); and page 59 ("The NAL-Triggered Mandates

NALs, which as described below, are based on water quality objectives for the following constituents:

- Discharges to inland surface waters for the following general constituents: fecal coliform, enterococci, turbidity, pH, dissolved oxygen, total nitrogen, total phosphorus, methylene blue active substance (MBAS); bays, harbors, and lagoons/estuaries; and to the surf zone. NALs were also established for the following priority pollutants: cadmium, copper, chromium III, chromium VI, lead, nickel, silver and zinc.
- Discharges to bays, harbors, and lagoons/estuaries for the following general constituents: total coliform, fecal coliform, enterococci, turbidity, pH. The NALs for the priority pollutants in discharges to inland surface waters also apply to the discharges to bays, harbors, and lagoons/estuaries.
- Discharges to the surf zone for the following general constituents: total coliform, fecal coliform, enterococci.[376]

The action levels are based on water quality objectives defined in the Basin Plan, the Water Quality Control Plan for Ocean Waters of California (Ocean Plan), and the State Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP), the exceedance of which requires responsive action by the claimants to conduct follow-up inspections and investigations to determine the source, and to take action to eliminate and document the discharge.[377] The Regional Board's Finding E.12. generally explains that the action levels for pollutants in non-stormwater discharges are designed to ensure that claimants comply with the federal requirement to effectively prohibit all types of unauthorized discharges of non-storm water in the MS4. Finding E.12. further explains that exceedances of non-stormwater action levels do not alone constitute a violation of the permit, but could indicate non-compliance with the requirement to effectively prohibit all types of unauthorized non-stormwater discharges into the MS4. However, the failure to undertake the required source investigation and elimination action following an exceedance of NAL is a violation of permit. Finding E.12. states the following:

> This Order requires each Copermittee to effectively prohibit all types of unauthorized discharges of non-storm water into its MS4. However, historically pollutants have been identified as present in dry weather non-

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are contained in Section C (pages 21-24) and Section F.4(d) and (e) (pages 70-71) of the 2009 Permit.").

[376] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2139-2140 (Order No. R9-2009-0002, section C.5.).

[377] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2137-2140 (Order No. R9-2009-0002, section C.).

> storm water discharges from the MS4s through 303(d) listings, monitoring conducted by the Copermittees under Order No. R9-2002-0001, and there are others expected to be present in dry weather non-stormwater discharges because of the nature of these discharges. This Order includes action levels for pollutants in non-storm water, dry weather, discharges from the MS4 designed to ensure that the requirement to effectively prohibit all types of unauthorized discharges of non-storm water in the MS4 is being complied with. Action levels in the Order are based upon numeric or narrative water quality objectives and criteria as defined in the Basin Plan, the Water Quality Control Plan for Ocean Waters of California (Ocean Plan), and the State Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP). An exceedance of an action level requires specified responsive action by the Copermittees. This Order describes what actions the Copermittees must take when an exceedance of an action level is observed. Exceedances of non-storm water action levels do not alone constitute a violation of this Order but could indicate non-compliance with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4 or other prohibitions established in this Order. Failure to undertake required source investigation and elimination action following an exceedance of a non-storm water action level (NAL or action level) is a violation of this Order. The Regional Board recognizes that use of action levels will not necessarily result in detection of all unauthorized sources of non-storm water discharges because there may be some discharges in which pollutants do not exceed established action levels. However, establishing NALs at levels appropriate to protect water quality standards is expected to lead to the identification of significant sources of pollutants in dry weather non-storm water discharges.[378]

The Regional Board explains its findings in the discussion for Finding E.12. as follows:

> This Order includes the existing requirement that Copermittees effectively prohibit all types of unauthorized non-storm water discharges in the MS4s. It also includes the following prohibition set forth in the Basin Plan: "The discharge of waste to waters of the state in a manner causing, or threatening to cause a condition of pollution, contamination or nuisance as defined in California Water Code section 13050 is prohibited." (Prohibition A.1.) As discussed in the Order's Findings on discharge characteristics, e.g., C.2., C.4., C.6., C.7., C.9., C.14., and C.15., the Copermittees' reliance on BMPs for the past 19 years has not resulted in compliance

[378] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2133 (Order No. R9-2009-0002, Finding E.12.).

with applicable water quality standards or compliance with the requirement to effectively prohibit all types of unauthorized discharges of non-storm water in the MS4. The Regional Board has evaluated (in accordance with 40 CFR 122.44(d)(1)) past and existing control (BMPs), non-storm water effluent monitoring results, the sensitivity of the species in receiving waters (e.g. endangered species), and the potential for effluent dilution and has determined that existing BMPs to control pollutants in storm water discharges are not sufficient to protect water quality standards in receiving waters and the existing requirement that Copermittees effectively prohibit all types of unauthorized non-storm water discharges into the MS4 historically results in the discharge of pollutants to the receiving waters.

Therefore it is appropriate to establish dry weather non-storm water action levels based upon established water quality standards to measure pollutants levels in the discharge of dry weather non-storm water that could indicate non-compliance with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4 and/or that these discharges are causing, or threatening to cause, a condition of pollution, contamination or nuisance in the receiving waters. NALs are not numeric effluent limitations. While not alone a violation of this Order, an exceedance of an NAL requires the Copermittees to initiate a series of source investigation and elimination actions to address the exceedance. Results from the NAL monitoring are to be used in developing the Copermittees annual work plans. Failure to undertake required source investigation and elimination action following an exceedance of an NAL is a violation of this Order. Please see further discussion in the directives section C of the fact sheet.[379]

Section C.1. requires that "Each Copermittee, beginning no later than May 1, 2011, shall implement the non-storm water dry weather action level (NAL) monitoring as described in Attachment E of this Order."[380] Attachment E., section II.C., addresses the requirements for non-stormwater, dry weather monitoring under the test claim permit, and states that until a monitoring program pursuant to the permit is implemented, permittees are required to comply with the dry weather monitoring requirements of the prior permit.[381]

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[379] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2404-2405 (Order No. R9-2009-0002, Fact Sheet).

[380] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2137 (Order No. R9-2009-0002, section C.1.).

[381] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2247-2250 (Order No. R9-2009-0002, Attachment E., section II.C.).

To assess compliance with the NALs, Attachment E., section II.C. requires a year-round monitoring program conducted on a watershed basis as follows:

> Each Copermittee must collaborate with the other Copermittees to conduct, and report on a year-round watershed based Dry Weather Non-storm Water MS4 Discharge Monitoring Program. The monitoring program implementation, analysis, assessment, and reporting must be conducted on a watershed basis for each of the hydrologic units. The monitoring program must be designed to assess compliance with non-storm water dry weather action levels in section C of this Order . . . .
>
> Each Copermittee's program must be designed to determine levels of pollutants in effluent discharges from the MS4 into receiving waters.[382]

Section F.4.d. requires that "Each Copermittee must conduct dry weather field screening and analytical monitoring of MS4 outfalls and other portions of its MS4 within its jurisdiction to detect illicit discharges and connections in accordance with Receiving Waters and MS4 Discharge Monitoring and Reporting Program No. R9-2009-0002 in Attachment E of this Order."[383] Section C.4. of the test claim permit requires monitoring at the end of pipe prior to discharge to the receiving waters at major outfalls as outlined in federal law and Attachment E. of the permit:

> Monitoring of effluent will occur at the end-of-pipe prior to discharge into the receiving waters, with a focus on Major Outfalls, as defined in 40 CFR 122.26(B 5-6) and Attachment E of this Order. The Copermittees must develop their monitoring plans to sample a representative percentage of major outfalls and identified stations within each hydrologic subarea. At a minimum, outfalls that exceed any NALs once during any year must be monitored in the subsequent year. Any station that does not exceed an NAL for 3 years may be replaced with a different station.[384]

Attachment E., section II.C., then imposes the following monitoring requirements:

> Each Copermittee's program must be designed to determine levels of pollutants in effluent discharges from the MS4 into receiving waters. Each Copermittee must conduct the following dry weather field screening and analytical monitoring tasks:

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[382] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2247-2248 (Order No. R9-2009-0002, Attachment E., section II.C.).

[383] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2186 (Order No. R9-2009-0002, section F.4.d.).

[384] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2138 (Order No. R9-2009-0002, section C.4.)

a. Dry Weather Non-storm Water Effluent Analytical Monitoring Stations

(1) Stations must be major outfalls. Major outfalls chosen must include outfalls discharging to inland surface waters; to bays, harbors and lagoons/estuaries; and to the surf zone. Other outfall points (or any other point of access such as manholes) identified by the Copermittees as potential high risk sources of polluted effluent or as identified under Section C.3.e shall be sampled.

(2) Each Copermittee must clearly identify each dry weather effluent analytical monitoring station on its MS4 Map as either a separate GIS layer or a map overlay hereafter referred to as a Dry Weather Non-storm Water Effluent Analytical Stations Map.

b. Develop Dry Weather Non-storm Water Effluent Analytical Monitoring Procedures

Each Copermittee must develop and/or update written procedures for effluent analytical monitoring (these procedures must be consistent with 40 CFR part 136), including field observations, monitoring, and analyses to be conducted. At a minimum, the procedures must meet the following guidelines and criteria:

(1) Determining Sampling Frequency: Effluent analytical monitoring must be conducted at major outfalls and identified stations. The Copermittees must sample a representative number of major outfalls and identified stations. The sampling must be done to assess compliance with dry weather non-storm water action levels pursuant to section C of this Order. All monitoring conducted must be preceded by a minimum of 72 hours of dry weather.

(2) If ponded MS4 discharge is observed at a monitoring station, make observations and collect at least one (1) grab sample. If flow is evident a 1 hour composite sample may be taken. Record flow estimation (i.e., width of water surface, approximate depth of water, approximate flow velocity, flow rate).

(3) Effluent samples shall undergo analytical laboratory analysis for constituents in: *Table 1. Analytical Testing for Mass Loading, Urban Stream Bioassessment, and Ambient Coastal Receiving Waters Stations* and for those constituents with action levels under Section C of this Order. Effluent samples must also undergo analysis for Chloride, Sulfate and Total Dissolved Solids.

(4) If the station is dry (no flowing or ponded MS4 discharge), make and record all applicable observations.

(5) Develop and/or update criteria for dry weather non-storm water effluent analytical monitoring results:

(a) Criteria must include action levels in Section C of this Order.

(b) Criteria must include evaluation of LC50 levels for toxicity to appropriate test organisms.[385]

Once samples are collected, source identification and investigation are required to be conducted pursuant to Attachment E., section II.C.b.6.,[386] and section F.4.e. of the test claim permit to determine if there is an exceedance water quality standards based on a NAL, which could indicate the presence of an illicit discharge. Section F.4.e. states the following:

> Each Copermittee must implement procedures to investigate and inspect portions of the MS4 that, based on the results of field screening, analytical monitoring, or other appropriate information, indicate a reasonable potential of containing illicit discharges, illicit connections, or other sources of pollutants in non-storm water.
>
> (1) Develop response criteria for data: Each Copermittee must develop, update, and use numeric criteria action levels (or other actions level criteria where appropriate) to determine when follow-up investigations will be performed in response to water quality monitoring. The criteria must include required non-storm water action levels (see Section C) and a consideration of 303(d)- listed waterbodies and environmentally sensitive areas (ESAs) as defined in Attachment C.
>
> (2) Respond to data: Each Copermittee must investigate portions of the MS4 for which water quality data or conditions indicates a potential illegal discharge or connection.
>
> (a) Obvious illicit discharges (i.e. color, odor, or significant exceedances of action levels) must be investigated immediately.
>
> (b) Field screen data: Within two business days of receiving dry weather field screening results that exceed action levels, the Copermittees must either initiate an investigation to identify the

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[385] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2248-2249 (Order No. R9-2009-0002, Attachment E., section II.C.a., b.1-4.).

[386] Attachment E., section II.C.b.6., states the following: "Develop and/or update procedures for source identification follow up investigations in the event of exceedance of dry weather non-storm water effluent analytical monitoring result criteria. These procedures must be consistent with procedures required in section F.4.d and F.4.e. of this Order." (Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2249.)

source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation. This documentation shall be included in the Annual Report.

(c) Analytical data: Within five business days of receiving analytical laboratory results that exceed action levels, the Copermittees must either initiate an investigation to identify the source of the discharge or document the rationale for why the discharge does not pose a threat to water quality and does not need further investigation. This documentation shall be included in the Annual Report.

(3) Respond to notifications: Each Copermittee must respond to and resolve each reported incident (e.g., public hotline, staff notification, etc.) in a timely manner. Criteria may be developed to assess the validity of, and prioritize the response to, each report.[387]

Section C.2. of the test claim permit then describes the procedures for when a permittee identifies an exceedance of a NAL, which requires investigation to identify the source of the exceedance, reporting to the Regional Board of the source identification, removal of the source if it is identified as an illicit discharge or connection. If the source is an exempted category of non-stormwater discharges, then the permittee has to determine if the circumstance is isolated or if the category of discharges must be addressed through the prevention or prohibition of that category of discharge as an illicit discharge. If a permittee is unable to identify the source of the exceedance after taking and documenting reasonable steps to do so, then the permittee must identify the pollutant as a high priority pollutant of concern, perform additional focused sampling, and update their program within a year to reflect this priority. Section C.2. states the following:

In response to an exceedance of an NAL, each Copermittee must investigate and identify the source of the exceedance in a timely manner. However, if any Copermittee identifies exceedances of NALs that prevent them from adequately conducting source investigations in a timely manner, then the Copermittees may submit a prioritization plan and timeline that identifies the timeframe and planned actions to investigate and report their findings on all of the exceedances. Following the source investigation and identification, the Copermittees must submit an action report dependant [sic] on the source of the pollutant exceedance as follows:

a. If the Copermittee identifies the source of the exceedance as natural (nonanthropogenically influenced) in origin and in conveyance into the

[387] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2186-2187 (Order No. R9-2009-0002, section F.4.e.).

MS4; then the Copermittee shall report their findings and documentation of their source investigation to the Regional Board within fourteen days of the source identification.

b. If the Copermittee identifies the source of the exceedance as an illicit discharge or connection, then the Copermittees must eliminate the discharge to their MS4 and report the findings, including any enforcement action(s) taken, and documentation of the source investigation to the Regional Board within fourteen days of the source identification. If the Copermittee is unable to eliminate the source of discharge within fourteen days, then the Copermittee must submit, as part of their action report, their plan and timeframe to eliminate the source of the exceedance. Those dischargers seeking to continue such a discharge must become subject to a separate NPDES permit prior to continuing any such discharge.

c. If the Copermittee identifies the source of the exceedance as an exempted category of non-storm water discharge, then the Copermittees must determine if this is an isolated circumstance or if the category of discharges must be addressed through the prevention or prohibition of that category of discharge as an illicit discharge. The Copermittee must submit their findings in including a description of the steps taken to address the discharge and the category of discharge, to the Regional Board for review with the next subsequent annual report. Such description shall include relevant updates to or new ordinances, orders, or other legal means of addressing the category of discharge. The Copermittees must also submit a summary of their findings with the Report of Waste Discharge.

d. If the Copermittee identifies the source of the exceedance as a non-storm water discharge in violation or potential violation of an existing separate NPDES permit (e.g. the groundwater dewatering permit), then the Copermittee must report, within three business days, the findings to the Regional Board including all pertinent information regarding the discharger and discharge characteristics.

e. If the Copermittee is unable to identify the source of the exceedance after taking and documenting reasonable steps to do so, then the Copermittee must identify the pollutant as a high priority pollutant of concern in the tributary subwatershed, perform additional focused sampling and update their programs within a year to reflect this priority. The Copermittee's annual report shall include these updates to their programs including, where applicable, updates to their watershed workplans (Section G.2), retrofitting consideration (Section F.3.d) and program effectiveness work plans (Section J.4).

f. The Copermittees or any interested party, may evaluate existing NALs and propose revised NALs for future Board consideration.[388]

Section C.3. explains, consistent with the findings of the permit, that an exceedance of a NAL does not alone constitute a violation of the permit, but may indicate a lack of compliance to effectively prohibit non-stormwater discharges or a violation of receiving water or discharge prohibitions. It also requires that during any annual reporting period in which one or more exceedances of NALs have been documented, the permittee is required to submit with the next scheduled annual report, a report describing whether and how the observed exceedances did or did not result in a discharge form the MS4 that caused, or threatened to cause or contribute to a condition of pollution, contamination, or nuisance in the receiving waters.[389] Section C.3. states the following:

> An exceedance of an NAL does not alone constitute a violation of the provisions of this Order, but an exceedance of an NAL may indicate lack of compliance with the requirement that Copermittees effectively prohibit all types of unauthorized non-storm water discharges into the MS4 or other prohibitions set forth in Sections A and B of this Order. Failure to timely implement required actions specified in this Order following an exceedance of an NAL constitutes a violation of this Order. However, neither compliance with NALs nor compliance with required actions following observed exceedances, excuses any non-compliance with the requirement to effectively prohibit all types of unauthorized non-storm water discharges into the MS4s or any non-compliance with the prohibitions in Sections A and B of this Order. NALs provide an assessment of the effectiveness of the prohibition of non-storm water discharges and of the appropriateness of exempted non-storm water discharges. During any annual reporting period in which one or more exceedances of NALs have been documented the Copermittee must submit with their next scheduled annual report, a report describing whether and how the observed exceedances did or did not result in a discharge form the MS4 that caused, or threatened to cause or contribute to a condition of pollution, contamination, or nuisance in the receiving waters.[390]

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[388] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2137-2138 (Order No. R9-2009-0002, section C.2.).

[389] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2138 (Order No. R9-2009-0002, section C.3.).

[390] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2138 (Order No. R9-2009-0002, section C.3.).

ii. Sections C. and F.4.d. and e. of the test claim permit do not mandate a new program or higher level of service.

The claimants contend that sections C. and F.4.d. and e. of the test claim permit "include[s] an elaborate and very particular set of programmatic investigation, monitoring and reporting requirements, and action items, all based on the existence, type and frequency of a NAL exceedance."[391] Although claimants concede that general dry-weather monitoring and follow-up requirements were included in the prior permit, they assert that "all of the NAL-Triggered" activities in the test claim permit are new and were not required in the prior permit.[392] The claimants further contend that the requirements are all mandated by the state; the "NAL-Triggered Mandates are not required or even referenced anywhere in the CWA or in the federal regulations thereunder."[393] In this respect, the claimants argue the following:

> …the language of the CWA, as well as the relevant authority discussing federal requirements for a municipal NPDES Permit under the CWA, all confirm that no numeric limits, whether or not styles as "action levels," are ***required*** to be included within a municipal storm water permit. (*See, e.g., Defenders of Wildlife, supra*, 191 F.3d 1159, 1163 and 1165 ["Industrial discharges must comply strictly with State water-quality standards," while Congress chose not to include a similar provision for municipal storm-sewer discharges;" "the ***statute unambiguously demonstrates*** that Congress did not require municipal storm-sewer dischargers to strictly comply with 33 U.S.C. § 1311(b)(1)(C)."] *BIA v. State Board, supra,* 124 Cal.App.4th 866, 874 ***["With respect to municipal stormwater discharges, Congress clarified that the EPA has the authority to fashion NPDES Permit requirements to meet water quality standards without specific numeric effluent limits and to instead impose 'controls to reduce discharge of pollutants to the maximum extent practicable.'"***]; *Divers' Environmental, supra,* 145 Cal.App.4th 246, 256 ***["In regulating stormwater permits the EPA has repeatedly expressed a preference for doing so by the way of BMPs, rather than by way of imposing either technology-based or water quality-based numerical limitations."]***; State Board Order No. 2000-11, p.3 ["In prior orders this Board has explained the need for the municipal stormwater programs ***and the emphasis on BMPs in lieu of numeric effluent limitations***."]; State Board Order No. 2006-12, p. 17 [***"Federal***

[391] Exhibit A, Test Claim, filed June 30, 2011, page 60.

[392] Exhibit A, Test Claim, filed June 30, 2011, page 62; Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 10-12.

[393] Exhibit A, Test Claim, filed June 30, 2011, page 61; see also, Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 9-10.

regulations do not require numeric effluent limitations for discharges of stormwater."]; and State Board Order No. 91-03, pgs. 30-31 [***"We . . . conclude that numeric effluent limitations are not legally required.*** Further we have determined that the program of prohibitions, source control measures and 'best management practices' set forth in the Permit constitutes effluent limitations as required by law."])

While NALs are not traditional "strict" numeric effluent limits, in that an exceedance of an NAL does not automatically constitute a permit "violation," numeric NALs are similar to strict numeric effluent limits in that they impose new mandated requirements on the Copermittees to meet such numeric limits. If the Copermittees' non-storm water discharges exceed the NALs, the Copermittees must thereafter implement costly measures to comply with the numeric action levels, regardless of the feasibility of complying. [Citation omitted.] Thus, the "NAL-Triggered Mandates" go far beyond what is required to be imposed in an MS4 permit. Accordingly, the Board had a "true choice" in deciding to impose the "NAL-Triggered Mandates." (Emphasis in original.)[394]

The Water Boards assert that the non-stormwater requirements of the test claim permit do not mandate a new program or higher level of service. They contend that federal law prohibits any discharge of non-stormwater pollutants to waters of the United States without a separate permit for such discharges, that such discharges are not subject to the CWA, and that the action levels are simply designed to assist Copermittees to comply with federal law. The Water Boards also state that the requirements are not new since the dry-weather monitoring and follow-up requirements were contained in the prior permit.[395] Specifically, they assert:

> Conveyances which continue to accept other "non-storm water" discharges (e.g. discharges without an NPDES permit) with the exceptions noted above (exempted discharges that are not a source of pollutants) do not meet the definition of municipal separate storm sewer and are not subject to 402(p)(3)(B) of the CWA unless such discharges are issued separate NPDES permits. Instead, conveyances which continue to accept non-storm water discharges which have not been issued separate NPDES permits are subject to sections 301 and 402 of the CWA.[396]

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[394] Exhibit A, Test Claim, filed June 30, 2011, page 64.

[395] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 29-30.

[396] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 29 (citing to CWA section 301).

As described below, the Commission finds that sections C. and F.4.d. and e. do not mandate a new program or higher level of service.

First, the Commission finds that the claimants mistakenly rely on provisions of the CWA that require NPDES permits authorizing *stormwater* discharges from MS4s, to reduce the discharge of pollutants to the maximum extent practicable (MEP) under section 402(p)(3)(B)(iii), to argue that the requirements in sections C., and F.4.d., and e., of the test claim permit are mandated by the state. Federal law includes a separate, more stringent requirement for *non-stormwater* discharges into the MS4. CWA section 402(p)(3)(B)(ii) requires that permits for discharges from MS4s "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers."[397] The distinction between the requirements for stormwater and non-stormwater discharges is explained in Finding 14 of the test claim permit as follows:

> Non-storm water (dry weather) discharge from the MS4 is not considered storm water (wet weather) discharge and therefore is not subject to regulation under the Maximum Extent Practicable(MEP) standard from CWA 402(p)(3)(B)(iii), which is explicitly for "Municipal . . . *Stormwater Discharges* (emphasis added)" from the MS4. Non-storm water discharges, per CWA 402(p)(3)(B)(ii), are to be effectively prohibited.[398]

EPA adopted regulations to implement the effective prohibition of non-stormwater discharges into the MS4 on November 16, 1990, by requiring operators of MS4s to submit, as part of their application for a NPDES permit, a description of their existing management program to control pollutants from the MS4 and the existing program to identify illicit connections to the MS4.[399] The application must also include the results of a field screening analysis for illicit connections and illegal dumping.[400] The federal regulations require that field screening points or major outfalls shall be randomly located throughout the storm sewer system, and selected by placing a grid over a drainage system map that identifies those cells of the grid that contain a segment of the storm sewer system or major outfall. The field screening analysis shall include a narrative description of visual observations made during dry weather periods. If any flow is observed, grab samples must be collected and analyzed for color, odor, turbidity, the presence of an oil sheen or surface scrum, and any other relevant observations regarding the potential presence of non-stormwater discharges or illegal dumping. In addition, a narrative description of the results of a field analysis using suitable methods

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[397] United States Code, title 33, section 1342(P)(3)(B)(ii), (Public Law 100-4).

[398] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2122 (Order No. R9-2009-0002, Finding 14).

[399] Code of Federal Regulations, title 40, section 122.26(d)(1)(v).

[400] Code of Federal Regulations, title 40, section 122.26(d)(1)(iv)(D).

to estimate pH, total chlorine, total copper, total phenol, and detergents (or surfactants) shall be provided, along with a flow rate.[401]

Federal regulations also require that the application for a NPDES permit contain a description of a proposed management program to detect and remove illicit discharges.[402] The program must include a description of procedures for ongoing field screening activities, including areas or locations to be evaluated;[403] and procedures to investigate portions of the MS4 that, based on field screening or other information, indicate a reasonable potential for containing illicit discharges or other sources of non-storm water pollution.[404] Federal regulations also contain reporting requirements.[405] When adopting these regulations, EPA stated the following:

> Today's rule defines the term "illicit discharge" to describe any discharge through a municipal separate storm sewer that is not composed entirely of storm water and that is not covered by an NPDES permit. Such illicit discharges are not authorized under the CWA. Section 402(p)(3)(B) of the CWA requires that permits for discharges from municipal separate storm sewers require the municipality to "effectively prohibit" non-storm water discharges from the municipal separate storm sewer. As discussed in more detail below, today's rule begins to implement the "effective prohibition" by requiring municipal operators of municipal separate storm sewer systems serving a population of 100,000 or more to submit a description of a program to detect and control certain non-storm water discharges to their municipal system. Ultimately, such non-storm water discharges through a municipal separate storm sewer must be either removed from the system or become subject to an NPDES permit . . . .[406]

In accordance with federal law, the prior permit required the claimants to effectively prohibit non-stormwater discharges by implementing a program to detect and remove illicit discharges, which included field screening and monitoring; preparing a map overlay of the monitoring stations and field screening points; procedures to investigate portions of the MS4 that, based on field screening or other information, indicate a reasonable potential for containing illicit discharges or other sources of non-stormwater

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[401] Code of Federal Regulations, title 40, section 122.26(d)(1)(iv)(D).

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

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

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

[405] Code of Federal Regulations, title 40, section 122.48.

[406] Exhibit K (27), NPDES Permit Application Regulations for Storm Water Discharges; Final Rule (55 Federal Register 47995, Nov. 16, 1990), page 2.

pollution; removal of the discharge; and reporting the results.[407] These requirements, also imposed by sections C. and F.4.d. and e. of the test claim permit, are not new.

In addition, claimants mistakenly contend that the numeric NALs "are similar to strict numeric effluent limits in that they impose new mandated requirements on the Copermittees to meet such numeric limits."[408] Although one of the draft versions of the permit would have required claimants to attain numeric effluent limitations for the identified pollutants, the draft never became the law.[409] Instead, the test claim permit simply identifies action levels for each pollutant consistent with water quality standards that, if detected in dry weather monitoring and field screening to be in excess of the action level, triggers the investigation, identification of the discharge, removal, and reporting activities required by federal law. The claimants do not violate the permit by exceeding the action level, as implied by the claimants; rather a violation occurs only if a permittee fails to timely implement the required actions following an exceedance of an action level.[410] In this sense, the action levels established in the test claim permit function the same as the prior permit, which required the claimants to identify criteria to determine if significant sources of pollutants were present in dry weather non-stormwater discharges consistent with water quality objectives.[411] Under both permits, the action levels or criteria are intended to determine the presence of an illicit discharge, which then triggers the federal requirements to investigate, identify, and remove the illicit discharge, and report the findings to the Regional Board.

As indicated above, the CWA requires that NPDES permits for MS4s "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers."[412] Federal law also requires that if a discharge causes, has the reasonable potential to cause, or contributes to an excursion of a numeric or narrative water quality criteria, the Regional Board must develop permit limits as necessary to meet water quality

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[407] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3439, 3465-3467, 3508-3510 (Order No. R9-2002-0001, sections B.5., F.5., Attachment E.).

[408] Exhibit A, Test Claim, filed June 30, 2011, page 64.

[409] Exhibit K (14), Draft Updates of Revised Tentative Order No. R9-2009-0002, June 18, 2009, page 98 (AR, Volume 1, for Order No. R9-2009-0002).

[410] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2138 (Order No. R9-2009-0002, section C.3.).

[411] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3466, 3510 (Order No. R9-2002-0001, section F.5.c.; sections E-3. and E.4.d.4., of Attachment E.)

[412] United States Code, title 33, section 1342(P)(3)(B)(ii), (Public Law 100-4).

standards.[413] In this case, the record contains substantial and unrefuted evidence that the claimants' non-stormwater program for the previous 19 years failed to comply with the federal program to effectively prohibit unauthorized discharges of non-stormwater in the MS4, and failed to comply with applicable water quality standards.[414] Thus, the Regional Board established the action levels that trigger the federally required activities instead of continuing to allow the claimants to identify the criteria for the presence of an illicit discharge. The non-stormwater action levels were established by the Regional Board "at levels appropriate to protect water quality standards [, which] is expected to lead to the identification of significant sources of pollutants in dry weather non-storm water discharges."[415] The action levels are based on previously adopted numeric or narrative water quality objectives and criteria for pollutants in the receiving waters as

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[413] Code of Federal Regulations, title 40, section 122.44(d)(1).

[414] Exhibit K (20), Fact Sheet for Tentative Order No. R9-2007-0002, page 26 (AR, Volume 1, for Order No. R9-2009-0002; Finding C.7., states: "The Copermittees have produced data that demonstrates water quality objectives are frequently not met during dry and wet weather. The 2006 Report of Waste Discharge and the 2005-06 Annual Reports document that receiving water monitoring stations often fail to meet water quality objectives established in the Basin Plan. Similar conclusions are found in monitoring reported to the Regional Board pursuant to Investigative Orders issued between 2001 and 2006 for Aliso Creek, Salt Creek . . . , Prima Deshecha. . . , and North Creek at Doheny Beach . . . ."; and "Water quality in receiving waters downstream of MS4 discharges fail to meet Ocean Plan standards. . . , California Toxics Rule standards . . . , and Basin Plan objectives. Data submitted in the MS4 Annual Reports indicate that at various times chemical, bacteria, pesticide, and metal concentrations may exceed water quality objectives in marine and fresh water receiving waters in both wet and dry weather conditions. Although wet weather MS4 effluent data is not generally reported, dry-weather MS4 effluent data demonstrates that the effluent contains concentrations of pollutants that would exceed receiving water quality objectives."); Exhibit K (41), Summary of Comments to the Regional Board, May 15, 2009, page 7 (AR, Volume 1, for Order No. R9-2009-0002, summary of comments filed by the City of Laguna Nigel on the draft permit imposing numeric effluent limitations, state: "Available data already suggest that these provisions will place the Co-Permittees in immediate and continuous violation of the Permit."); Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2133 (Order No. R9-2009-0002, Finding E-12) provides: "historically pollutants have been identified as present in dry weather non-storm water discharges from the MS4s through 303(d) listings, monitoring conducted by the Copermittees under Order No. R9-2002-0001, and there are others expected to be present in dry weather non-stormwater discharges because of the nature of these discharges.")

[415] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2133 (Order No. R9-2009-0002, Finding E-12.).

identified in the Ocean Plan; the Basin Plan; the State Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP); and the California Toxics Rule. The action levels determine the presence of an illicit discharge detected with monitoring and field screening, which then triggers the federal requirements to investigate, identify, and remove the illicit discharge, and report the findings to the Regional Board. As the claimants concede, these "general dry-weather monitoring and follow-up requirement[s]" of the test claim permit were included in the prior permit and are not new.[416]

The test claim permit, however, does contain more specificity to effectively prohibit non-stormwater discharges and to protect the region's water quality standards, when compared to the prior permit. For example, the test claim permit includes deadlines to investigate the potential illicit discharge when screening results exceed action levels, and reporting deadlines to the Regional Board.[417] Although the requirements to investigate and report were contained in the prior permit and are not new, the prior permit did not specify deadlines. A deadline may affect the timing, but it does not require that any new activities be performed.

In addition, the test claim permit now specifically requires non-stormwater monitoring and analysis of sulfates, chloride, and total dissolved solids, due to exceedances in 303(d) listed water bodies.[418] According to the Fact Sheet for the test claim permit,

> Water Quality Limited Segments on the current 303(d) list (2006) within the jurisdiction of this Order have been identified due to exceedances of Sulfate, Chloride, and Total Dissolved Solids criteria from a source which is currently unknown. (see Table 2a). These pollutants are not monitored for under the current non-storm water MS4 effluent monitoring program. While this Order does not establish a numeric action level for these constituents at this time, this Order now requires non-storm water MS4 discharge monitoring to including monitoring for Sulfates, Chlorides, and Total Dissolved Solids.[419]

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[416] Exhibit A, Test Claim, filed June 30, 2011, page 62.

[417] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2187 (Order No. R9-2009-0002, Section F.4.e.2.).

[418] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2249 (Order No. R9-2009-0002, section C.b.3. of Attachment E.).

[419] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2417 (Order No. R9-2009-0002, Fact Sheet). Section 303(d) of the Clean Water Act, identified in the paragraph above, requires states to identify waters where current pollution control technologies alone cannot meet the water quality standards set for that waterbody. Every two years, states are required to submit a list of impaired waters plus any that may soon become impaired to EPA for approval. The impaired waters are

However, the CWA has always required an NPDES permittee to monitor its discharges into the waters of the United States in a manner sufficient to determine whether it is in compliance with the permit, including the receiving water limitations and discharge prohibitions.[420] An NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance.[421] Since sulfates, chloride, and total dissolved solids from an unknown source were previously identified and exceeded water quality standards in 303(d) listed water bodies, the Regional Board had no choice but was required by federal law to require further monitoring, investigation of the source, removal of any illicit discharges or connections, and reporting the results. Federal law mandates that permits for discharges from MS4s "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers," unless those discharges are conditionally exempted from this prohibition.[422] And, as stated above, "sufficient" monitoring to meet water quality standards is not new.

The test claim permit also specifies that the claimants must "conduct, and report on a year-round watershed based Dry Weather Non-stormwater MS4 Discharge Monitoring Program."[423] The prior permit required that "dry weather analytical and field screening monitoring shall be conducted at each identified station at least twice between May 1st and September 30th of each year, but it also required dry weather monitoring and field screening "*more frequently as the Copermittee determines is necessary to comply with the order.*"[424] The Findings in the test claim permit indicate that the permittees had not complied with applicable water quality standards and did not effectively prohibit non-

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prioritized based on the severity of the pollution and the designated use of the waterbody. States must establish the total maximum daily load(s) (TMDLs) of the pollutant(s) in the waterbody for impaired waters on their list. (33 U.S.C., section 1313(d); 40 C.F.R. section 130.7.) Table 2a of the test claim permit identifies Sulfates, Chloride, and Total Dissolved Solids as "303(d) pollutant stressors" in the San Juan Creek. (Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2119).

[420] United States Code, title 33, section 1342(a)(2); Code of Federal Regulations, title 40, sections 122.43(a), 122.44(i)(1).

[421] Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(F); see also *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1209.

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

[423] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2247 (Order No. R9-2009-0002, section C., of Attachment E.).

[424] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3509 (Order No. 2002-0001, Attachment E.4.c., emphasis added).

stormwater discharges for the previous 19 years.[425] The claimants were therefore required by the prior permit to conduct dry weather monitoring and field screening more often than twice per year, and as necessary to comply with the receiving water limitations and discharge prohibitions required by federal law. Thus, a year-round monitoring program is not a new requirement.

Thus, the activities required by the test claim permit are not new. Moreover, the requirements do not constitute a new program or higher level of service. The Supreme Court has clarified that "simply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting 'service to the public' under article XIII B, section 6, and Government Code section 17514."[426] Rather, the new program or higher level of service must "increase the actual level or quality of governmental services provided."[427] In this case, federal law has long required that all dischargers, including private industrial dischargers and local governments effectively prohibit "all types" of non-stormwater discharges identified as sources of pollutants to waters of the United States.[428] The new requirements imposed by the test claim permit do not change or increase the level or quality of service to the public; they simply make the claimants comply with existing federal law imposed on all dischargers to comply with water quality standards.[429]

Accordingly, the Commission finds that Sections C. and F.4.d. and e. of the test claim permit do not mandate a new program or higher level of service.

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[425] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2404-2405 (Order No. R9-2009-0002, Fact Sheet).

[426] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877. (Emphasis in original.)

[427] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877.

[428] United States Code, title 33, section 1342(p)(3)(B)(ii) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(1). In addition, MS4 dischargers must demonstrate adequate legal authority, through ordinance, permit, or other means, to prohibit illicit discharges to the MS4, Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(B).

[429] Code of Federal Regulations, title 40, sections 122.41(a) and 122.44(d)(1).

3. Section F.4.b., of the Test Claim Permit, Which Requires the Use of Geographic Information Systems (GIS) for MS4 Mapping to Implement the Illicit Discharge Detection and Elimination Program, Imposes Some New Activities that Constitute a State-Mandated New Program or Higher Level of Service.

The claimants plead section F.4.b. of the test claim permit.[430] Section F.4.b. of the test claim permit requires each copermittee to use Geographic Information System (GIS) to update and submit to the Regional Board, within 365 days after adoption of the permit, a map of their entire MS4 and the corresponding drainage areas within their jurisdiction. The accuracy of the MS4 map must be confirmed during dry weather field screening and analytical monitoring and must be updated at least annually.[431]

The claimants contend that section F.4.b. requires the copermittees to perform the following activities:

- Procure GIS field equipment.
- Digitize storm drains systems and develop a GIS storm drain layer using field equipment.
- Maintain an updated map in the GIS system on Copermittee computer system.[432]

As explained below, the Commission finds that the one-time required activities of updating the map of the entire MS4 and the corresponding drainage areas within each copermittees' jurisdiction *in GIS format* and submitting GIS layers within 365 days of adoption of the permit to the Regional Board constitute a state-mandated new program or higher level of service. However, maintaining an updated map of the entire MS4 and the corresponding drainage areas within each copermittees' jurisdiction; confirming the accuracy of the MS4 map during dry weather field screening and analytical monitoring; annually updating the map and submitting it with the Jurisdictional Runoff Management Plan were required by the prior permit and are not new.

[430] Exhibit A, Test Claim, filed June 30, 2011, pages 37, 96.

[431] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2186 (Order No. R9-2009-0002, section F.4.b.).

[432] Exhibit A, Test Claim, filed June 30, 2011, page 96 (Test Claim narrative).

a. Section F.4.b. of the test claim permit imposes a state-mandated program by requiring the claimants to update the map of the entire MS4 and corresponding drainage areas *in GIS format* and submit GIS layers within 365 days of adoption of the test claim permit. However, maintaining an updated map of the entire MS4 and the corresponding drainage areas within each copermittees' jurisdiction; confirming the accuracy of the MS4 map during dry weather field screening and analytical monitoring; annually updating the map and submitting it with the Jurisdictional Runoff Management Plan were required by the prior permit and are not new.

i. Positions of the parties.

The claimants assert that section F.4.b., imposes activities that are mandated by the state, imposes a new program or higher level of service, and results in increased costs mandated by the state.[433] The claimants further assert, in response to the comments of the Water Boards, that they did not propose the use of GIS for the entire MS4. Rather, the claimants' ROWD "references the fact that certain GIS-mapping activity had been undertaken and during 2003-4 and 2004-5, an evaluation was performed using a GIS based model. Nowhere in this section do Claimants propose that an entire GIS MS4 map be required."[434]

The Water Boards admit that the prior permit expressed a preference for, but did not require, use of GIS to fulfill the mapping requirements of federal law.[435] However, they assert that federal regulations recognize that accurate mapping is essential to successful implementation of illicit discharge detection and prevention programs. The Water Boards cite federal regulations that require field screening analyses for non-stormwater illicit discharges and illicit connections, including illegal dumping. To conduct the analysis, field screening points are required to be placed at major outfalls randomly located throughout the MS4 system, and are selected by placing a grid over a drainage system map. The federal regulations state that the field screening points shall be established with a "grid system consisting of perpendicular north-south and east-west lines spaced ¼ mile apart [and] shall be overlayed on a map of the municipal storm sewer system, creating a series of cells."[436] The Water Boards also cite the CWA that specifies the "Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including

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[433] Exhibit A, Test Claim, filed June 30, 2011, page 96 (Test Claim narrative, page 61); Exhibit F, Claimants' Rebuttal Comments filed January 6, 2017, page 41.

[434] Exhibit F, Claimants' Rebuttal Comments, filed January 6, 2017, page 41.

[435] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 41.

[436] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 41 (citing 40 C.F.R. § 122.26(d)(1)(iv)(D)).

conditions on data and information collection, reporting, and such other requirements as he deems appropriate."[437] The Water Boards explain the requirement as follows:

> Use of GIS for mapping is a condition imposed on data and information collection which the Board has determined is necessary to assure compliance with the regulatory requirements to identify field screening points for analyzing illicit connections and dumping, in furtherance of the Clean Water Act's requirement that Copermittees effectively prohibit unauthorized non-storm water discharges. [Citation omitted.][438]

The Water Boards also contend that the requirement to use GIS for MS4 mapping are not new and, thus do not mandate a new program or higher level of service for the following reasons:

- The prior permit required an accurate map of the watersheds of the San Juan Creek Watershed Management Area in Orange County (preferably in GIS format) that identifies all receiving waters; all 303(d) impaired waterbodies; existing and planned land uses; MS4s; major highways; jurisdictional boundaries; and inventoried commercial, construction, industrial, municipal sites, and residential areas.
- The claimants' 2006 ROWD indicates that GIS mapping had already begun and was expected to be completed for the entire county by the end of 2006. The ROWD noted the benefits of GIS mapping and proposed the continued use of GIS.[439]

> *ii. Section F.4.b. imposes a new state-mandated program to update the map of the entire MS4 and corresponding drainage areas in GIS format and submit GIS layers within 365 days of adoption of the Test Claim permit. But maintaining an updated map of the entire MS4 and the corresponding drainage areas within each copermittees' jurisdiction; confirming the accuracy of the MS4 map during dry weather field screening and analytical monitoring; annually updating the map and submitting it with the Jurisdictional Runoff Management Plan were required by the prior permit and are not new.*

Section F.4.b. states the following:

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[437] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 41 (citing section 402(a)(2) of the Clean Water Act).

[438] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 41.

[439] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 42.

> Each copermittee must maintain an updated map of its entire MS4 and the corresponding drainage areas within its jurisdiction. The use of GIS is required. The accuracy of the MS4 map must be confirmed during dry weather field screening and analytical monitoring and must be updated at least annually. The GIS layers of the MS4 map must be submitted with the updated Jurisdictional Runoff Management Plan within 365 days after adoption of this Order.[440]

The plain language of this provision requires claimants to perform the following activities:

- Maintain an updated map of the entire MS4 and the corresponding drainage areas within each copermittee's jurisdiction by using GIS.
- Confirm the accuracy of the map during dry weather field screening and analytical monitoring.
- Update the MS4 map annually.
- Submit the GIS layers of the MS4 map with the updated Jurisdictional Runoff Management Plan (JRMP) within 365 days after adoption of the permit.

The Commission finds the activities of maintaining an updated map of the entire MS4 and the corresponding drainage areas within each copermittees' jurisdiction; confirming the accuracy of the MS4 map during dry weather field screening and analytical monitoring; annually updating the map and submitting it with the Jurisdictional Runoff Management Plan were required by the prior permit and are not new. Attachment E.4. of the prior permit states the following:

> Each Copermittee shall develop or revise its Dry Weather Monitoring Program to meet or exceed the following requirements:
>
> a. Develop MS4 Map: Each Copermittee shall develop or obtain an up-to-date labeled map of its entire municipal separate storm sewer system (MS4) and the corresponding drainage watersheds within its jurisdiction. The use of a Geographic Information System (GIS) is highly recommended, but not required. The accuracy of the MS4 map shall be confirmed and updated at least annually during monitoring activities.[441]

Section E.2. of the prior permit then requires the copermittees to submit their "Dry Weather Monitoring Program to the Principal Permittee as part of its Jurisdictional

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[440] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2186 (Order No. R9-2009-0002).

[441] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3508 (Order No. R9-2002-0001, Attachment E.).

Urban Runoff Management Program Document" and the "Principal Permittee shall collectively *submit the dry weather monitoring maps* and procedures *to the SDRWQCB within 365 days of adoption of [the] Order*."[442]

However, the one-time activities of updating the map of the entire MS4 and the corresponding drainage areas *in GIS format* and submitting GIS layers within 365 days of adoption of the Order were not required by the prior permit. The prior permit, as indicated in the quoted paragraph above, stated that the "use of a Geographic Information System (GIS) is highly recommended, but not required." And the Fact Sheet to the test claim permit states that a "requirement has been added requiring submittal of the GIS layers of the MS4 map within 365 days of Order adoption."[443]

In addition, federal law requires a drainage system map, but does not require that the map be maintained in GIS format. Federal regulations require applicants of an NPDES permit to conduct field screening analyses for the potential presence of non-stormwater discharges or illegal dumping at major outfalls, which must be randomly located throughout the MS4 by placing a grid over a drainage system map. The field screening points shall be established using the following guidelines and criteria: "(1) a grid system consisting of perpendicular north-south and east-west lines spaced ¼ mile apart shall be overlayed on a map of the municipal storm sewer system, creating a series of cells . . . ."[444]

Thus, the one-time activities of updating the map of the entire MS4 and the corresponding drainage areas within each copermittees' jurisdiction in GIS format and submitting GIS layers within 365 days of adoption of the permit are new requirements.

iii. The new requirements imposed by section F.4.b. are mandated by the state.

The Commission further finds that the new requirements are mandated by the state. In the 2016 decision in *Department of Finance v. Commission on State Mandates*, the California Supreme Court identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or the federal government:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose

[442] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3508 (Order No. R9-2002-0001, Attachment E., emphasis added).

[443] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2461 (Order No. R9-2009-0002, Fact Sheet).

[444] Code of Federal Regulations, title 40, section 122.26(d)(1)(iv)(D).

> the requirement by virtue of a "true choice," the requirement is not federally mandated.[445]

The courts have also explained that "except where a regional board finds the conditions are the *only means* by which the [federal] 'maximum extent practicable' standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard."[446] "That the San Diego Regional Board found the permit requirements were 'necessary' to meet the standard establishes only that the San Diego Regional Board exercised its discretion."[447]

Here, the Water Boards state that the GIS requirements were necessary to comply with federal law,[448] but there is no evidence in the record that the requirements are the only means by which the MEP standard can be met.

The Water Boards also assert that the claimants' 2006 ROWD indicates that GIS mapping had already begun and was expected to be completed for the entire county by the end of 2006. The ROWD noted the benefits of GIS mapping and proposed the continued use of GIS. Thus, the Water Boards assert that the mandated activities do not impose a new program or higher level of service.[449] The section of the claimants' ROWD the Water Boards refer to addresses a "BMP Retrofit Opportunities Study," which states the following:

> In 1997-98, the feasibility of incorporating BMP retrofits to optimize beneficial use attainment began to be addressed in the context of the long-term water quality planning initiatives being conducted within Orange County, a number of which were in cooperation with the Army Corps of Engineers. To supplement these earlier efforts, *during 2003-04, a countywide evaluation was initiated using a GIS-based model to identify opportunities within the existing storm drain infrastructure for configuring/reconfiguring storm drains or channel segments in order to improve water quality and maintain the designated beneficial uses (see*

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[445] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

[446] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 (citing to *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.)

[447] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

[448] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 41.

[449] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 42.

DAMP Appendix E). This effort was continued in 2005-06 with further use of the GIS-based model.[450]

The claimants' ROWD also states that GIS-based mapping was used for a portion of the County to define watershed boundaries as follows:

> To support the development of the DAMP/Watershed Chapters, GIS-based mapping was undertaken for the S. County area initially to define watershed boundaries. It will be completed for the entire County area by the end of 2006 and will, for the first time, establish definitive watershed and sub-watershed boundaries for Orange County.[451]

However, the claimants' ROWD does not indicate that the claimants updated the map of the entire MS4 and corresponding drainage areas in GIS format. Moreover, even if a local agency, "at its option, has been incurring costs that are subsequently mandated by the state, the state shall reimburse the local agency . . . for those costs that are incurred after the operative date of the mandate."[452]

Accordingly, updating the map of the entire MS4 and corresponding drainage areas in GIS format and submitting GIS layers to the Regional Board within 365 days of adoption of the permit are new state-mandated activities.

b. <u>The new requirements imposed by section F.4.b. constitute a new program or higher level of service.</u>

Article XIII B, section 6 requires reimbursement whenever the Legislature or any state agency mandates a new program or higher level of service that results in costs mandated by the state. "New program or higher level of service" is defined as "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state."[453]

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[450] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2919-2920 (Claimants' ROWD, dated July 21, 2006, emphasis added to the text that the State Water Boards' reference in their comments).

[451] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2908 (Claimants' ROWD, dated July 21, 2006, section 2.2.4.).

[452] Government Code section 17565.

[453] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

Only one of these alternatives is required to establish a new program or higher level of service.[454]

Here, the new mandated activities cited above are expressly directed toward the local agency permittees, and thus are unique to local government. The Regional Board imposed the requirements because it was "necessary to assure compliance with the regulatory requirements to identify field screening points for analyzing illicit connections and dumping, in furtherance of the Clean Water Act's requirement that Copermittees effectively prohibit unauthorized non-storm water discharges."[455] The challenged requirements are not bans or limits on pollution levels, they are mandates to perform specific actions designed to reduce pollution entering stormwater drainage systems and receiving waters.[456] Thus, the new mandated activities also provide a governmental service to the public.

[454] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

[455] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 41.

[456] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560.

4. Section D.2. of the Test Claim Permit, Which Addresses Stormwater Action Levels (SALs), Imposes a State-Mandated New Program or Higher Level of Service to Develop a Monitoring Plan to Sample a Representative Percentage of Major Outfalls Within Each Hydrologic Subarea to Determine SAL Compliance. However, the Remaining Provisions and Requirements in Section D. Are Not New and Do Not Mandate a New Program or Higher Level of Service.

Claimants plead Section D. of the test claim permit, addressing stormwater action levels (SALs) for eight selected pollutants (nitrate/nitrite,[457] turbidity,[458] and the following metals: cadmium, chromium, nickel, zinc, lead, and copper).[459] The action levels are based on EPA Rain Zone 6 Phase I MS4 monitoring data for pollutants in stormwater, and reflect the water quality standards in the Basin Plan, the federal California Toxics Rule (CTR), and the EPA Water Quality Criteria.[460] Section D. requires the copermittees to implement stormwater monitoring at major outfalls and BMPs to reduce the discharge of these pollutants in stormwater to the MEP standard so as not to

[457] Nitrates and nitrites are nitrogen-oxygen chemical units which combine with various organic and inorganic compounds. Once taken into the body, nitrates are converted into nitrites. The greatest use of nitrates is as a fertilizer, and these pollutants are often found in drinking water. In 1974, Congress passed the Safe Drinking Water Act, which required EPA to determine safe levels of chemicals in drinking water and standards were set for nitrates and nitrites. The short term effects of excessive levels of nitrate in drinking water have caused serious illness and sometimes death. The serious illness in infants is due to the conversion of nitrate to nitrite by the body, which can interfere with the oxygen-carrying capacity of the child's blood. This can be an acute condition in which health deteriorates rapidly over a period of days. Symptoms include shortness of breath and blueness of the skin. Nitrates and nitrites have the potential to cause the following effects from a lifetime exposure at levels above the standards: diuresis, increased starchy deposits and hemorrhaging of the spleen. (Exhibit K (47), U.S. EPA Fact Sheet on Nitrates.)

[458] "Turbidity" is a measure of the clarity of a water body. It is defined as "the state or quality of being clouded or opaque, usually because of suspended matter or stirred-up sediment." https://www.dictionary.com/browse/turbidity (accessed on June 27, 2023).

[459] Exhibit A, Test Claim, filed June 30, 2011, pages 36, 64-67.

[460] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2141-2142, 2425 (Order No. R9-2009-0002; Fact Sheet).

exceed the SALs.[461] "It is the goal of the SALs, through the iterative and MEP process, to have outfall storm water discharges meet all applicable water quality standards."[462]

The claimants contend that section D. imposes a reimbursable state-mandated program, and requires them to perform the following new activities:

> [P]ermittees were not required to perform wet weather monitoring of MS4 outfalls under the prior permit." [Fn. omitted.] Nor were permittees required under the 2002 Permit to develop a year-round watershed-based wet weather MS4 discharge monitoring program; to present a plan with the rationale, locations, frequency and analyses identified; to conduct monitoring at a "representative percent" of the major outfalls within each hydrologic subarea; to conduct source identification monitoring to identify sources of pollutants causing the priority water quality problems within each hydrologic subarea; to respond to SAL exceedances by taking them into consideration when adjusting and executing annual work plans; to sample for a broader suite of constituents obtained from monitoring; and, if a SAL exceedance was believed to be from natural causes, to demonstrate that the "likely and expected" cause of the exceedance was not "anthropogenic in nature." [Fn. omitted.][463]

The claimants further contend that reporting monitoring results under this section of the permit is mandated by the state.[464] However, section D. of the permit does not, by its plain language, require reporting. Reporting is required by sections N. and O. and Attachments B. and E. of the test claim permit, which address standard reporting requirements for receiving waters and MS4 discharge monitoring.[465] In addition, Attachment E., which is the Receiving Waters and MS4 Discharge Monitoring and Reporting Program, requires each copermittee to collaborate with the other copermittees to develop a year-round watershed based Wet Weather MS4 Discharge Monitoring Program that characterizes pollutant discharges from MS4 outfalls in each watershed during wet weather and comply with the SALs in Section D. of the test claim

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[461] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2123, 2141-2142 (Order No. R9-2009-0002, Finding D.1.h. and section D.).

[462] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2142 (Order No. R9-2009-0002).

[463] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, page 15.

[464] Exhibit A, Test Claim, filed June 30, 2011, page 66.

[465] Exhibit C, Water Boards' Comments, on the Test Claim filed October 21, 2016, pages 2206-2207, 2215, 2236 et al.

permit.[466] Sections N. and O. and Attachments B. and E. are not referenced in section D., SALs, and were not pled in this Test Claim. Therefore, the Commission does not have jurisdiction to determine whether the requirements in sections N. and O. and Attachments B. and E. impose a reimbursable state-mandated program.[467]

As described below, the Commission finds that section D.2. of the test claim permit mandates a new program or higher level of service for the following *one-time* activity:

- Develop a monitoring plan to sample a representative percent of the major outfalls within each hydrologic subarea to determine SAL compliance.[468]

However, the remaining requirements to implement the monitoring, analyze the monitoring samples to determine if they meet water quality standards, determine the source of a pollutant, and evaluate and modify BMPs and work plans if an exceedance of a SAL exists, are not new and, do not mandate a new program or higher level of service. The SALs imposed by the test claim permit are simply numbers that reflect the existing water quality standards applicable to the waterbodies in the Basin Plan, the federal California Toxics Rule (CTR), and the US EPA Water Quality Criteria for turbidity, nitrate and nitrite, cadmium, chromium, nickel, zinc, lead, and copper, and if there is an exceedance of a SAL detected with monitoring, then the claimants have to address those exceedances by implementing or modifying BMPs to the MEP as required by existing federal law. Thus, the Regional Board has imposed an iterative, BMP-based compliance regime, using the SALs as a target, or trigger, but leaving substantial flexibility to the permittees to determine how to comply with long-standing federal requirements to monitor, implement BMPs, and report exceedances to the Regional Board. The SALs themselves do not impose any new mandated activities. Moreover, monitoring and implementing BMPs to ensure that stormwater discharges meet water quality standards for these constituents are not new, but have long been required and thus, these activities do not constitute a new program or higher level of service.

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[466] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2246 (Order No. R9-2009-0002, Attachment E, section B.1.)

[467] Government Code section 17553(b)(1) requires test claims to identify the specific sections of the executive order alleged to contain a mandate and a detailed description of the new activities mandated by the state.

[468] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2141 (Order No. R9-2009-0002, section D.2.).

a. Background

i. Federal law requires permittees to monitor and implement BMPs to achieve water quality standards, and established water quality criteria for the pollutants at issue in section D.

Federal law requires that permits for discharges from municipal storm sewers "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[469] Federal regulations define "best management practices" as:

> . . . schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.[470]

Applications for an NPDES permit from medium and large MS4 dischargers are required to identify the following information, including monitoring and BMPs proposals, to reduce pollutants to the MEP:

- A list of water bodies that receive discharges from the MS4, including downstream segments, lakes, and estuaries, where pollutants from the system discharges may accumulate and cause water degradation, and a description of water quality impacts.[471]
- Existing quantitative data describing the volume and quality of discharges from the MS4, including a description of the outfalls sampled, sampling procedures and analytical methods used.[472]
- A description of the existing management programs to control pollutants from the municipal separate storm sewer system. The description shall provide information on existing structural and source controls, including operation and maintenance measures for structural controls that are currently being implemented.[473]

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

[470] Code of Federal Regulations, title 40, section 122.2.

[471] Code of Federal Regulations, title 40, section 122.26(d)(1)(iv)(C).

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

[473] Code of Federal Regulations, title 40, section 122.26(d)(1)(v).

- Quantitative data from representative outfalls or field screening points that include samples of effluent analyzed for the pollutants listed in Table III of appendix D of 40 C.F.R. part 122 (which include, as relevant here, cadmium, chromium, nickel, zinc, lead, and copper); and for nitrate/nitrite.[474]
- A proposed monitoring program for representative data collection that describes the location of outfalls or field screening points to be sampled, why the location is representative, the frequency of sampling, parameters to be sampled, and a description of the sampling equipment.[475]
- A proposed management program that covers the duration of the permit. The management program "shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate." The proposed programs will be considered when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable.[476]

Federal law then requires the Regional Board to establish conditions, as required on a case-by-case basis, to provide for and ensure compliance with all applicable requirements of the Clean Water Act and regulations.[477]

In addition, when the Regional Board determines that an MS4 discharge causes, has the reasonable potential to cause, or contributes to an excursion of a numeric or narrative water quality criteria, the Regional Board is required by federal law to develop NPDES permit effluent limits as necessary to meet water quality standards.[478]

Water quality standards and criteria protect the beneficial uses of any given waterbody, and are developed by the states and included in the Regional Board's Basin Plans.[479] In addition, the EPA publishes water quality criteria in receiving waters to reflect the latest scientific knowledge on the kind and extent of all

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

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

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

[477] Code of Federal Regulations, title 40, section 122.43(a).

[478] Code of Federal Regulations, title 40, section 122.44(d)(1).

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

identifiable effects on health and welfare, which may be expected from the presence of pollutants in any body of water.[480] EPA's water quality criteria for human health and aquatic life are published, and include recommended numeric criteria for the pollutants identified in section D. of the test claim permit.[481] EPA also established numeric water quality criteria for priority toxic pollutants and other provisions for water quality standards to be applied to waters in the state of California, which is known as the California Toxics Rule (CTR), on May 18, 2000.[482] As the courts have explained, the CTR is a water quality standard that applies to "'all waters' for 'all purposes and programs under the Clean Water Act" as follows:[483]

> The EPA's Summary of the Final CTR Rule provides that "[t]hese Federal criteria are legally applicable in the State of California for inland surface waters, enclosed bays and estuaries for all purposes and programs under the Clean Water Act." . . . "All waters (including lakes, estuaries and marine waters) . . . are subject to the criteria promulgated today. Such criteria will need to be attained at the end of the discharge pipe, unless the State authorizes a mixing zone." [Citing to 65 Fed. Reg. 31682, 31701.][484]

All of the metals identified in section D. of the test claim permit are priority toxic pollutants identified in the CTR.

The Clean Water Act requires an NPDES permittee to monitor its discharges into the waters of the United States in a manner sufficient to determine whether it is in compliance with the permit.[485] An NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance.[486] Federal regulations further require that samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity, and shall be retained for at least five years.

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

[481] Exhibit K (51), U.S. EPA National Recommended Water Quality Criteria Aquatic Life Criteria Table; Exhibit K (52), U.S. EPA National Recommended Water Quality Criteria – Human Health Criteria Table.

[482] Code of Federal Regulations, title 40, section 131.38 (65 Federal Register 31711).

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

[484] *Santa Monica Baykeeper v. Kramer Metals, Inc.* (2009) 619 F.Supp.2d 914, 926.

[485] United States Code, title 33, section 1342(a)(2); Code of Federal Regulations, title 40, section 122.44(i)(1).

[486] Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(F); see also *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1209.

Monitoring must be conducted according to approved test procedures, unless another method is required as specified.[487]

Monitoring results must be reported, including any instances of noncompliance.[488] In addition, the permittee is required by federal regulations to report any noncompliance that may endanger health or the environment verbally within 24 hours, followed by a written report within five days. The report shall state whether the noncompliance has been corrected and the steps taken or planned to reduce or eliminate the noncompliance.[489] Federal regulations also require the operator of a large or medium MS4 to submit an annual report by the anniversary of the date of the issuance of the permit, which shall include the status of the stormwater management program; proposed changes to the program; revisions, if necessary, to the assessment of controls; a summary of data, including monitoring data; annual expenditures; a summary of the enforcement actions, inspections, and public education programs; and identification of water quality improvements or degradation.[490]

ii. The prior permit prohibited discharges from MS4s that cause or contribute to exceedances of receiving water quality objectives and required the claimants to conduct receiving water quality monitoring, and dry weather (non-stormwater) monitoring at major outfalls at least twice during dry weather months, and implement BMPs to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards.

The prior permit recognized that the most common categories of pollutants in urban runoff include heavy metals, such as copper, lead, zinc, and cadmium, and nutrients (e.g., nitrogen and phosphorus fertilizers).[491] The prior permit required the copermittees to meet receiving water limitations through "control measures and other actions to reduce pollutants in urban runoff discharges."[492] Part C.1. prohibited discharges from MS4s that cause or contribute to the violation of water quality standards.[493] The prior

[487] Code of Federal Regulations, title 40, section 122.41(j).

[488] Code of Federal Regulations, title 40, sections 122.41(l)(4),(7); 122.42; 122.48; and Code of Federal Regulations, title 40, Part 127.

[489] Code of Federal Regulations, title 40, section 122.41(l)(6).

[490] Code of Federal Regulations, title 40, sections 122.42(c), 122.48.

[491] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3433 (Order R9-2002-0001).

[492] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3439-3440 (Order R9-2002-0001).

[493] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3439 (Order R9-2002-0001).

permit also prohibited discharges from MS4s that cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater.[494] Part A.4. stated that "[i]n addition to the above prohibitions, discharges from MS4s are subject to all Basin Plan prohibitions cited in Attachment A to this Order." Attachment A. of the prior permit states that the "discharge of waste to inland surface waters, except in cases where the quality of the discharge complies with applicable receiving water quality objectives, is prohibited."[495]

Section C.2. of the prior permit then required the copermittees to implement control measures to reduce pollutants in urban runoff discharges in accordance with the Jurisdictional Urban Runoff Management Program (JURMP). As part of the program, copermittees were required to conduct receiving water quality monitoring, in accordance with Attachment B.[496] Attachment B. to the prior permit (titled, "Receiving Water Monitoring and Reporting Program"), required the copermittees to collaborate with each other to revise their existing receiving water monitoring program to monitor and report findings for discharges of urban runoff.[497] The monitoring program design, implementation, analysis, assessment, and reporting was required to be conducted annually on a watershed basis for each of the six hydrologic units in the San Juan Creek Watershed Management Area within Orange County and incorporate the following components:

- Urban Stream Bioassessment Monitoring (Section B.2.b.8.a.). Sampling, monitoring, and analysis of data at 15 stations in urban streams located in one of the six watersheds. The stations had to be representative of urban stream conditions, and be monitored twice annually in May and October.[498] "When findings indicate the presence of toxicity, a Toxicity Identification Evaluation (TIE) shall be conducted to determine the cause(s) of the toxicity."[499]

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[494] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3438 (Order R9-2002-0001).

[495] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3482 (Order R9-2002-0001, Attachment A.).

[496] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3467 (Order R9-2002-0001).

[497] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3485-3488 (Order R9-2002-0001, Attachment B.).

[498] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3485 - 3487 (Order R9-2002-0001, Attachment B.).

[499] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3487 (Order R9-2002-0001, Attachment B.).

- Long Term Mass Loading (Section B.2.b.8.b.). Copermittees were required to continue long term mass loading monitoring conducted under the 99-04 Plan in Orange County within the San Diego Region, which uses measurements of key pollutants to assess loads over a time frame of years to decades to compare with past and present levels.[500] The plan had to be revised as necessary to ensure adequate coverage and to conduct toxicity identification evaluations (TIE) to determine the cause of toxicity.[501] The claimants' ROWD indicates that this wet weather monitoring was conducted at six locations.[502] Three storms were monitored at each location and for each storm, the water chemistry is monitored with a series of composite samples collectively spanning about 96 hours. "This time period provides for comparison of the data to 96-hour guidance criteria for chronic aquatic toxicity from the California Toxics Rule (CTR)."[503]
- Coastal Storm Drain Outfall Monitoring (Section B.2.b.8.c.). Copermittees were required to develop and implement a monitoring program for bacterial indicator discharges of urban runoff from coastal storm drain outfalls. Samples had to be collected during dry and wet weather periods.[504]
- Ambient Coastal Receiving Water Monitoring (Section B.2.b.8.d.). Copermittees were required to develop and implement a program to assess the overall health of the coastal receiving waters and monitor the impact of urban runoff on ambient receiving water quality.[505] The claimants' 2006 ROWD, summarizes their Ambient Coastal Receiving Water Monitoring Program as follows:

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[500] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3487 (Order R9-2002-0001, Attachment B.); Exhibit K (8), 2007 Drainage Area Management Plan, page 388; Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3034 (2006 ROWD, July 21, 2006, Section 11.0).

[501] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3487 (Order R9-2002-0001, Attachment B.).

[502] The six locations are identified in Attachment E., to the test claim permit, which requires that the mass loading station monitoring continue. The six locations are Laguna Canyon, Aliso Creek, San Juan Creek, Trabuco Creek, Prima Deshecha Channel, and Segunda Deshecha Channel. (Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2238 [Attachment E.].

[503] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3487 (Order R9-2002-0001, Attachment B.).

[504] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3487-3488 (Order R9-2002-0001, Attachment B.).

[505] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3488 (Order R9-2002-0001, Attachment B.).

> The ambient coastal receiving water component of the water quality monitoring program is intended to assess the impact of urban runoff to ecologically sensitive coastal areas by analyzing the water chemistry, aqueous toxicity, and magnitude of plumes of stormwater discharges to these areas. With this information the Permittees would then prioritize these sites for further study in terms of their relative degree of potential threat to water quality and ecological resources. Monitoring at these 17 sites focuses primarily on aquatic chemistry and aquatic toxicity during both dry and wet (storm) weather conditions. Aerial photographs of stormwater plumes provide a basis for estimating the relative magnitudes of the impact zones.
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> Values for five metals are compared to acute toxicity criteria established in the California Toxics Rule (CTR) for guidance and the numbers and percentages of CTR exceedances tabulated.[506]

The purpose of the Receiving Water Monitoring and Reporting Program was to assess compliance with the permit; measure the effectiveness of the urban runoff management plans; assess the chemical, physical, and biological impacts to receiving waters resulting from urban runoff; and to assess the overall health and evaluate long-term trends in receiving water quality.[507]

The annual "Receiving Waters Monitoring Annual Report" was required to be submitted to the Regional Board by November 9th each year, beginning November 9, 2003.[508] The monitoring reports were required to include the monitoring locations and sampling and analysis protocols; monitoring data and results, including exceedances of receiving water quality objectives; the identity of the sources of pollutants; an estimation of total pollutant loads due to urban runoff; an analysis and assessment of whether water quality standards were being met; a recommendation of future monitoring and BMPs, and be signed under penalty of perjury.[509] The Fact Sheet for the prior permit explains the requirements as follows:

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[506] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3036-3037 (2006 ROWD, July 21, 2006, Section 11.0).

[507] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3484 (Order R9-2002-0001, Attachment B.).

[508] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3488 (Order R9-2002-0001, Attachment B.).

[509] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3488-3489 (Order R9-2002-0001, Attachment B.); see also, Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3440 (Order No. R9-2002-0001).

> The monitoring reports shall provide the data and results, the methods of evaluating the data, graphical summaries of the data and an explanation and discussion of the data for each monitoring component listed above. The report will also provide an analysis of each component, prioritize water quality problems, identify the sources of the problems, and recommend future monitoring and BMP implementation measures. The Copermittees will be expected to make both long term and short term use of this data to refine and improve their Jurisdictional and Watershed Urban Runoff Management Programs. To this extent, the analysis shall also include an evaluation of the effectiveness of existing control measures with respect to water quality problems identified in the course of the review of previous monitoring methods and results as well as data collected under this Order. The Copermittees will also be required to clearly identify exceedances of receiving water quality objectives, provide ongoing analysis of short term and long term trends in urban runoff and receiving water quality, provide a three person committee review of the reports prior to submitting them to the SDRWQCB, and provide comprehensive interpretations and conclusions.[510]

In addition, if a copermittee determined that the MS4 discharges are causing or contributing to an exceedance of an applicable water quality objective, the copermittee was required under the prior permit to "assure compliance" with water quality standards by promptly notifying and submitting a report to the Regional Board that describes the BMPs that are currently implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. Within 30 days following approval of the report, the copermittee was required to revise its JURMP and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required. This report could be incorporated into the annual report.[511]

The prior permit then states that "[n]othing in this section shall prevent the SDRWQCB from enforcing any provision of this Order while the Copermittee prepares and implements the above report."[512]

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[510] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3711 (Order No. R9-2002-0001, Fact Sheet).

[511] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3440 (Order R9-2002-0001).

[512] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3440 (Order R9-2002-0001).

In addition to the receiving water monitoring program, the prior permit required the claimants, as part of their JURMP, to conduct dry weather (or nonstormwater) monitoring "at each major drainage area within the copermittee's jurisdiction (either major outfalls or other outfall points such as manholes) to adequately cover the entire MS4 system."[513] Dry weather monitoring and analysis was required at least twice between May 15 and September 30 of each year, "or as more frequently as the Copermittee determines is necessary to comply with the order," for the following pollutants: turbidity, nitrate nitrogen, cadmium, copper, lead, zinc.[514] If monitoring results showed an exceedance of a water quality criteria, claimants were required to investigate the source and eliminate any illicit discharges.[515] Dry weather monitoring reports were also required.[516]

> *iii. Section D. of the test claim permit requires the claimants to develop and implement wet weather monitoring plans for end-of-pipe assessment points at a representative percentage of the major outfalls within each hydrologic subarea. Outfalls that exceed the SALS for Turbidity, Nitrate and Nitrite, Cadmium, Chromium, Nickel, Zinc, Lead, and Copper require the copermittee to continue to monitor the outfall in the subsequent year and implement BMPs to reduce the discharge of these pollutants to the MEP standard.*

The findings in the test claim permit indicate that prior water quality monitoring indicated persistent violations of water quality objectives for turbidity and metals as follows:

> Copermittees water quality monitoring data submitted to date documents persistent violations of Basin Plan water quality objectives for various runoff-related pollutants (. . . . turbidity, metals, etc.) at various watershed monitoring stations. Persistent toxicity has also been observed at some watershed monitoring stations. In addition, bioassessment data indicates that the majority of urbanized receiving waters have Poor to Very Poor Index of Biotic Integrity ratings. In sum, the above findings indicate that

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[513] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3509 (Order R9-2002-0001, Attachment E., section E.4.b.)

[514] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3509-3510 (Order R9-2002-0001, Attachment E., section E.4.c., and d.1.).

[515] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3509 (Order R9-2002-0001, Attachment E., section E.4.d.).

[516] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3510 (Order R9-2002-0001, Attachment E., section E.5.).

> runoff discharges are causing or contributing to water quality impairments, and are the leading cause of such impairments in Orange County.[517]

The Regional Board's findings also indicate that the copermittees have generally been implementing the jurisdictional runoff management programs required by the prior permit since February 13, 2003, but runoff discharges continue to cause or contribute to violations of water quality standards.[518]

Accordingly, section D. of the test claim permit establishes stormwater action levels (SALs) for turbidity, nitrate and nitrite, cadmium, chromium, nickel, zinc, lead, and copper. Copermittees are required to implement a stormwater control program to reduce the discharge of these pollutants in stormwater from the permitted areas so as not to exceed the SALs. "It is the goal of the SALs, through the iterative and MEP process, to have outfall storm water discharges meet all applicable water quality standards."[519] The Fact Sheet states that:

> For the past 4 permit cycles (19 years), Copermittees have utilized non-numerical limitations (BMPs) to control and abate the discharge of any pollutants in storm water discharges to the MEP. Copermittees have been accorded 19 years to research, develop, and deploy BMPs that are capable of reducing storm water discharges from the MS4 to levels

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[517] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2120 (Test claim permit, section C.9., [Discharge Characteristics]); see also Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3053-3054 (2006 ROWD, July 21, 2006, Section 11.0, which summarizes the "Exceedances of Acute CTR Criteria Across the Region" for Copper, Nickel, and Zinc).

[518] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2121 (Order No. R9-2009-0002, section D.1., [Runoff Management Programs]).

See also, Exhibit C, Water Boards' Comments on the Test Claim, on the Test Claim filed October 21, 2016, page 2332 (Order No. R9-2009-0002, Fact Sheet, which states that the most common categories of pollutants in runoff include heavy metals, pesticides and nitrogen and phosphorus fertilizers); pages 2357-2358 (Order No. R9-2009-0002, Fact Sheet, which states that in response to the prior permit, the copermittees have improved their runoff management programs and have developed comprehensive plans. "Although the programmatic improvements have led to better implementation of BMPs, the Copermittees' monitoring data demonstrate additional or revised BMPs are necessary to prevent discharges from MS4s from causing or contributing to violations of water quality standards."); and 2400 (Order No. R9-2009-0002, Fact Sheet, "Stormwater discharges from MS4s may cause or contribute to an excursion above water quality standards for turbidity.")

[519] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2142 (Order No. R9-2009-0002, section D.5.).

represented in SALs. Storm Water Action Levels are set at such a level that an exceedance of a SAL will clearly indicate BMPs being implemented are insufficient to protect the Beneficial Uses of waters of the State. Copermittee shall utilize the exceedance information as a high priority consideration when adjusting and executing annual work plans, as required by this Permit.[520]

The SALs were developed by using the national EPA Rain Zone 6 Phase I MS4 stormwater monitoring data from the Counties of Orange, San Diego, Los Angeles, and Ventura. While the County of Orange has a large monitoring data set, the Regional Board concluded that there was a lack of effluent monitoring from major outfalls that were representative of the conditions in the region. Thus, the SALs were set as the 90th percentile of the dataset from the region for each pollutant.[521] In addition, since the goal of the SALs, through the iterative and MEP process, is to have outfall stormwater discharges meet all applicable water quality objectives, the SALs reflect the water quality standards in the Basin Plan, the CTR, and the EPA Water Quality Criteria.[522]

Section D. of the test claim permit requires copermittees to develop and implement monitoring plans for end-of-pipe assessment points at a representative percentage of the major outfalls within each hydrologic subarea. Outfalls that exceed the SALS for turbidity, nitrate and nitrite, cadmium, chromium, nickel, zinc, lead, and copper require the copermittee to continue to monitor the outfall in the subsequent year and to implement BMPs to reduce the discharge of these pollutants to the MEP standard. Section D., of the permit identifies these required activities as follows:

- Develop and implement monitoring plans to sample a representative percent of the major outfalls within each hydrologic subarea. The end-of-pipe assessment points for the determination of SAL compliance are all major outfalls. Outfalls that exceed SALs must be monitored in the subsequent year. Any station that does not exceed a SAL for three years may be replaced with a different station.
- Beginning Year 3 after the permit is adopted, "a running average of twenty percent or greater of exceedances of any discharge of stormwater from the MS4 to waters of the United States that exceed the SALs for the pollutants" identified, will require each Copermittee to affirmatively augment and implement all necessary controls and measures (BMPs) to reduce the discharge of the

[520] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2369 (Order No. R9-2009-0002, Fact Sheet).

[521] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2369, 2424 (Order No. R9-2009-0002, Fact Sheet).

[522] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2425 (Order No. R9-2009-0002, Fact Sheet).

associated class of pollutant(s) to the MEP standard. Copermittees shall take the magnitude, frequency, and number of constituents exceeding the SAL(s), in addition to receiving water quality data and other information, into consideration when reacting to SAL exceedances in an iterative manner.[523]

Attachment E. describes how MS4 outfall monitoring to comply with the SALs in section D. of the permit is required to be done:

a. . . .Samples must be collected during the first 24 hours of the storm water discharge or for the entire storm water discharge if it is less than 24 hours.

   1. Grab samples may be utilized only for pH, indicator bacteria, DO, temperature and hardness.

   2. All other constituents must be sampled using 24 hour composite samples or for the entire storm water discharge if the storm event is less than 24 hours.

b. Sampling to compare MS4 outfall discharges with total metal SALs must include a measurement of receiving water hardness at each outfall. If a total metal concentration exceeds a SAL, that concentration must be compared to the California Toxic Rule criteria and the USEPA 1 hour maximum concentration for the detected level of receiving water hardness associated with that sample. If it is determined that the sample's total metal concentration for that specific pollutant exceeds the SAL but does not exceed the applicable 1 hour criteria for the measured level of hardness, then the SAL shall be considered not exceeded for that measurement.[524]

As a practical matter, it is necessary to first identify the source of the pollutant to implement BMPs to control or reduce the discharge of pollutants at issue. Attachment E. clarifies that the permittees are required to "identify sources of pollutants causing the priority water quality problems within each watershed. The monitoring program must include focused monitoring which moves upstream into each watershed as necessary to identify sources."[525]

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[523] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2141 (Order No. R9-2009-0002, section D.1-2.). "Major outfall" is defined in federal CWA regulations as "a major separate storm sewer outfall." (Code of Fed. Regs., tit. 40, § 122.26(b)(6).).

[524] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2246-2247 (Order No. R9-2009-0002, Attachment E., section B.1.).

[525] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2247 (Order No. R9-2009-0002, Attachment E., section B.2.).

The claimants describe their SAL program to include thirteen representative major outfalls, monitored twice per year during a stormwater runoff event, with one sample collected per hour (up to 24 hours) and analyzed for any SAL exceedances, as follows:

> The Wet Weather MS4 Discharge Monitoring Program is intended to characterize the quality of stormwater runoff from the municipal stormdrain system exclusive of influences from non-municipal activities. The results of monitoring are compared to Stormwater Action Levels (SALs), statistically derived from the National Stormwater Quality Database. Thirteen major outfalls were selected for monitoring. Each outfall was selected to be representative of the stormdrain system within its respective Hydrologic Subwatershed Area (HAS). The selection criteria were as follows:
>
> - The stormwater conveyance structure must be composed of reinforced concrete or corrugated metal pipe with no upstream earthen component,
> - The outfall dimensions must meet EPA sizing criteria for major outfalls, and the major outfall must discharge to waters of the United States,
> - The outfall discharge quality must be measureable without interference from upstream receiving waters, and
> - Discharge from the MS4 must be capable of being collected by an automatic sampler.
>
> Each site is monitored twice per year during a representative stormwater runoff event. Monitoring is conducted with an automatic sampler programmed to collect one sample per hour for the duration of stormwater runoff or 24 hours, whichever is shorter. A grab sample of the receiving waters is collected to calculate the acute toxicity criteria for total metals from the California Toxics Rule. If a total recoverable metal concentration exceeds its respective SAL but does not exceed the hardness adjusted CTR acute criterion for that metal, the SAL shall not be considered as exceeded.[526]

Section D., further states that the permit does not regulate natural sources and conveyances of the pollutants. Thus, "to be relieved of the requirements to prioritize pollutant/watershed combinations for BMP updates and to continue monitoring a station, the Copermittee must demonstrate that the likely and expected cause of the SAL

[526] Exhibit K (29), Orange County Permittees' 2011-12 Unified Annual Progress Report, Program Effectiveness Assessment, Section C-11, pages 10-11.

exceedance is not anthropogenic in nature [i.e., not caused by humans]."[527] The claimants contend that this language requires them to demonstrate that the likely and expected cause of the SAL exceedance is not anthropogenic in nature, in order to be *relieved* of the requirements to prioritize pollutant/watershed combinations for BMP updates and to continue monitoring a station, in accordance with paragraph 4 of Section D.[528] The plain language of this provision, however, gives the copermittees discretion to seek relief from the requirements to monitor and implement BMPs at a station where the cause of the SAL exceedance is not anthropogenic in nature. If a permittee seeks relief, then the permittee has to comply with the requirement to demonstrate that the likely and expected cause of the SAL exceedance is not anthropogenic in nature. Downstream requirements triggered by local discretionary decisions are not mandated by the state.[529]

Thus, the plain language of section D., requires copermittees to develop and implement wet weather monitoring plans for collecting samples at end-of-pipe assessment points at a representative percentage of the major outfalls within each hydrologic subarea, and analyze those samples for the SALs. Outfalls that exceed the SALs for turbidity, nitrate and nitrite, cadmium, chromium, nickel, zinc, lead, and copper require the copermittee to continue to monitor the outfall in the subsequent year, identify the source of the pollutant discharge, and beginning in year three after the permit is adopted, implement BMPs to reduce the discharge of these pollutants to the MEP standard.

b. Except for the one-time requirement in Section D.2. to develop a monitoring plan to sample a representative percent of the major outfalls within each hydrologic subarea to determine SAL compliance, Section D. of the test claim permit (SALs) does not mandate a new program or higher level of service.

The claimants contend that section D. imposes a reimbursable state-mandated program. "Similar to the NAL-Triggered Mandates, the 2009 Permit includes a series of new monitoring, reporting and compliance obligations associated with "SALs" that were not contained in the 2002 Permit, and that are not required by federal law.[530] The claimants argue that there is no federal requirement that municipal NPDES permits

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[527] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2141 (Order No. R9-2009-0002, section D.4.). "Anthropogenic" is defined to mean "resulting from the influence of human beings on nature." (Merriam-Webster.)

[528] Exhibit A, Test Claim, filed June 30, 2011, page 65; Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, page 15.

[529] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 743.

[530] Exhibit A, Test Claim, filed June 30, 2011, page 65.

include monitoring, reporting or compliance obligations that are triggered by an exceedance of a SAL, as follows:

> Contrary to any requirement to include a SAL-Related Mandate within a municipal NPDES Permit, the plain language of the CWA, as well as controlling case authority interpreting the Act, all make clear that no form of SALs or any related mandates are required to be included within a municipal NPDES Permit by federal law. (*See Defenders of Wildlife, supra*, 191 F.3d 1159, 1163 ***["Industrial discharges must strictly comply with State water-quality standards," while "Congress chose not to include a similar provision for municipal storm-sewer discharges."]***; *Divers' Environmental, supra*, 145 Cal.App.4th 246, 256 **[*"In regulating stormwater permits the EPA has repeatedly expressed a preference for doing so by the way of BMPs, rather than by way of imposing either technology-based or water quality-based numerical limitations."*]**; and *BIA v. State Board, supra*, 124 Cal.App.4th 866, 874 ["With respect to municipal stormwater discharges, Congress clarified that the EPA has the authority to fashion NPDES Permit requirements to meet water quality standards ***without specific numeric effluent limits*** and to instead impose 'controls to reduce the discharge of pollutants to the maximum extent practicable.'"]; State Board Order No. 2000-11, p. 3 ["In prior orders this Board has explained the need for the municipal stormwater programs ***and the emphasis on BMPs in lieu of numeric effluent limitations***."]; State Board Order No. 2006-12, p. 17 ***["Federal regulations do not require numeric effluent limitations for discharges of stormwater."]***; and State Board Order No. 91-03, pgs. 30-31 ["***We . . . conclude that numeric effluent limitations are not legally required***. Further we have determined that the program of prohibitions, source control measures and 'best management practices' set forth in the Permit constitutes effluent limitations as required by law.'"].)[531]
>
> The claimants contend that like the NALs, the SALs are similar to numeric effluent limits in that they are new programs imposed on the copermittees that are tied to achieving compliance with specific numeric limits. "[I]f the Copermittees exceed the SALs, they are subject to additional and costly requirements, regardless of the feasibility of complying with the SALs."[532]

The claimants therefore contend that "[a]ll of the SAL-Related Mandates, including monitoring, investigation, reporting and compliance activities contained in the 2009

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[531] Exhibit A, Test Claim, filed June 30, 2011, page 66, emphasis in original.

[532] Exhibit A, Test Claim, filed June 30, 2011, page 66.

Permit are state-mandated new programs that were not included in any fashion in the 2002 Permit," and result in increased costs mandated by the state.[533]

The Water Boards disagree and contend that section D., SALs, does not impose a state-mandated new program or higher level of service as follows:

> As in prior permits, Copermittees are required to comply with water quality standards and to control pollutants in storm water discharges to the MEP. They remain required "through timely implementation of control measures and other actions to reduce pollutants in storm water discharges." [Citation omitted.] Contrary to Claimants' assertions, SALs, like NALs, do not exceed the requirements of federal law, but instead are required in this case to help the Copermittees control of pollutants in storm water to the maximum extent practicable (MEP), the federal standard established in CWA section 402(p)(3)(B)(iii).[534]

As explained below, the Commission finds that except for the one-time requirement in section D.2. to develop a monitoring plan to sample a representative percent of the major outfalls within each hydrologic subarea to determine SAL compliance, section D. of the test claim permit (SALs) does not impose a new program or higher level of service.

i. The one-time requirement in Section D.2. to develop a monitoring plan to sample a representative percent of the major outfalls within each hydrologic subarea to determine SAL compliance imposes a state-mandated new program or higher level of service.

As indicated above, Section D.2 requires the permittees to develop a monitoring plan to sample a representative percent of the major outfalls within each hydrologic subarea to ensure compliance with the SALs.[535] This activity is new and was not required by prior law.

Federal law does not require monitoring of each stormwater source at the precise point of discharge.[536] Thus, the wet weather monitoring required by the prior permit focused

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[533] Exhibit A, Test Claim, filed June 30, 2011, page 66.

[534] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 30-31.

[535] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2141 (Order No. R9-2009-0002, section D.2.).

[536] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1209.

on the receiving waters and required a receiving waters monitoring program.[537] The Fact Sheet for the test claim permit clarifies that the copermittees did not previously monitor the discharge of stormwater from the MS4 outfalls.[538] "The monitoring of outfalls is expected to be used to identify storm drains that are discharging pollutants in concentrations that may pose a threat to receiving waters."[539] However, the Regional Board wanted to give the permittees the flexibility in assigning stations for wet weather monitoring, choosing the number and frequency of monitoring stations, and thus determining the overall cost of their program.[540] This requirement is new.

The Commission further finds that the requirement in section D.2. to develop a monitoring plan to sample a representative percent of the major outfalls within each hydrologic subarea imposes a state-mandated new program or higher level of service.

In *Department of Finance v. Commission on State Mandates*, the California Supreme Court identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or the federal government:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[541]

Federal law does not specifically require the permittees to develop this additional monitoring plan, nor does it compel the state to impose this requirement. Thus, the requirements to develop and submit the monitoring plan is mandated by state.

Moreover, the requirement to develop a monitoring plan to sample a representative percent of the major outfalls within each hydrologic subarea imposes a new program or higher level of service. A "new program or higher level of service" is defined as "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local

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[537] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3485-3487 (Order R9-2002-0001, Attachment B.).

[538] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2492 (Order No. R9-2009-0002, Fact Sheet).

[539] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2492 (Order No. R9-2009-0002, Fact Sheet).

[540] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2492 (Order No. R9-2009-0002, Fact Sheet).

[541] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

governments and do not apply generally to all residents and entities in the state."[542] This new requirement is uniquely imposed on the local government claimants and, thus, it imposes a new program or higher level of service.

Thus, the following activity required by section D.2. of the test claim permit imposes a state-mandated new program or higher level of service:

- Develop a monitoring plan to sample a representative percent of the major outfalls within each hydrologic subarea to determine SAL compliance.

    ii. The remaining requirements in Section D. to conduct the wet weather discharge monitoring, analyze the monitoring samples to determine if they meet water quality standards, determine the source of a pollutant, and evaluate and modify BMPs and work plans if an exceedance of a SAL exists, do not impose a new program or higher level of service.

The courts have held that "simply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting 'service to the public' under article XIII B, section 6, and Government Code section 17514."[543] Rather, all of the requirements of article XIII B, section 6 must be met, including that the requirements imposed by the state mandate a new program or higher level of service.[544]

In this case, the claimants' costs may increase as a result of Section D. The prior permit required major outfall monitoring for dry weather monitoring and for coastal storm drains, but wet weather monitoring was at the receiving water.[545] The claimants are now required to monitor a representative percentage of the major outfalls within each hydrologic subarea and, thus, the number of monitoring locations may have increased. The costs will depend, however, on how the permittees structured their monitoring plan. As explained in the Fact Sheet, "[t]he MRP provides the Copermittees great flexibility in assigning stations for wet weather monitoring. Copermittees are to choose the number

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[542] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

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

[544] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877, emphasis in original; see also, *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[545] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3485-3487, 3509 (Order No. R9-2002-0001, Attachment B., and Attachment E., section E.4.b.).

and frequency of monitoring stations, thus determining the overall cost of their program."[546]

However, the requirements in Section D. to monitor for the pollutants at issue, analyze the monitoring samples to determine if they meet water quality standards, determine the source of a pollutant, and evaluate and modify BMPs and work plans if an exceedance of a SAL exists, are not new and, do not impose a new program or higher level of service.

First, the SALs, themselves, do not require any activities as suggested by the claimants. The SALs, like the NALs, are simply numbers set at the 90th percentile of the dataset for each constituent, that reflect the existing water quality standards in the Basin Plan, the CTR, and the US EPA Water Quality Criteria for turbidity, nitrate and nitrite, cadmium, chromium, nickel, zinc, lead, and copper, and if there is an exceedance of a SAL detected with monitoring, then the claimants have to determine the source and address those exceedances by implementing or modifying BMPs.[547] Section D. therefore imposes an iterative, BMP-based compliance regime, using the SALs as a target, or trigger, but leaving substantial flexibility to the permittees to determine how to comply with long-standing federal requirements to monitor discharges into the waters of the United States to ensure compliance with water quality standards and to implement BMPs to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards.

Specifically, the CWA requires an NPDES permittee to monitor discharges into the waters of the United States in a manner sufficient to determine whether it is meeting water quality standards.[548]

> First and foremost, the Clean Water Act *requires* every NPDES permittee to monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit. 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1) ("[E]ach NPDES permit shall include conditions meeting the following ... monitoring requirements ... to assure compliance with permit limitations."). That is, an NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance. *See* 40 C.F.R. § 122.26(d)(2)(i)(F) ("Permit applications for discharges from large and medium municipal storm sewers ... shall include ... monitoring procedures

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[546] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2492 (Order No. R9-2009-0002, Fact Sheet).

[547] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2141 (Order No. R9-2009-0002, section D.1-2.).

[548] United States Code, title 33, section 1342(a)(2) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.44(i)(1).

necessary to determine compliance and noncompliance with permit conditions....").[549]

Federal regulations expressly require the permittees to monitor for cadmium, chromium, nickel, zinc, lead, and copper, for which SALs were identified.[550] Monitoring must be conducted according to approved test procedures, unless otherwise approved.[551] Approved testing procedures for sampling, sample preservation, and analyses are located in federal regulations.[552]

Monitoring results must be reported, including any instances of noncompliance.[553] In addition, the permittee is required by federal regulations to report any noncompliance that may endanger health or the environment verbally within 24 hours, followed by a written report within five days. The report shall state whether the noncompliance has been corrected and the steps taken or planned to reduce or eliminate the noncompliance.[554] The steps taken or planned to reduce or eliminate the noncompliance to achieve water quality standards include BMPs, or "controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[555] Federal law also requires that annual monitoring reports identify and evaluate the results of the analysis of the monitoring data.[556] An NPDES permit is unlawful if a permittee is not required to *effectively* monitor its permit compliance.[557]

Similarly, the monitoring program required by the prior permit was conducted in both wet and dry seasons (thus, year round), and also required the claimants to assess compliance with the permit and determine whether the discharges were meeting water

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[549] *Natural Resources Defense Council v. County of Los Angeles* (2013) 725 F.3d 1194, 1207.

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

[551] Code of Federal Regulations, title 40, section 122.41(j).

[552] Code of Federal Regulations, title 40, Part 136.

[553] Code of Federal Regulations, title 40, sections 122.41(l)(4), (7); 122.22, 122.48; Code of Federal Regulations, title 40, Part 127.

[554] Code of Federal Regulations, title 40, section 122.41(l)(6).

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

[556] Code of Federal Regulations, title 40, section 122.41(j)(3).

[557] Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(F); see also *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1209.

quality standards for the pollutants at issue here.[558] The claimants were required to conduct toxicity identification evaluations (TIE) on the samples to determine the cause of any toxicity.[559] The monitoring reports were required to include the monitoring locations and sampling and analysis protocols; monitoring data and results, including exceedances of receiving water quality objectives; the identity of the sources of pollutants; an estimation of total pollutant loads due to urban runoff; an analysis and assessment of whether water quality standards were being met; and a recommendation of additional monitoring and BMPs.[560] If a copermittee determined that the MS4 discharges are causing or contributing to an exceedance of an applicable water quality objective, the copermittee was required under the prior permit to "assure compliance" with water quality standards by revising its JURMP and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and "any additional monitoring required."[561]

In addition, water quality standards for the pollutants at issue in section D. of the test claim permit had been in place and adopted by EPA pursuant to federal law and through the CTR before the prior permit became effective.[562] These water quality standards apply to "'all waters' for 'all purposes and programs under the Clean Water Act."[563] The Fact Sheet explains that the claimants were "accorded 19 years to research, develop, and deploy BMPs that are capable of reducing storm water discharges from the MS4 *to levels represented in the SALs*."[564]

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[558] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3438 (Order R9-2002-0001, Discharge Prohibitions), pages 3485-3487 (Order R9-2002-0001, Attachment B.), pages 3509-3510 (Order R9-2002-0001, Attachment E., section E.4.c., and d.1.).

[559] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3487 (Order R9-2002-0001, Attachment B.).

[560] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3488-3489 (Order R9-2002-0001, Attachment B.); see also, Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3440 (Order R9-2002-0001).

[561] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3440 (Order R9-2002-0001).

[562] United States Code, title 33, section 1314(a); Code of Federal Regulations, title 40, section 131.38 (Federal Register, Volume 65, No. 57, p. 31682, May 18, 2000).

[563] Exhibit K, Federal Register, Volume 65, No. 97, page 31701; *Santa Monica Baykeeper v. Kramer Metals, Inc.* (2009) 619 F.Supp.2d 914, 927.

[564] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2369 (Order No. R9-2009-0002, Fact Sheet), emphasis added.

Thus, the requirements in Section D. to monitor the pollutants at issue, analyze the monitoring samples to determine if they meet water quality standards, determine the source of a pollutant, and evaluate and modify BMPs and work plans if an exceedance of a SAL (or water quality standard) exists, have long been required by law and are not new, state-mandated requirements.

Moreover, section D. does not increase the level or quality of service to the public. As indicted above, federal law already required the claimants to comply with water quality standards (including those reflected in the Basin Plan, the CTR, and the EPA Water Quality Criteria) by monitoring and implementing BMPs. The prior permit expressly prohibited discharges from MS4s that cause or contribute to the violation of water quality standards.[565] The prior permit also prohibited discharges from MS4s that cause or contribute to exceedances of receiving water quality objectives for surface water or groundwater.[566] The prior permit further stated that "[n]othing in this section shall prevent the SDRWQCB from enforcing any provision of this Order while the Copermittee prepares and implements" the report required after a determination that the MS4 discharges are causing or contributing to an exceedance of an applicable water quality objective.[567] As indicated in the findings, the claimants were not meeting water quality standards.[568] Based on these facts, the claimants could have been held liable for violating the Clean Water Act.

In *Building Industry Association of San Diego County v. State Water Resources Control Board*,[569] the Building Industry Association (BIA) challenged a 2001 NPDES stormwater permit issued by the San Diego Regional Water Quality Control Board that expressly prohibited the discharge of pollutants that "cause or contribute to exceedances of receiving water quality objectives," and that "cause or contribute to the violation of water

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[565] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3439 (Order R9-2002-0001).

[566] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3438 (Order R9-2002-0001).

[567] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3440 (Order R9-2002-0001).

[568] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2120 (Test claim permit, section C.9., [Discharge Characteristics]); see also Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3053-3054 (2006 ROWD, July 21, 2006, Section 11.0, which summarizes the "Exceedances of Acute CTR Criteria Across the Region" for Copper, Nickel, and Zinc).

[569] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866.

quality standards."[570] The permit contained an enforcement provision that required a municipality to report any violations or exceedances of an applicable water quality standard and describe a process for improvement and prevention of further violations.[571] The permit also contained a provision that "Nothing in this section shall prevent the Regional Water Board from enforcing any provision of this Order while the municipality prepares and implements the above report."[572] BIA, concerned that the permit provisions were too stringent, impossible to satisfy, and would result in all affected municipalities being in immediate violation of the permit and subject to substantial civil penalties because they were not then complying with applicable water quality standards, contended that under federal law, the "maximum extent practicable" standard is the exclusive measure that may be applied to municipal storm sewer discharges. BIA asserted that the Regional Board may not require a municipality to comply with a state water quality standard if the required controls exceed a maximum extent practicable standard.[573] The court, however, rejected BIA's interpretation, and held that the permit provisions requiring compliance with water quality standards are proper under federal law.[574]

Similarly, in *Natural Resources Defense Council, Inc. v. County of Los Angeles*,[575] the permit prohibited discharges from the MS4 that cause or contribute to the violation of water quality standards and objectives contained in the Basin Plan, the California Toxics Rule, the National Toxics Rule, and other state or federal approved surface water quality plans. The permit further provided that the permittees comply with the discharge prohibitions with monitoring and timely implementation of control measures and other

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[570] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 872, 876-877.

[571] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 877.

[572] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 877.

[573] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 872, 880, 890.

[574] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 880; see also, *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1166-1167, which also held that the US EPA or the state administrator has the authority to determine that ensuring strict compliance with state water quality standards is necessary to control pollutants.

[575] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194.

actions to reduce pollutants in their discharges.[576] Between 2002 and 2008, annual monitoring reports were published, and identified 140 separate exceedances of the water quality standards for aluminum, copper, cyanide, zinc, and fecal coliform bacteria in the Los Angeles and San Gabriel Rivers.[577] NRDC filed a lawsuit alleging that the permittees violated the Clean Water Act and its causes of actions were based on the following assertions: that the permit incorporated the water quality limits for each receiving water body; that the monitoring stations had recorded pollutant loads in the receiving water bodies that exceed those permitted under the relevant standards; that an exceedance constitutes non-compliance with the permit and, thereby, the CWA; and that the permittees were liable for these exceedances under the CWA.[578] The permittees argued they could not be held liable for violating the permit and, thus, the CWA, based solely on monitoring data because the monitoring was not designed or intended to measure compliance of any permittee, which the court disagreed with based on the plain language of the permit; and the monitoring data cannot parse out precisely whose discharge contributed to any given exceedance because the monitoring stations manage samples downstream and not at the discharge points.[579] The court disagreed with the permittees, finding that:

> . . . . the data collected at the Monitoring Stations is intended to determine whether the Permittees are in compliance with the Permit. If the District's monitoring data shows that the level of pollutants in federally protected water bodies exceeds those allowed under the Permit, then, as a matter of permit construction, the monitoring data conclusively demonstrates that the County Defendants are not "in compliance" with the Permit conditions. Thus, the County Defendants are liable for Permit violations.[580]

The court also found that "the Clean Water Act requires every NPDES permittee to monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit."[581]

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[576] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199.

[577] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1200.

[578] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1201.

[579] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1204-1205.

[580] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1206-1207.

[581] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1207, citing to United States Code, title 33, section 1342(a)(2); 40 Code of

The court stated that Congress recognized that MS4s often cover many square miles and comprise numerous, geographically scattered sources of pollution including streets, catch basins, gutters, man-made channels, and storm drains, and that for large urban areas, MS4 permitting could not be accomplished on a source-by-source basis. Thus, Congress delegated to the US EPA and the state administrators discretion to issue permits on a jurisdiction-wide basis, instead of requiring separate permits for individual discharge points. Nothing in the MS4 permitting scheme of federal law, however, relieves permittees of the obligation to monitor their compliance with the permit and the Clean Water Act.[582] "Because the results of County Defendants' pollution monitoring conclusively demonstrate that pollution levels in the Los Angeles and San Gabriel Rivers are in excess of those allowed under the Permit, the County Defendants are *liable* for Permit violations as a matter of law."[583] The court remanded the case to the lower courts to determine the appropriate remedy for the county's violations.[584]

Therefore, section D., does not increase the level or quality of service to the public; the SALs simply help the claimants comply with existing law to meet water quality standards. As stated in the Fact Sheet, the purpose of the SALs, through the iterative and MEP process, is to have outfall stormwater discharges meet all applicable water quality standards reflected in the Basin Plan, the CTR, and the EPA Water Quality Criteria.[585]

Moreover, the requirement to comply with water quality standards is not unique to government. As a matter of law, industrial dischargers are required to meet applicable effluent limitations with the "best practicable control technology currently available," and are required to achieve "any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance…or any other Federal law or regulations, or required to implement any applicable water quality standard established pursuant to this chapter."[586] The U.S. EPA's Multi-Sector General Permit for Stormwater Discharges, applicable to industrial activity, states simply that

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Federal Regulations section 122.44(i)(1); Code of Federal Regulations, title 40, 122.26(d)(2)(i)(F).

[582] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1209.

[583] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1210, emphasis in original.

[584] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199, 1210.

[585] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2425 (Order No. R9-2009-0002, Fact Sheet).

[586] United States Code, title 33, section 1311(b)(1)(C). See also, *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1164-1166.

"Your discharge must be controlled as necessary to meet applicable water quality standards."[587] Any exceedance of an applicable water quality standard by an industrial discharger requires corrective action, reporting, and potential monetary penalties for failing to strictly comply with the effluent limit.[588]

By contrast, federal law requires that municipal stormwater dischargers' permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods…"[589] And in the test claim permit specifically, the discovery of an exceedance requires claimants to monitor for exceedances and implement BMPs, rather than imposing monetary penalties or other consequences when an exceedance occurs. As the Fact Sheet expressly states:

> SALs are not numeric effluent limitations, which is reflected in language which clarifies an excursion above a SAL does not create a presumption that MEP is not being met. Instead, a SAL exceedance is to be used by the Copermittee as an indication that the MS4 storm water discharge point is a definitive "bad actor," and the result from the monitoring needs to be considered as part of the iterative process for reducing pollutants in storm water to the MEP.[590]

Thus, the claimants' argument that the numeric SALs are similar to numeric effluent limits is not supported by the plain language of the test claim permit.[591]

Therefore, monitoring major outfalls and implementing BMPs of the claimants' choosing to ensure that stormwater discharges meet water quality standards has long been the service required to be provided to the public by all dischargers and, thus, these requirements imposed by section D. of the test claim permit (SALs) do not impose a state-mandated new program or higher level of service.

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[587] Exhibit K (26), Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, May 27, 2009, page 21.

[588] Exhibit K (26), Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity, May 27, 2009, pages 21-24; 183 ["The CWA provides that any person who violates a permit condition implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a civil penalty not to exceed the maximum amounts authorized by Section 309(d) of the Act and the Federal Civil Penalties Inflation Adjustment Act…"].

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

[590] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2368-2369 (Order No. R9-2009-0002, Fact Sheet).

[591] Exhibit A, Test Claim, filed June 30, 2011, page 66.

5. Section I. of the Test Claim Permit, Which Implements the TMDL at Baby Beach for Total Coliform, Fecal Coliform, and Enterococci Bacteria, Does Not Impose a New Program or Higher Level of Service.

The claimants plead section I. of the test claim permit, which imposes requirements on the County of Orange and the City of Dana Point to implement the TMDL to control fecal indicator bacteria (total coliform, fecal coliform, and Enterococci) at Baby Beach.[592]

Baby Beach is a small man-made beach, approximately 600 feet wide, located in the City of Dana Point, and owned and operated by the County of Orange.[593] In 2002, after several beach closures occurred due to exceedances of fecal indicator bacteria, Baby Beach was listed as a 303(d) impaired water body that did not meet water quality standards (WQSs). Fecal indicator bacteria originate from the intestinal biota of warm-blooded animals, including humans, and their presence in surface water is used as an indicator of the possible presence of human pathogens. Pathogens include protozoans, bacteria, viruses, and other organisms that can cause illness in people exposed through recreational water use.[594] In 2008, the Regional Board adopted a TMDL, which established numeric targets and the wasteload allocations required for the MS4s to meet the numeric targets for these pollutants to attain state and federal WQSs and the beneficial use of water contact recreation (where ingestion of water is reasonably possible) at Baby Beach. The numeric targets were set equal to the recreational water contact beneficial use water quality objectives for total coliform, fecal coliform, and Enterococci indicator bacteria prescribed in the Basin Plan.[595]

Section I. of the test claim permit requires the County of Orange and the City of Dana Point to implement BMPs capable of achieving the interim and final wasteload allocations identified in the TMDL to meet water quality objectives for total coliform, fecal coliform, and Enterococcus in Baby Beach by the end of year 2014 for dry weather and 2019 for wet weather; conduct monitoring to assess the effectiveness of pollutant load reductions, changes in urban runoff and discharge water quality, and changes in receiving water quality; continue to meet the numeric targets in Baby Beach receiving

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[592] Exhibit A, Test Claim, filed June 30, 2011, pages 36, 49-50; Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2194 (Order No. R9-2009-0002, section I.).

[593] Exhibit K (9), Annual Progress Report, Baby Beach Dana Point Harbor Bacterial Indicator TMDL (Fiscal Year 2012-2013), dated November 15, 2013, page 2.

[594] Exhibit K (35), Resolution No. R9-2008-0027 and Basin Plan Amendment, dated June 11, 2008, page 3.

[595] Exhibit K (35), Resolution No. R9-2008-0027 and Basin Plan Amendment, dated June 11, 2008.

waters once the wasteload reductions have been achieved; and submit annual progress reports as part of the annual report.[596]

As explained below, the Commission finds that the TMDL requirements in section I. of the test claim permit do not mandate a new program or higher level of service and, thus, do not require reimbursement pursuant to article XIII B, section 6 of the California Constitution. As stated in the TMDL, the numeric targets are the same as the water quality criteria and objectives for total coliform, fecal coliform, and Enterococcus in coastal recreational receiving waters, for both dry and wet weather, which were established by the state and federal governments long before the adoption of the TMDL and the test claim permit in this case.[597] And federal law has long required claimants to meet water quality objectives in receiving waters by monitoring, implementing BMPs, and reporting progress and exceedances to the Water Boards.[598] The only difference between the prior permit and the test claim permit is that the test claim permit now identifies the wasteload allocations for the bacterial indicators calculated in the TMDL so that claimants know the percentage of bacterial loads that need to be reduced to meet the existing water quality objectives for Baby Beach. The prior permit, however, required the claimants to comply with the numeric water quality objectives for total coliform, fecal coliform, and Enterococcus in coastal recreational receiving waters by expressly prohibiting claimants from discharging from the MS4s any runoff that caused or contributed to the violation or exceedance of the water quality objectives.[599] Instead of the water quality objectives being immediately enforceable, the test claim permit gives claimants more time to meet those objectives. Accordingly, section I. of the test claim permit does not mandate a new program or higher level of service.

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[596] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2194 (Order No. R9-2009-0002, section I.).

[597] Exhibit K (55), Water Quality Standards for Coastal and Great Lakes Recreation Waters, Final Rule, 69 FR 67218; Health and Safety Code section 115880 (Stats. 1997, ch. 1987, AB 411); California Code of Regulations, title 17, section 1758; Exhibit K (46), U.S. EPA Ambient Water Quality Criteria for Bacteria, 1986; Exhibit K (4), 1994 Basin Plan; Exhibit K (13), Compilation of California Ocean Plans 1972-2001.

[598] United States Code, title 33, section 1342(p)(3)(B)(iii); Code of Federal Regulations, title 40, section 122.44(d)(1), (i); Code of Federal Regulations, title 40, section 122.48; Code of Federal Regulations, title 40, Part 127 (electronic reporting).

[599] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3438-3439 (Order R9-2002-0001).

a. Federal law requires states to establish TMDLs for impaired waterbodies to attain water quality standards necessary to protect the designated beneficial uses of the waterbody and requires that effluent limits "consistent with the assumptions and requirements of any available wasteload allocation for the discharge" contained in a TMDL prepared by the state and approved by EPA be included in NPDES Permits.

As discussed in the Background, the CWA requires states to develop a list of waters within their jurisdiction that are "impaired," meaning that existing controls of pollutants are not sufficient to meet water quality standards (including the numeric criteria in the NTR and CTR) necessary to permit the designated beneficial uses, such as fishing or recreation. States must then rank those impaired waters by priority, and establish a TMDL, which includes a calculation of the maximum amount of each constituent pollutant that the water body can assimilate and still meet water quality standards.[600] A TMDL represents the total assimilative capacity of a water body for a specific constituent pollutant, with a margin of safety, which is protective of that water body's identified beneficial uses. Usually a TMDL will also include WLAs, which divide up the total assimilative capacity of the receiving waters among the known point source dischargers, and load allocations (LAs) for non-point source discharges.[601] The development of a TMDL triggers further regulatory action by the state, as explained by the court in *City of Arcadia v. U.S. EPA*:

> TMDLs established under Section 303(d)(1) of the CWA function primarily as planning devices and are not self-executing. *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir.2002) ("TMDLs are primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans.") (citing *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 984–85 (9th Cir.1994)). A TMDL does not, by itself, prohibit any conduct or require any actions. Instead, each TMDL

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

[601] United States Code, title 33, section 1313(d). Code of Federal Regulations, title 40, section 130.2(h) defines WLA as "The portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation." Code of Federal Regulations, title 40, section 130.2(g) defines LA as "The portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, natural and nonpoint source loads should be distinguished."

> represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source controls. See, e.g., *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir.2002) ("Each TMDL serves as the goal for the level of that pollutant in the waterbody to which that TMDL applies.... The theory is that individual-discharge permits will be adjusted and other measures taken so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL."); *Idaho Sportsmen's Coalition v. Browner*, 951 F.Supp. 962, 966 (W.D.Wash.1996) ("TMDL development in itself does not reduce pollution.... TMDLs inform the design and implementation of pollution control measures."); *Pronsolino*, 291 F.3d at 1129 ("TMDLs serve as a link in an implementation chain that includes ... state or local plans for point and nonpoint source pollution reduction ...."); *Idaho Conservation League v. Thomas*, 91 F.3d 1345, 1347 (9th Cir.1996) (noting that a TMDL sets a goal for reducing pollutants). Thus, a TMDL forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant discharges and waterbodies.
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> For point sources, limitations on pollutant loadings may be implemented through the NPDES permit system. 40 C.F.R. § 122.44(d)(1)(vii)(B). EPA regulations require that effluent limitations in NPDES permits be "consistent with the assumptions and requirements of any available wasteload allocation" in a TMDL. *Id*.[602]

Once a TMDL is adopted, it must be approved by U.S. EPA. If U.S. EPA does not approve the TMDL, it must, within 30 days after disapproval "establish such loads for such waters as [it] determines necessary to implement the water quality standards applicable to such waters."[603] A regional board is then required by federal law to incorporate the TMDL into the Basin Plan.[604] Basin Plan amendments do not become effective until approved by the State Water Board and the Office of Administrative Law (OAL).[605]

Regional boards are then required by federal law to include effluent limits that comply with "all applicable water quality standards" and are "consistent with the assumptions

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[602] *City of Arcadia v. U.S. EPA* (2003) 265 F.Supp.2d 1142, 1145.

[603] United States Code, title 33, section 1313(d)(2); Code of Federal Regulations, title 40, section 130.7(d)(2).

[604] United States Code, title 33, section 1313(d)(2); Code of Federal Regulations, title 40, sections 130.6, 130.7(d)(2).

[605] California Government Code section 11353.

and requirements of any available wasteload allocation for the discharge" in NPDES permits as follows:

> When developing water quality-based effluent limits under this paragraph the permitting authority shall ensure that:
>
> (A) The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards; and
>
> (B) Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.[606]

An "effluent limitation" is defined in the CWA as "*any restriction* established by a State or the Administrator on *quantities, rates, and concentrations* of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance."[607] The definition of "effluent limitation" in the CWA "does not specify that a limitation must be numeric, and provides that an effluent limitation may be a schedule of compliance."[608] Federal EPA guidance states, however, that in cases where adequate information exists to develop more specific numeric effluent limitations to meet water quality standards, these numeric limitations are to be incorporated into stormwater permits as necessary and appropriate.[609] Any schedule of compliance shall require compliance as soon as possible, but not later than the applicable statutory deadline under the CWA.[610] Compliance schedules that are longer than one year in duration must set forth interim requirements and dates for their achievement.[611] If the compliance schedule extends past the expiration date of the permit, the schedule must include the final effluent limitations in the permit to ensure enforceability under the

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[606] Code of Federal Regulations, title 40, section 122.44(d)(1)(vii).

[607] United States Code, title 33, section 1362(11). See also Code of Federal Regulations, title 40, section 122.2.

[608] *Communities for a Better Environment v. State Water Resources Control Board* (2003) 109 Cal.App.4th 1089, 1104.

[609] Exhibit K (21), Federal Interim Permitting Approach for WQBELs, 61 FR 43761, August 26, 1996.

[610] Code of Federal Regulations, title 40, section 122.47(a)(1).

[611] Code of Federal Regulations, title 40, section 122.47(a)(3).

CWA.[612] Schedules of compliance included in a permit must be approved by EPA and be based on a reasonable finding, adequately supported by the administrative record, that:

- The compliance schedule will lead to compliance with an effluent limitation to meet water quality standards by the end of the compliance schedule.[613]
- The compliance schedule is "appropriate" and that compliance with the final water quality based effluent limit is required "as soon as possible."[614]
- The discharger cannot immediately comply with the water quality based effluent limit upon the effective date of the permit.[615]

In addition, to meet water quality standards federal law also requires dischargers to monitor compliance with the effluent limitations identified in an NPDES permit, implement best management practices to control the pollutants, and report monitoring results at least once per year, or within 24 hours for any noncompliance which may endanger health or the environment.[616] An NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance.[617]

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[612] Exhibit K (48), U.S. EPA Memorandum Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits, page 2.

[613] United States Code, title 33, section 1311(b)(1)(C); Code of Federal Regulations, title 40, sections 122.2, 122.44(d)(1)(vii)(A).

[614] Code of Federal Regulations, title 40, section 122.47(a)(1); Exhibit Q (38), U.S. EPA Memorandum Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits, pages 2-3.

[615] Code of Federal Regulations, title 40, section 122.47(a)(1).

[616] United States Code, title 33, section 1342(p)(3)(B)(iii) requires that permits for discharges from municipal storm sewers "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, *including management practices*, control techniques and system, design and engineering methods, and such other provisions as . . . the State determines appropriate for the control of such pollutants." (Emphasis added.) See also, Code of Federal Regulations, title 40, sections 122.41 (conditions applicable to all permits, including monitoring and reporting requirements); section 122.44(i) (monitoring requirements to ensure compliance with permit limitations); section 122.48 (requirements for recording and reporting monitoring results); and Part 127 (electronic reporting).

[617] Code of Federal Regulations, title 40, section 122.26(d)(2)(i)(F); see also *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1209.

If a permittee fails to comply with these federal requirements, or otherwise violates the conditions in an NPDES permit, it may be subject to state and federal enforcement actions and private citizen lawsuits for injunctive relief and civil penalties.[618]

b. Before the adoption of the TMDL, EPA and the State set water quality criteria and objectives for fecal bacterial indicators (fecal coliform, total coliform, and Enterococcus) in recreational waters, which Baby Beach did not meet.

i. Federal water quality criteria for bacterial indicators.

Pursuant to CWA section 304(a),[619] U.S. EPA is required to publish water quality criteria to reflect the latest scientific knowledge on the kind and extent of all identifiable effects on health and welfare which may be expected from the presence of pollutants in any body of water. Under this authority, EPA has published recommended water quality criteria for recreational waters based on the correlation between bacterial indicator counts and gastrointestinal illness rates.

Before 1986, U.S. EPA believed that the best indicator of fecal contamination and the associated health risks from recreational water contact in marine waters was fecal coliform and, thus, recommended a numeric water quality criteria in recreational waters based on fecal coliform, with a geometric mean of 200 colony forming units per 100 milliliters (ml), and no more than ten percent of the total single sample taken during any 30-day period exceeding 400/100 ml. In 1986, U.S. EPA studies found that Enterococci was a better indicator of digestive system illnesses than the general indicators of fecal coliform or total coliform, and recommended a water quality criteria for recreational marine waters based on Enterococci, with a geometric mean of 35 colony forming units per 100 ml, and no more than ten percent of the total single sample taken during any 30-day period exceeding 104/100 ml at a designated beach.[620]

On October 10, 2000, Congress passed the Beaches Environmental Assessment and Coastal Health Act (also known as the Beach Act). The Beach Act added subdivision (i) to the United States Code, title 33, section 1313, to require states that have coastal recreation waters to adopt new or revised water quality standards by April 10, 2004, for pathogens and pathogen indicators for which U.S. EPA has published criteria under section 304(a) (codified at 33 U.S.C. § 1314). Section 1313(i) further states that "[i]f a State fails to adopt water quality criteria and standards in accordance with paragraph

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[618] United States Code, title 33, sections 1319, 1342(b)(7), 1365(a).

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

[620] Exhibit K (10), Appendix A, Technical Report, TMDL for Indictor Bacteria Baby Beach, dated June 11, 2008, page 2; Exhibit K (46), U.S. EPA Ambient Water Quality Criteria for Bacteria, 1986.

(1)(A) that are as protective of human health as the criteria for pathogens and pathogen indicators for coastal recreation waters published by the Administrator [of EPA[621]], the Administrator shall promptly propose regulations for the State setting forth revised or new water quality standards for pathogens and pathogen indicators described in paragraph (1)(A) for coastal recreation waters of the State."

On December 16, 2004, U.S. EPA adopted the "Water Quality Standards for Coastal and Great Lakes Recreation Waters; Final Rule," which established water quality criteria for Enterococci for coastal recreation waters, including bays and estuaries, in states that did not have water quality standards that complied with the requirements of section 1313(i).[622] U.S. EPA adopted a geometric mean of 35/100 ml for Enterococci in marine coastal waters, with a single sample maximum at 104/100 ml.

ii. Water quality objectives for bacterial indicators adopted by the State Legislature (Statutes 1997, chapter 765), the State Water Board (the Ocean Plan), and the Regional Board (in the Basin Plan).

In 1997, after beach closures in Southern California due to high concentrations of fecal indicator bacteria, the Legislature enacted Statutes 1997, chapter 765 (AB 411), which required the Department of Health Services (DHS) to amend their regulations to (1) require the testing of waters adjacent to public beaches for microbiological contaminants, including total coliform, fecal coliform, and Enterococci bacteria; (2) require weekly monitoring of beaches with storm drains that discharge during dry weather and visited by more than 50,000 people per year from April 1 through October 31 by the local health officer or environmental health agency; and (3) establish protective minimum standards for total coliform, fecal coliform and Enterococci bacteria.[623] The Department of Health Services adopted the following minimum protective bacteriological standards for receiving waters adjacent to public beaches and public water contact sport areas in California Code of Regulations, title 17, section 7958:

- Based on a *single sample*, the density of bacteria in water from each sampling station at a public beach or public water contact sports area shall not exceed:
    - (A) 1,000 total coliform bacteria per 100 ml, if the ratio of fecal/total coliform bacteria exceeds 0.1; or
    - (B) 10,000 total coliform bacteria per 100 ml; or
    - (C) 400 fecal coliform bacteria per 100 ml; or

[621] Code of Federal Regulations, title 40, section 122.2.

[622] Exhibit K (55), Water Quality Standards for Coastal and Great Lakes Recreation Waters, Final Rule, 69 FR 67218.

[623] Health and Safety Code section 115880 (Stats. 1997, ch. 765 (AB 411)).

- (D) 104 enterococcus bacteria per 100 ml.

- Based on the *geometric mean* of the logarithms of the results of at least five weekly samples during any 30-day sampling period, the density of bacteria in water from any sampling station at a public beach or public water contact sports area, shall not exceed:
  - (A) 1,000 total coliform bacteria per 100 ml; or
  - (B) 200 fecal coliform bacteria per 100 ml; or
  - (C) 35 enterococcus bacteria per 100 ml.[624]

The regulations further provide that "[i]n order to determine that the bacteriological standards specified in 7958 above are being met in a water-contact sports area designated by a Regional Water Quality Control Board in waters affected by a waste discharge, water samples shall be collected at such sampling stations and at such frequencies as may be specified by said board in its waste discharge requirements."[625] When a public beach fails to meet these standards, the local health officer or the Department of Health Services may close, post warning signs, or otherwise restrict the use of the beach until such time as corrective action has been taken.[626] Baby Beach is subject to the standards and monitoring requirements imposed by Statutes 1997, chapter 765 (AB 411) and the regulations adopted by the Department of Health Care Services.[627]

The 2001 Ocean Plan adopted by the State Water Board contained the same objectives for total coliform and fecal coliform as Statutes 1997, chapter 765 (AB 411) for contact recreation (bacteria shall not exceed the geometric mean of 1,000/100 ml and 200/100 ml, respectively; and shall not exceed a single sample of 10,000/100 ml and 400/100 ml, respectively), but did not include criteria for Enterococcus.[628] In accordance with EPA's "Water Quality Standards for Coastal and Great Lakes Recreation Waters; Final Rule," the State Water Board amended the Ocean Plan in 2005 to add a geometric mean of 35/100 ml for Enterococci in marine coastal waters, with a single sample maximum at 104/100 ml, to protect the beneficial use of contact recreation.[629]

The 1994 Basin Plan adopted by the Regional Board identifies the same water quality objectives to protect recreational waters. For fecal coliform in inland surface waters,

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[624] California Code of Regulations, title 17, section 7958 (Register 99, Nos. 31, 49).

[625] California Code of Regulations, title 17, former section 7959(a).

[626] California Code of Regulations, title 17, section 7960.

[627] Exhibit K (24), Improving Water Quality at Enclosed Beaches, June 2006, page 61.

[628] Exhibit K (13), Compilation of California Ocean Plans 1972-2001, page 15.

[629] Exhibit K (6), 2005 Ocean Plan, Resolution 2005-0013, paragraphs 8 and 9.

enclosed bays and estuaries, and coastal lagoons designated for contact recreation (REC-1), the objective is stated as follows:

> In waters designated for contact recreation (REC-1), the fecal coliform concentration based on a minimum of not less than five samples for any 30-day period, shall not exceed a log mean of 200/100 ml, nor shall more than 10 percent of total samples during any 30-day period exceed 400/100 ml.[630]

For total coliform, the water quality objective is as follows: "provided that not more than 20 percent of the samples at any sampling station, in any 30-day period, may exceed 1,000 per 100 ml (10 per ml), and provided further that no single sample when verified by a repeat sample taken within 48 hours shall exceed 10,000 per 100 (100 per ml)."[631]

And the 1994 Basin Plan incorporates the federal limits adopted in 1986 for Enterococci in recreational marine waters (with a geometric mean of 35/100 ml, and total single sample of 104/100 ml).[632]

c. Routine testing of bacterial water quality at Baby Beach began in 1995 and, in 2002, after continued exceedances of the water quality objectives for fecal indicator bacteria, Baby Beach was placed on the 303(d) list as impaired.

Two storm drains discharge directly to Baby Beach at the west and east ends of the beach. The west end drains runoff from the hillside to the west of the harbor including surrounding roadways, commercial development, residential areas, and undeveloped open space. The east end drains runoff from a small parking lot near Baby Beach. Another small drain near Baby Beach discharges runoff from the Ocean Institute.[633]

Routine testing of bacterial water quality at Baby Beach began in 1995. In August 1996, high fecal indicator bacteria concentrations (total coliform, fecal coliform, and Enterococci bacteria) in beach waters prompted health officials to close the beach to swimmers. Health officials began an 11-month source investigation, with video camera inspections of nearby sewer lines, testing of groundwater, inspection of plumbing of harbor restrooms, analysis of runoff from bluff top neighborhoods, installation of plugs in storm drains to the beach, reduction of irrigation and fertilizer use at adjacent park areas, increased cleanup of animal excrement, installation of signage to discourage the feeding of birds, and removal of an old septic tank. However, the source of the high

[630] Exhibit K (4), 1994 Basin Plan, page 122.

[631] Exhibit K (4), 1994 Basin Plan, page 123.

[632] Exhibit K (4), 1994 Basin Plan, page 123.

[633] Exhibit K (9), Annual Progress Report, Baby Beach Dana Point Harbor Bacterial Indicator TMDL (Fiscal Year 2012-2013), dated November 15, 2013, page 8.

bacteria levels remained a mystery and elevated concentrations of fecal indicator bacteria remained a periodic problem.[634]

In 2000, health risk advisory signs were posted at Baby Beach pursuant to Statutes 1997, chapter 765 (AB 411) for 54 days. As a result, Baby Beach was placed on the 2002 303(d) list as impaired for indicator bacteria.[635]

d. The prior permit required the claimants to monitor and report findings for discharges of urban runoff from coastal storm drain outfalls and for coastal receiving waters, including the monitoring and analysis of total coliform, fecal coliform, and Enterococci; and if a copermittee determined that the MS4 discharges are causing or contributing to an exceedance of an applicable water quality objective, the copermittee was required to promptly notify and submit a report to the Regional Board that describes the BMPs that are currently implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards.

Finding 37 of the prior permit, Order No. R9-2002-0001, states that several TMDLs were being developed in the San Diego region for impaired water bodies and that once the TMDLs are approved by the Regional Board and the U.S. EPA, "Copermittees' discharge of urban runoff into an impaired water body will be subject to load allocations established by the TMDLs."[636]

In the meantime, the prior permit required the Copermittees to meet receiving water limitations through "control measures and other actions to reduce pollutants in urban runoff discharges."[637] Section C.1. prohibited discharges from MS4s that cause or contribute to the violation of water quality standards.[638] The prior permit also prohibited discharges from MS4s that cause or contribute to exceedances of receiving water

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[634] Exhibit K (9), Annual Progress Report, Baby Beach Dana Point Harbor Bacterial Indicator TMDL (Fiscal Year 2012-2013), dated November 15, 2013, pages 5-7.

[635] Exhibit K (42), Technical Report, TMDL for Indictor Bacteria Baby Beach, dated June 11, 2008, page 18; Exhibit K (9), Annual Progress Report, Baby Beach Dana Point Harbor Bacterial Indicator TMDL (Fiscal Year 2012-2013), dated November 15, 2013, page 7.

[636] Exhibit C, Water Boards' Comments on Test Claim, filed October 21, 2016, page 3437 (Order R9-2002-0001, Findings, paragraph 37).

[637] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3439-3441 (Order R9-2002-0001, section C.).

[638] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3439 (Order R9-2002-0001, section C.1.).

quality objectives for surface water or groundwater.[639] Section A.4. stated that "[i]n addition to the above prohibitions, discharges from MS4s are subject to all Basin Plan prohibitions cited in Attachment A to this Order." Attachment A. to the prior permit states that the "discharge of waste to inland surface waters, except in cases where the quality of the discharge complies with applicable receiving water quality objectives, is prohibited."[640]

Section C.2. of the prior permit then required copermittees to comply with the discharge prohibitions and limitations by implementing control measures to reduce pollutants in urban runoff discharges in accordance with the Jurisdictional Urban Runoff Management Program (JURMP) and other parts of the permit. As part of the plan, copermittees were required to conduct dry weather analytical monitoring to detect illicit discharges and connections,[641] and receiving water quality monitoring, in accordance with Attachment B.[642] Attachment B. to the prior permit (titled, "Receiving Water Monitoring and Reporting Program") required the copermittees to monitor and report findings for discharges of urban runoff from coastal storm drain outfalls and for coastal receiving waters, including the monitoring and analysis of total coliform, fecal coliform and Enterococci, as follows:[643]

- Coastal Storm Drain Outfall Monitoring (Section B.2.b.8.c.). Copermittees were required to collaborate to develop and implement a monitoring program for discharges of urban runoff from coastal storm drain outfalls. The monitoring program had to contain the following requirements:
    1. The program shall include rationale and criteria for selection of storm drain outfalls to be monitored.
    2. The program shall include collection of samples for analysis of total coliform, fecal coliform, and Enterococci, in addition to any other indicators or pathogens identified by the copermittees.

[639] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3438 (Order R9-2002-0001, section A.2.).

[640] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3438 (Order R9-2002-0001, section A.4.).

[641] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3466 (Order R9-2002-0001, section F.5.).

[642] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3478 (Order R9-2002-0001, section P.).

[643] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3484 (Order R9-2002-0001, Attachment B.).

3. Samples shall be collected at both the storm drain outfall and in the surf zone (at ankle to knee water depths) directly in from of the outfall.
4. Samples shall be collected during dry and wet weather periods.
5. Exceedances of public health standards for bacteria must be reported to the County of Orange Health Care Agency, Regulatory Health Services, Environmental Health, Ocean Recreation Protection Program as soon as possible.[644]

- Ambient Coastal Receiving Water Monitoring (Section B.2.b.8.d.). Copermittees were required to collaborate to develop and implement a program to assess the overall health of the coastal receiving waters and monitor the impact of urban runoff on ambient receiving water quality. This monitoring had to include Dana Cove, the creek and stream mouths, the Pacific Ocean coastline of Orange County within the San Diego region, and all Clean Water Act section 303(d) water bodies.[645]
- The "Receiving Waters Monitoring Annual Report" was required to be submitted to the Regional Board by November 9th each year, beginning November 9, 2003. (Section B.6.) The monitoring reports had to include analysis of the findings, and identify and prioritize water quality problems. The analysis had to also identify potential sources of the problems, and recommend future monitoring and BMP implementation measures for identifying and addressing the sources. Monitoring reports had to include an assessment of compliance with applicable water quality standards, and shall comply with 40 C.F.R., section 122.21 (Clean Water Act regulations).[646]

In addition to the "Receiving Waters Monitoring Annual Report," each copermittee was required to submit an annual report to the Regional Board, which had to contain an assessment of the effectiveness of its Jurisdictional Urban Runoff Management Plan.[647]

Thus, if a copermittee determined that the MS4 discharges are causing or contributing to an exceedance of an applicable water quality objective, the copermittee was required under the prior permit to promptly notify and submit a report to the Regional Board that describes the BMPs that are currently implemented and additional BMPs that will be

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[644] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3487-3488 (Order R9-2002-0001, Attachment B., section B.2.b.8.c.).

[645] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3488 (Order R9-2002-0001, Attachment B., section B.2.b.8.d.).

[646] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3488-3489 (Order R9-2002-0001, Attachment B., section B.6.).

[647] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3467, 3471 (Order R9-2002-0001, sections F.8., I.).

implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. Within 30 days following approval of the report, the copermittee was required to revise its Jurisdictional Urban Runoff Management Plan and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required.[648] The prior permit also states that "[n]othing in this section shall prevent the SDRWQCB from enforcing any provision of this Order while the Copermittee prepares and implements the above report."[649]

e. The Regional Board adopted the TMDL for total coliform, fecal coliform, and Enterococcus indicator bacteria at Baby Beach, through a Basin Plan amendment (R9-2008-0027), which became effective on September 15, 2009.

The record indicates that the County of Orange conducted numerous studies and implemented a variety of non-structural and structural BMPs in an effort to reduce bacteria levels at Baby Beach since before the 2002 303(d) listing. These efforts included installing seasonal plugs in storm drains, increased street sweeping efforts, expedited trash collection to control birds, the installation of bird netting under the pier, public education efforts against bird-feeding at the beach, artificial circulation of water at Baby Beach, a dry weather flow diversion structure and media filter system on the west end of the beach, catch basin filters, and the collection and disposal of bird fecal droppings from the exposed intertidal areas of the beach.[650] Water quality data from 2002 to 2006 indicate that bacteria levels in the waters at Baby Beach showed significant improvement.[651]

However, bacteria densities at Baby Beach continued to exceed the numeric water quality objectives for total coliform, fecal coliform, and Enterococcus indicator bacteria as defined in the Basin Plan and, thus, a TMDL project ("Bacteria Impaired Waters

[648] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3440 (Order R9-2002-0001, section C.2.).

[649] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3440 (Order R9-2002-0001, section C.3.).

[650] Exhibit K (35), Resolution No. R9-2008-0027 and Basin Plan Amendment, dated June 11, 2008, page 19 (Attachment A.); Exhibit K (42), Technical Report, TMDL for Indictor Bacteria Baby Beach, dated June 11, 2008, page 94.

[651] Exhibit K (35), Resolution No. R9-2008-0027 and Basin Plan Amendment, dated June 11, 2008, page 19 (Attachment A.).

TMDL Project II for San Diego Bay and Dana Point Harbor Shorelines") was started in 2004.[652]

On June 11, 2008, the Regional Board adopted the TMDL and incorporated it into the Basin Plan by Resolution R9-2008-0027.[653] On June 16, 2009, the State Board approved the Basin Plan amendment;[654] on September 15, 2009, OAL approved the Basin Plan amendment; and on October 26, 2009 the EPA approved the TMDL.[655] The TMDL became effective on September 15, 2009, the date of OAL approval and adoption of California Code of Regulations, title 23, section 3989.9, which states the following:

> Through Regional Water Board Resolution R9-2008-0027, adopted on June 11, 2008, the San Diego Regional Water Quality Control Board amended the Water Quality Control Plan for the San Diego Region (Basin Plan). On June 16, 2009, the State Water Resources Control Board (State Water Board) approved this amendment under Resolution No. 2009-0053. This Basin Plan amendment incorporates Total Maximum Daily Loads (TMDLs) for indicator bacteria in Baby Beach in Dana Point Harbor and Shelter Island Shoreline Park in San Diego Bay.
>
> The numeric targets for these TMDLs were set equal to the recreational water contact beneficial use water quality objectives for total coliform, fecal coliform, and *Enterococci* indicator bacteria prescribed in the Basin Plan. Specific segments of San Diego Bay and Dana Point Harbor in the San Diego Region were placed on the List of Water Quality Limited Segments because levels of total coliform, fecal coliform and/or *Enterococci* at those locations exceeded water quality objectives for water-contact recreation (REC-1) beneficial use.
>
> Since the numeric targets in the TMDLs are equal to the water quality objectives for total coliform, fecal coliform, and *Enterococci* bacteria, attainment of the TMDLs will ensure attainment of these water quality objectives. Applicable National Pollutant Discharge Elimination System

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[652] Exhibit K (42), Technical Report, TMDL for Indictor Bacteria Baby Beach, dated June 11, 2008, page 19.

[653] Exhibit K (35), Resolution No. R9-2008-0027 and Basin Plan Amendment, dated June 11, 2008.

[654] Exhibit K (34), Resolution 2009-0053, dated June 16, 2009, page 1.

[655] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2130 (Order No. R9-2009-0002, Finding E.9); Exhibit K (34), Resolution R9-2009-0053, page 2.

permit requirements for municipal storm water discharges will be re-issued or revised to include requirements that will implement the TMDLs.[656]

As indicated above, TMDLs are defined as the maximum amount of a pollutant the waterbody can receive and still attain water quality objectives and protection of beneficial uses. Once calculated, a TMDL is set equal to the sum of all individual wasteload allocations for point sources and load allocations for nonpoint sources, with a margin of safety that takes into account any uncertainties in the calculation. The methodology for calculating the TMDL for Baby Beach is described in Attachment A. to Resolution R9-2008-0027, which amended the Basin Plan to include the TMDL, and in the appendices.[657]

When calculating the TMDL, numeric targets for the receiving water at Baby Beach were established to meet the water quality objectives and to ensure the protection of the beneficial use. As stated above in section 3989.9 of the title 23 regulations, the numeric targets are equal to, and the same as the REC-1 water quality objectives for indicator bacteria contained in the Basin Plan and Ocean Plan, to ensure attainment of the water quality objectives. The numeric targets are as follows.[658]

Numeric Targets

Bacterial Indicator	30-Day Geometric Mean (MPN/100mL)	Single Sample Max (MPN/100mL)
	Numeric Target for Dry Weather only	*Numeric Target* for Dry and Wet Weather
Total Coliform	1,000	10,000
Fecal Coliform	200	400
Enterococcus	35	104

Different dry weather and wet weather targets were used for load calculations because the bacteria transport mechanisms to receiving waters are different under wet and dry weather conditions. Wet weather loading originating from the watersheds is dominated by episodic storm flows that wash off bacteria that build up on the surface of all land use types in the watershed drying dry periods. Dry weather loading originating from the watersheds is dominated by nuisance flows from urban land use activities, such as car

[656] California Code of Regulations, title 23, section 3989.9 (Register 2009, No. 38).

[657] Exhibit K (35), Resolution R9-2008-0027 and Basin Plan Amendment, beginning on page 11.

[658] Exhibit K (35), Resolution R9-2008-0027 and Basin Plan Amendment, pages 3 and 12 (Attachment A.).

washing, sidewalk washing, and lawn over-irrigation, which pick up bacteria and deposit it into receiving waters.[659]

Sources of bacteria are the same under both wet weather and dry weather conditions. Bacteria can enter surface waters from both nonpoint and point sources. Nonpoint sources are typically diffuse sources that have multiple routes of entry into surface waters. The only nonpoint sources identified to potentially affect Baby Beach were natural sources (e.g., direct inputs from birds, terrestrial and aquatic animals, wrack line and aquatic plants, sediments, or other unidentified or unquantified sources within the receiving waters) or other background sources (ambient bacteria that may be influenced by illegal discharges from boats) which are not controllable. Due to lack of data, bacteria loads from natural sources or other background sources could not be specifically identified for TMDL development. Until more information is obtained through further study to provide identification of the relative loading from each of these potential sources, they were combined into a single source and assigned a load allocation for wet weather and dry weather. The Board also recognized homeless encampments as a nonpoint source. However, because homeless encampments are illegal, the loads for illegal discharges were set at zero and are required to be eliminated.[660]

Point sources typically discharge at a specific location from pipes, outfalls, and conveyance channels. The only point sources identified to affect Baby Beach was the municipal separate storm sewer system (MS4) and illegal discharges from boats, and wastewater collection systems and treatment plants. The loads for illegal discharges from boats and wastewater collection systems and treatment plants were set at zero and are required to be eliminated. The only allowable point source identified was urban runoff discharged from MS4s, which was assigned a wasteload allocation for wet weather and dry weather. Since only the point sources are considered controllable, a wasteload reduction was also calculated for the bacteria loads from the MS4s in wet weather and dry weather, based on "the difference between the existing wasteload and WLA [wasteload allocation] divided by the existing wasteload."[661]

The TMDL also "implicitly incorporates" a margin of safety since the Regional Board used conservative model assumptions to develop the wasteload and load allocations.[662]

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[659] Exhibit K (35), Resolution R9-2008-0027 and Basin Plan Amendment, pages 12 and 13 (Attachment A.).

[660] Exhibit K (35), Resolution R9-2008-0027 and Basin Plan Amendment, pages 13 and 14 (Attachment A.); Exhibit K (42), Technical Report, TMDL for Indictor Bacteria Baby Beach, dated June 11, 2008, page 2.

[661] Exhibit K (35), Resolution R9-2008-0027 and Basin Plan Amendment, pages 13 and 14 (Attachment A.).

[662] Exhibit K (42), Technical Report, TMDL for Indictor Bacteria Baby Beach, dated June 11, 2008, page 14 (Attachment A.).

The following tables represent the TMDL calculations for Baby Beach, including the wasteload allocations and reductions required for the MS4s to meet the numeric targets (which, as stated above, are equal to the water quality objectives of the receiving water) for each type of indicator bacteria in wet and dry weather conditions.

Wet Weather Wasteload Allocations and Reductions[663]

	TMDL (Billion MPN/30 days)	Load Allocations for Nonpoint Sources	Wasteload Allocations for MS4	Existing Wasteloads MS4	Percent Reduction of MS4 Existing Wasteload
Total Coliform	166,111	162,857	3,254	3,254	0%
Fecal Coliform	32,585	32,473	112	112	0%
Enterococcus	5,730	5,616	114	301	62.2%

Dry Weather Wasteload Allocations and Reductions[664]

	TMDL (Billion MPN/30 days)	Load Allocations for Nonpoint Sources	Wasteload Allocations for MS4	Existing Wasteloads MS4	Percent Reduction of MS4 Existing Wasteload
Total Coliform	5,430	5,429	0.86	9.0	90.4%
Fecal Coliform	1,083	1,082	0.17	1.0	82.7%
Enterococcus	187	187	0.03	0.8	96.2%

The Technical Report explains that "while the information in the tables [above] does not provide absolute numeric values that must be met, it does provide a tool for identifying bacteria sources that may need to be controlled."[665] The Technical Report further

[663] Exhibit K (35), Resolution R9-2008-0027 and Basin Plan Amendment, pages 15 and 16 (Attachment A.).

[664] Exhibit K (35), Resolution R9-2008-0027 and Basin Plan Amendment, pages 17 and 18 (Attachment A.).

[665] Exhibit K (42), Technical Report, TMDL for Indictor Bacteria Baby Beach, dated June 11, 2008, page 74.

explains that when no wasteload reductions are required (i.e., for total coliform and fecal coliform in wet weather), then the water quality objectives for these pollutants are not expected to be exceeded due to discharges from the MS4.[666] However, "in situations where a wasteload reduction is calculated for the MS4, this indicates that discharges from the MS4 are a likely source that is causing, or at least significantly contributing, to exceedances in REC-1 WQO [water quality objectives]. This means that bacteria loads originating from the MS4 need to be controlled."[667] The municipal dischargers (County of Orange and City of Dana Point) will be required to meet the wasteload allocation and reduce bacteria loads in their urban runoff before it is discharged from the MS4 to the receiving waters.[668]

Attachment A. to Resolution R9-2008-0027 and Section 10 of the Technical Report contain a phased compliance schedule for attaining the wet and dry weather wasteload reductions and TMDLs for Baby Beach. As noted above, the only wet weather reduction calculated was for Enterococcus, to be reduced by 62.2 percent. Under the compliance schedule, the dischargers are to meet 50 percent of this reduction by year 7 after the effective date of the TMDL, or by 2014, and 100 percent of the reduction by year 10, or by 2019. Dry weather wasteload reductions were calculated for total coliform, fecal coliform, and enterococcus between 83 percent and 96 percent; 50 percent of which is to be achieved by 3 years after the effective date, or by 2012, and 100 percent by 5 years after the effective date, or by 2014. Actions to comply with these TMDLs include water quality monitoring and implementing BMPs.[669] "If TMDLs for indicator bacteria are attained, then water quality objectives are met, and health risks associated with pathogens are minimal."[670]

The Technical Report further states that "pursuant to receiving water limitations in the San Diego . . . MS4 NPDES requirements . . . , the dischargers are already planning and implementing BMP programs, and monitoring for all MS4 bacteria and other pollutant discharges that cause or contribute to violations of water quality standards in

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[666] Exhibit K (42), Technical Report, TMDL for Indictor Bacteria Baby Beach, dated June 11, 2008, page 94.

[667] Exhibit K (42), Technical Report, TMDL for Indictor Bacteria Baby Beach, dated June 11, 2008, page 74 and 78.

[668] Exhibit K (42), Technical Report, TMDL for Indictor Bacteria Baby Beach, dated June 11, 2008, page 91.

[669] Exhibit K (35), Resolution R9-2008-0027 and Basin Plan Amendment, pages 32-33 (Attachment A.); Exhibit K (42), Technical Report, TMDL for Indictor Bacteria Baby Beach, dated June 11, 2008, pages 95-96.

[670] Exhibit K (35), Resolution R9-2008-0027 and Basin Plan Amendment, page 3.

the water quality limited segments within, or receiving pollutant discharges from their jurisdictions."[671]

The Technical Report further states the following:

> Although NPDES requirements must contain WQBELs that are consistent with the assumptions and requirements of the TMDL WLAs, the federal regulations [Footnote omitted] do not require the WQBELs to be identical to the WLAs. The regulations leave open the possibility that the San Diego Water Board could determine that fact-specific circumstances render something other than literal incorporation of the WLA into discharge requirements to be consistent with the TMDL assumptions and requirements. For example, the WLAs in Tables 8-1 through 8-6 are expressed as billion MPN per 30 days (or per day); however, the WQBELs prescribed in response to the WLAs may or may not be written using the same metric. WQBELs may be expressed as numeric effluent limitations using a different metric, or, more likely, as BMP development, implementation, and revision requirements.[672]

f. <u>The TMDL provisions in section I. of the test claim permit do not mandate a new program or higher level of service.</u>

i. The test claim permit incorporates the wasteload allocations in the TMDL and establishes WQBELs requiring the County of Orange and City of Dana Point to monitor, implement BMPs to achieve the wasteload reductions and numeric targets that must be attained in the Baby Beach receiving waters in accordance with the compliance schedule, and submit progress reports to the Regional Board.

The test claim permit incorporates the wasteload allocations developed in the TMDL for Baby Beach, and establishes water quality-based effluent limitations (WQBELs) requiring the County of Orange and City of Dana Point to monitor and implement BMPs capable of achieving the wasteload allocations and numeric targets in accordance with the compliance schedule.[673] Finding E. 11. of the permit states the following:

> This Order addresses TMDLs through Water Quality Based Effluent Limitations (WQBELs) that must be consistent with the assumptions and requirements of the WLA [citing 40 C.F.R. 122.44(d)(1)(vii)(B)]. Federal

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[671] Exhibit K (42), Technical Report, TMDL for Indictor Bacteria Baby Beach, dated June 11, 2008, page 94.

[672] Exhibit K (42), Technical Report, TMDL for Indictor Bacteria Baby Beach, dated June 11, 2008, page 100-101.

[673] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2132 (Order No. R9-2009-0002, Finding E, paragraph 11).

guidance [citing, Federal Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 FR 43761, August 26, 1996] states that when adequate information exists, storm water permits are to incorporate numeric water quality based effluent limitations. In most cases, the numeric target(s) of a TMDL are a component of the WQBELs. When the numeric target is based on one or more numeric WQOs, the numeric WQOs and underlying assumptions and requirements will be used in the WQBELs as numeric effluent limitations by the end of the TMDL compliance schedule, unless additional information is required. When the numeric target interprets one or more narrative WQOs, the numeric target may assess the efficacy and progress of the BMPs in meeting the WLAs and restoring the Beneficial Uses by the end of the TMDL compliance schedule.

This Order fulfills a component of the TMDL Implementation Plan adopted by this Regional Board on June 11, 2008 for indicator bacteria in Baby Beach by establishing WQBELs expressed as both BMPs to achieve the WLAs and as numeric limitations [citation omitted] for the City of Dana Point and the County of Orange. The establishment of WQBELs expressed as BMPs should be sufficient to achieve the WLA specified in the TMDL. The Waste Load Allocations (WLAs) and Numeric Targets are the necessary metrics to ensure that the BMPs achieve appropriate concentrations of bacterial indicators in the receiving waters.[674]

Section I. of the test claim permit requires the following activities:

- Implement BMPs capable of achieving the interim and final wasteload allocations (in accordance with the compliance schedule in the TMDL) in discharges to Baby Beach. The state has not mandated any specific BMPs, but has left that decision to the copermittees.
- Conduct necessary monitoring, as described in Attachment A., to Resolution R9-2008-0027. Pages 4 and 5 of Resolution R9-2008-0027 states that "[m]onitoring including pollutant load reductions, changes in urban runoff and discharge water quality, and changes in receiving water quality will be necessary to assess effectiveness in achieving load and wasteload allocations and compliance with the water quality objectives for total coliform, fecal coliform, and Enterococcus bacteria."[675] Attachment A., as it relates to monitoring and analysis of samples, provides as follows:

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[674] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2131-2132 (Order No. R9-2009-0002, Finding E, paragraph 11).

[675] Exhibit K (35), Resolution R9-2008-0027 and Basin Plan Amendment, pages 4 and 5.

- "Locations of water quality sampling sites that are spatially representative of the waterbody and appropriate for identifying potential sources, *including, at a minimum, the monitoring stations currently used to monitor water quality*."
- "Schedule of water quality sampling that is temporally representative of both wet weather and dry weather conditions. Wet weather samples are collected during storms of 0.2 inches of rainfall and the 72 hour period after the storm. Dry weather samples are collected from during times when rain has not fallen for the preceding 72 hours."
- "Presentation of past and present water quality data that have been collected."
- "Analysis of water quality data compared to the applicable Basin Plan water quality objectives. Dry weather water quality data are compared to long-term (e.g., geometric mean, mean, or median) water quality objectives, as well as short-term (e.g., single sample maximum) water quality objectives."
- "Analysis of water quality data to correlate noticeable improvements in water quality with past and current BMPs that have been implemented and are effective."
- "Analysis of water quality data to correlate elevated bacteria levels with known or suspected sewage spills from wastewater collection systems and treatment plants or boats."[676]

- Attain the wasteload allocations for each bacteria indicator in Baby Beach receiving water by the end of the year 2019 for wet weather and 2014 for dry weather.
- Meet the numeric targets in Baby Beach receiving waters once 100 percent of the wasteload reductions have been achieved.
- Submit annual progress reports as part of the annual report.[677]

ii. Section I. of the test claim permit does not mandate a new program or higher level of service.

The claimants contend that section I. of the test claim permit constitutes a reimbursable state-mandated program. The claimants argue that the numeric effluent requirements

[676] Exhibit K (35), Resolution R9-2008-0027 and Basin Plan Amendment, page 24 (Attachment A.).

[677] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2194 (Order No. R9-2009-0002, section I).

of the test claim permit "are not compelled by federal law"[678] and that while "federal regulations require that NPDES permit terms be 'consistent with the assumptions and requirements of any available wasteload allocations for the discharge prepared by the State and approved by EPA,'" they do not require that a wasteload allocation be incorporated into a stormwater permit as a strict numeric limit.[679] The claimants further assert that section I. of the test claim permit requires "the Copermittees to meet both interim and final numeric limits (referenced as "Waste Load Allocations" or "WLAs" within the Permit) and to comply with monitoring and reporting requirements" and that "[n]one of these requirements…are required by federal law."[680] The claimants argue that for municipal stormwater discharges, Congress replaced the requirement of strict compliance "with the requirement that municipal storm-sewer dischargers 'reduce the discharge of pollutants to the maximum extent practicable,' and 'expressly' 'did not require municipal storm-sewer dischargers to comply strictly with 33 U.S.C. section 1311(b)(a)(C)."[681] The claimants argue that strict compliance with wasteload allocations in the TMDL is not required when incorporating a TMDL into a stormwater NPDES permit and that the plain language of the CWA does not require numeric effluent limits to be imposed upon municipal stormwater permittees.[682] The claimants cite to *Building Industry Ass'n. of San Diego County v. State Water Resources Control Board*, in which the court found that "[w]ith respect to municipal storm water discharges, Congress clarified that the EPA has the authority to fashion NPDES permits…without specific numeric effluent limits" and instead impose BMPs.[683] Thus, the claimants assert that the requirements in section I are mandated by the state.

The claimants further contend that the requirements are all new:

> The 2002 Permit contained none of the TMDL-Related Mandates in issue in this Test Claim. As such, all of the requirements involving TMDLs within the 2009 Permit are new requirements that go beyond what is required

[678] Exhibit A, Test Claim, filed June 30, 2011, page 48.

[679] Exhibit A, Test Claim, filed June 30, 2011, page 49; Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 16-23.

[680] Exhibit A, Test Claim, filed June 30, 2011, page 47.

[681] Exhibit A, Test Claim, filed June 30, 2011, pages 49-50; Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, page 18, 22 (citing *Defenders of Wildlife v Browner* (9th Cir. 1999) 1991 F.3d 1159, 1165, and Exhibit K (58), State Water Resources Control Board Order WQ 2015-0075).

[682] Exhibit A, Test Claim, filed June 30, 2011, page 50.

[683] Exhibit A, Test Claim, filed June 30, 2011, page 52.

> under federal law, and thus all such requirements constitute unfunded State mandates.[684]

The claimants also state the following:

> As a legal matter, incorporation of a TMDL constitutes the imposition of additional pollution control requirements for permittees. The court in *City of Arcadia v. US. EPA* [fn. citation omitted] recognized how TMDL incorporation spawns additional requirements when it identified TMDLs as "planning devices" which "forms the basis for further administrative actions that may require or prohibit conduct with respect to particularized pollutant dischargers and waterbodies."[Fn. citation omitted.] See also *Pronsolino v. Nastri* ("TMDLs are primarily informational tools that allow the states to proceed from the identification of water requiring additional planning to the required plans"); [Fn. citation omitted.] *Idaho Sportsmen's Coalition v. Browner* ("TMDLs inform the design and implementation of pollution control measures."). [Fn. citation omitted.]
>
> As a factual matter, the TMDL incorporation was a new program or higher level of service not previously required. As set forth in the Declaration of Rita Abellar ("Abellar Decl.") filed herewith, this new program and higher level of service included TMDL-related supplemental monitoring and reporting, a Microbial Source Tracking study, a Dye study, and a Sewer Investigation/Sanitary Survey/BMP Investigation study, all to identify bacterial indicator sources, determine BMP effectiveness, and determine the TMDL WLA compliance required by the Test Claim Permit (Abellar Decl. ¶6).[685]

Finally, as discussed in Section IV.A.3. of this Decision, the claimants incorrectly contend that Test Claim Permit's obligations cannot be compared with those in the 2002 Permit because the permittees were legally precluded from filing a test claim with respect to the obligations in the 2002 Permit; and the permittees had no obligation to

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[684] Exhibit A, Test Claim, filed June 30, 2011, page 58; Exhibit F, Claimants' Rebuttal Comments, filed January 6, 2017, page 23.

[685] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, page 23. The Declaration of Rita Abellar, an Environmental Resource Specialist for the County of Orange who manages the South Orange County Bacteria TMDLs, states that the County performed the "new" activities identified by the claimants from 2009-2015 at a cost of $254,953. (Exhibit J, Claimants Comments on the Draft Proposed Decision, filed August 25, 2023, pages 141-142).

continue to implement BMPs in compliance with the receiving water limitations in the 2002 Permit once the 2002 Permit terminated.[686]

The Water Boards disagree that section I. imposes a state-mandated program, arguing that federal law requires states to adopt TMDLs for surface waters "in which federal water quality standards are not being obtained."[687] The Water Boards state that federal law "specifically requires the permit writers such as the San Diego Water Board to implement TMDLs by including effluent limitations in NPDES permits that are 'consistent with the assumptions and requirements of any available wasteload allocations.'"[688] They further argue that:

> The 2009 Permit provisions incorporating Wasteload Allocations Reductions, Final Allocations and Numeric Targets come directly from the adopted TMDL. This is in compliance with the requirement that all NPDES permit are consistent with the assumptions and requirements of Waste Load Allocations in adopted and applicable TMDLs.[689]

The Water Boards state that the inclusion of the numeric effluent limitations were expressly endorsed by the U.S. EPA in their comments on the permit, and that subsequent federal guidance by U.S. EPA endorse the use of numeric effluent limitations in TMDLs when numeric effluent limitations are capable of improving clarity and enforceability of the CWA.[690] The Water Boards further assert that the activities required by section I. of the test claim permit do not impose a new program or higher

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[686] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 24-26.

[687] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 10.

[688] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 25.

[689] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 25 (citing 40 C.F.R. section 122.44(d)(1)(vii)(B)).

[690] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 25-26 (citing to AR, Volume I, pages 4987-4998, 5165-5167, 5175-5181, U.S. EPA letters endorsing numeric effluent limitations proposed by the Los Angeles Regional Water Board, Santa Ana Regional Water Board, and subsequent permits issued by the San Diego Regional Water Board; and pages 5183-5199, U.S. EPA memoranda "articulating the sound reasons that support its preference for the use of numeric effluent limitations as the means of assuring WLAs are achieved.")

level of service since the prior permit and the copermittees' plans recognized that TMDLs were being developed for impaired water bodies.[691]

The Commission finds that the TMDL requirements in section I. of the test claim permit do not mandate a new program or higher level of service and, thus, do not require reimbursement pursuant to article XIII B, section 6 of the California Constitution.

As stated above, section I. of the test claim permit requires the County of Orange and the City of Dana Point to implement BMPs capable of achieving the interim and final wasteload allocations and reductions to meet water quality objectives for total coliform, fecal coliform, and Enterococcus in Baby Beach by the end of year 2014 for dry weather and 2019 for wet weather; conduct monitoring to assess the effectiveness of pollutant load reductions, changes in urban runoff and discharge water quality, and changes in receiving water quality; continue to meet the numeric targets in Baby Beach receiving waters once the wasteload reductions have been achieved; and submit annual progress reports as part of the annual report. The state has not required any specific BMPs to comply with the TMDL, but has left that decision to the copermittees.

The activities required in section I. of the test claim permit are not new, and do not provide a higher level of service to the public. As stated in the TMDL, the numeric targets are the same as the water quality criteria and objectives for total coliform, fecal coliform, and Enterococcus in coastal recreational receiving waters, for both dry and wet weather, which were established by the state and federal governments long before the adoption of the TMDL and the test claim permit in this case.[692] And federal law has long required claimants to meet water quality objectives in receiving waters by monitoring, implementing BMPs, and reporting progress and exceedances to the Water Boards.[693]

Moreover, the prior permit required the claimants to comply with the numeric water quality objectives for total coliform, fecal coliform, and Enterococcus in coastal recreational receiving waters by expressly prohibiting claimants from discharging from the MS4s any runoff that caused or contributed to the violation or exceedance of the

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[691] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 28-29.

[692] See, Exhibit K (55), Water Quality Standards for Coastal and Great Lakes Recreation Waters, Final Rule, 69 FR 67218; Health and Safety Code section 115880 (Stats. 1997, ch. 1987, AB 411); California Code of Regulations, title 17, section 1758; Exhibit K (46), U.S. EPA Ambient Water Quality Criteria for Bacteria, 1986; Exhibit K (4), 1994 Basin Plan; Exhibit K (13), Compilation of California Ocean Plans 1972-2001.

[693] United States Code, title 33, section 1342(p)(3)(B)(iii); Code of Federal Regulations, title 40, section 122.44(d)(1), (i); Code of Federal Regulations, title 40, section 122.48; Code of Federal Regulations, title 40, Part 127 (electronic reporting).

water quality objectives;[694] requiring the copermittees to implement "control measures and other actions to reduce pollutants in urban runoff discharges,"[695] which included implementing BMPs;[696] requiring dry weather analytical monitoring to detect illicit discharges and connections;[697] requiring coastal storm drain outfall, surf zone, and receiving water monitoring and analysis specifically for total coliform, fecal coliform, and Enterococci;[698] reporting any exceedances of water quality objectives that included a recommendation of future monitoring and BMP implementation measures to identify and address the source of the exceedance; and reporting the annual progress of their Jurisdictional URMPs.[699] The prior permit also authorized the Regional Board to strictly enforce the water quality objectives for total coliform, fecal coliform, and Enterococcus by stating that "[n]othing in this section shall prevent the SDRWQCB from enforcing any provision of this Order while the Copermittee prepares and implements the above report [of an exceedance of water quality objectives]."[700]

These requirements of the prior permit are similar to the permit at issue in *Building Industry Association of San Diego County v. State Water Resources Control Board*.[701] In that case, the Building Industry Association (BIA) challenged a 2001 NPDES stormwater permit issued by the San Diego Regional Board that expressly prohibited the discharge of pollutants that "cause or contribute to exceedances of receiving water quality objectives," and that "cause or contribute to the violation of water quality standards."[702] The permit also contained an enforcement provision that required a

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[694] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3438-3439, 3482 (Order R9-2002-0001, section C; Attachment A.).

[695] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3439-3440 (Order R9-2002-0001, section C.2.).

[696] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3484 (Order R9-2002-0001, Attachment B.).

[697] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3466 (Order R9-2002-0001, section F.5.).

[698] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3478 (Order R9-2002-0001, section P.).

[699] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3484 (Order R9-2002-0001, Attachment B.).

[700] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3440 (Order R9-2002-0001, section C.3.).

[701] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866.

[702] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 872, 876-877.

municipality to report any violations or exceedances of an applicable water quality standard, and describe a process for improvement and prevention of further violations.[703] The permit in BIA then contained the same provision contained in the prior permit in this case that "Nothing in this section shall prevent the Regional Water Board from enforcing any provision of this Order while the municipality prepares and implements the above report."[704] BIA, concerned that the permit provisions were too stringent, impossible to satisfy, and would result in all affected municipalities being in immediate violation of the permit and subject to substantial civil penalties because they were not then complying with applicable water quality standards contended that under federal law, the "maximum extent practicable" standard is the exclusive measure that may be applied to municipal storm sewer discharges. BIA asserted that the Regional Board may not require a municipality to comply with a state water quality standard if the required controls exceed a maximum extent practicable standard.[705]

The court, however, rejected BIA's interpretation, and held that the permit provisions requiring compliance with water quality standards are proper under federal law.[706] The Clean Water Act provides that permits for discharges from municipal storm sewers "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, *and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants*."[707] The court interpreted the plain language of this provision to authorize the administrator to impose appropriate water pollution controls in NPDES permits, *in addition* to those that come within the definition of "maximum extent practicable."[708] The court also found that "legislative history supports that in identifying a maximum extent practicable standard Congress did not intend to substantively bar the EPA/state agency from imposing a more stringent

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[703] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 877.

[704] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 877.

[705] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 872, 880, 890.

[706] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 880; see also, *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1166-1167, which also held that the EPA or the state administrator has the authority to determine that ensuring strict compliance with state water quality standards is necessary to control pollutants.

[707] United States Code, title 33, section 1342(p)(3)(B)(iii), emphasis added.

[708] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 883.

water quality standard if the agency, based on its expertise and technical factual information and after the required administrative hearing procedure, found this standard to be a necessary and workable enforcement mechanism to achieving the goals of the Clean Water Act."[709]

Moreover, the State Board issued precedential orders in 1999 directing that MS4 permits require discharges to be controlled so as not to cause or contribute to any exceedances of water quality standards in receiving waters as follows:

> We have directed, in precedential orders, that MS4 permits require discharges to be controlled so as not to cause or contribute to exceedances of water quality standards in receiving waters, [fn. omitted] but have prescribed an iterative process whereby an exceedance of a water quality standard triggers a process of BMP improvements. That iterative process involves reporting of the violation, submission of a report describing proposed improvements to BMPs expected to better meet water quality standards, and implementation of these new BMPs. [FN. omitted.] The current language of the existing receiving waters limitations provisions was actually developed by USEPA when it vetoed two regional water board MS4 permits that utilized a prior version of the State Water Board's receiving water limitations provisions. [FN. omitted.] In State Water Board Order WQ 99-05, we directed that all regional boards use USEPA's receiving water limitations provisions.
>
> There has been significant confusion within the regulated MS4 community regarding the relationship between the receiving water limitations and the iterative process, in part because the water boards have commonly directed dischargers to achieve compliance with water quality standards by improving control measures through the iterative process. *But the iterative process, as established in our precedential orders and as generally written into MS4 permits adopted by the water boards, does not provide a "safe harbor" to MS4 dischargers. When a discharger is shown to be causing or contributing to an exceedance of water quality standards, that discharger is in violation of the permit's receiving water limitations and potentially subject to enforcement by the water boards or through a citizen suit, regardless of whether or not the discharger is actively engaged in the iterative process*. [FN. omitted.][710]

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[709] *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 884.

[710] Exhibit K (58) State Water Resources Control Board Order WQ 2015-0075, pages 11-12.

The State Board has also ruled that "[w]e will not reverse our precedential determination in State Water Board Order WQ 99-05 that established the receiving water limitations provisions for MS4 permits statewide and reiterate that we will continue to read those provisions consistent with how the courts have: engagement in the iterative process does not excuse exceedances of water quality standards."[711]

Thus, like the permit in the cases described above, the prior permit required the claimants to comply with the existing water quality standards and objectives for total coliform, fecal coliform, and Enterococci in recreational waters by implementing BMPs, monitoring, and reporting, and made compliance with the water quality objectives immediately enforceable with the provision stating that "[n]othing in this section shall prevent the SDRWQCB from enforcing any provision of this Order while the Copermittee prepares and implements the above report [of an exceedance of water quality objectives]."

Section I. of the test claim permit requires the claimants to perform the same activities as the prior permit to meet the water quality objectives (or numeric targets) by implementing BMPs, monitoring, and reporting. As stated in the Technical Report for the TMDL, "pursuant to receiving water limitations in the San Diego . . . MS4 NPDES requirements . . . , the dischargers are already planning and implementing BMP programs, and monitoring for all MS4 bacteria and other pollutant discharges that cause or contribute to violations of water quality standards in the water quality limited segments within, or receiving pollutant discharges from their jurisdictions."[712] The Technical Report goes on to state the following:

> For example, the County of Orange has already conducted numerous studies and implemented a variety of non-structural BMPs in an effort to reduce bacteria levels at BB [Baby Beach] since before 2002. . . . These actions appear to have resulted in significant improvements in water quality since 2002. The County of Orange should be able to achieve the MS4 WLAs in the near future.[713]

Attachment A. to the Resolution amending the Basin Plan to incorporate the TMDL further acknowledges that "if current trends continue, monitoring and permanent

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[711] Exhibit K (58) State Water Resources Control Board Order WQ 2015-0075, page 15.

[712] Exhibit K (42), Technical Report, TMDL for Indictor Bacteria Baby Beach, dated June 11, 2008, page 94.

[713] Exhibit K (42), Technical Report, TMDL for Indictor Bacteria Baby Beach, dated June 11, 2008, page 94.

implementation of current programs and BMPs may be adequate for meeting the wet weather and dry weather TMDLs."[714]

The only difference between the prior permit and the test claim permit is that the test claim permit now identifies the wasteload allocations for the bacterial indicators calculated in the TMDL so that claimants know the percentage of bacterial loads that need to be reduced to meet the existing water quality objectives for Baby Beach. And, instead of the water quality objectives being immediately enforceable, the Test Claim permit gives claimants more time to meet those objectives. The California Supreme Court has made clear that "simply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting 'service to the public' under article XIII B, section 6, and Government Code section 17514."[715] Rather, the new program or higher level of service must "increase the actual level or quality of governmental services provided."[716] Thus, even though the claimants may experience additional or increased costs to actually meet the water quality objectives at Baby Beach, there is no new program or higher level of service.

Accordingly, the TMDL provisions in section I of the test claim permit do not mandate a new program or higher level of service.

6. Sections F.1.d. and h. and F.3.d. of the Test Claim Permit, Addressing Low Impact Development (LID), Hydromodification Plans, BMPs for Priority Development Projects, and a Retrofitting Program to Reduce Impacts from Hydromodification and Promote LID BMPs, Impose Some State-Mandated New Programs or Higher Levels of Service.

The claimants have pled sections F.1.d. and. h. and F.3.d. of the test claim permit.[717] These sections are part of the Jurisdictional Runoff Management Program (JRMP) that

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[714] Exhibit K (35), Resolution R9-2008-0027 and Basin Plan Amendment, page 20 (Attachment A.).

[715] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877. (Emphasis in original.)

[716] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877.

[717] Exhibit A, Test Claim, filed June 30, 2011, pages 36, 67-84, 97-101. The Test Claim states that "The Permittees challenge parts F.1.d of the 2009 Permit as applied to municipal projects and development of program [sic] Permittees also challenge F.1.h., in its entirety." (Exhibit A, Test Claim, filed June 30, 2011, p. 71.) Even though this one sentence in the Test Claim appears to limit what is being challenged in section F.1.d., to municipal projects, the Test Claim in later pages also identifies the requirements in section F.1.d.9., which requires the claimants to verify compliance with the Standard Storm Water Mitigation Plan (SSMP) for all priority development projects. (Exhibit A,

requires, in the continuing effort to reduce the discharges of stormwater pollution from the MS4 to the MEP and to prevent those discharges from causing or contributing to a violation of water quality standards, an updated plan for review of priority development projects proposed by residential, commercial, industrial, mixed-use, and public project proponents; implementation of Low-Impact Development (LID) site design BMPs at new development and redevelopment projects; the development of a hydromodification plan to manage increases in runoff discharge rates and durations from priority development projects; and the development and implementation of a retrofitting program to reduce the impacts from hydromodification and promote LID BMPs.[718]

As described below, the Commission finds that:

- The LID and hydromodification requirements imposed by sections F.1.d. and F.1.h. of the test claim permit with respect to municipal priority development projects are not mandated by the state and do not impose a new program or higher level of service because such costs are incurred at the discretion of the local agency, are not unique to government, and do not carry out a governmental function of providing a service to the public.
- The remaining new activities imposed by sections F.1.d., F.1.h., and F.3.d. that relate to the claimants' regulatory activities for the LID, hydromodification, and retrofit provisions are mandated by the state and impose a new program or higher level of service.

a. Background

i. Federal law requires an NPDES applicant to propose structural and source control measures to reduce pollutants from runoff from all construction sites and all new development and redevelopment of commercial, residential, and industrial areas to the MEP, and EPA encourages green infrastructure as an integral part of stormwater management.

Under federal law, municipalities are required to apply for a NPDES permit in order to discharge any pollutant from an MS4.[719] NPDES permits must include conditions to

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Test Claim, filed June 30, 2011, p. 77.) This Decision analyzes all of section F.1.d. However, the reporting requirements in section F.1.d.7.i., are analyzed with the reporting requirements, consistent with the claimants' Test Claim pleading, in Section IV.C.9., of this Decision. (See, Exhibit A, Test Claim, filed June 30, 2011, p. 94.)

[718] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2147-2157, 2159-2163, and 2183-2185 (Order No. R9-2009-0002, sections F.1.d., and h., and F.3.d.).

[719] Code of Federal Regulations, title 40, section 122.26(a)(3); *Arkansas v. Oklahoma* (1992) 503 U.S. 91, 101-102.

achieve water quality standards and objectives.[720] Such conditions "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[721] Federal regulations define "best management practices" as:

> . . . schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.[722]

Federal regulations require that the application for an NPDES permit for large and medium MS4 dischargers to describe a proposed management program that covers the duration of the permit to be considered by the Regional Board when developing permit conditions to reduce pollutants in discharges to the MEP. The proposed management program shall include a comprehensive planning process which involves public participation and where necessary, intergovernmental coordination, to reduce the discharge of pollutants to the MEP using management practices, control techniques and system, design and engineering methods, and other appropriate conditions. Separate proposed programs may be submitted by each co-applicant, and proposed programs may impose controls on a systemwide basis, watershed basis, a jurisdiction basis, or on individual outfalls. As relevant here, the proposed management programs shall include the following information:

- A description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the MS4

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[720] United States Code, title 33, section 1311(b)(1)(C), which states that "in order to carry out the objective of this chapter there shall be achieved . . . any more stringent limitation, including those necessary to meet water quality standards"; United States Code, title 33, section 1342(o)(3), which states that "In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters"; and Code of Federal Regulations, title 40, 122.44(d)(1), which states that NPDES permits must include "any requirements in addition to or more stringent than promulgated effluent limitations guidelines . . . necessary to . . . [a]chieve water quality standards established under section 303 of the CWA."

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

[722] Code of Federal Regulations, title 40, section 122.2.

and that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include, as relevant here:

  - A description of planning procedures including a comprehensive master plan to develop, implement, and enforce controls to reduce the discharge of pollutants from MS4s that receive discharges from areas of new development and significant redevelopment. The plan shall address controls to reduce pollutants in discharges from MS4s after construction is completed.
  - A description of practices for operating and maintaining public streets, roads, and highways, and procedures for reducing the impact on receiving waters of discharges from MS4s.

- A description of a program to monitor and control pollutants in stormwater discharges to municipal systems from industrial facilities that the municipal permit applicant determines is contributing a substantial pollutant loading to the MS4. The description shall identify priorities and procedures for inspections and establishing and implementing control measures for such discharges.
- A description of a program to implement and maintain structural and non-structural BMPs to reduce pollutants in stormwater runoff from construction sites to the MS4. The description shall include procedures for site planning, which incorporates consideration of potential water quality impacts; requirements for nonstructural and structural BMPs; procedures for identifying priorities for inspecting sites and enforcing control measures that consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and appropriate educational and training measures for construction site owners.[723]

The application shall also include estimated reductions in loadings of pollutants from discharges of runoff from MS4s expected as a result of the water quality management programs, and the identification of known impacts of stormwater controls on ground water.[724]

In 2006, U.S. EPA requested the National Research Council of the National Academy of Sciences (NRC) to conduct a review of the existing stormwater regulatory program. NRC issued its report in 2008, and found that "the rapid conversion of land to urban and suburban areas has profoundly altered how water flows during and following storm events, putting higher volumes of water and more pollutants into the nation's rivers,

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

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

lakes, and estuaries. These changes have degraded water quality and habitat in virtually every urban stream system."[725] The NRC report recommended a number of actions, including conserving natural areas, reducing hard surface cover (such as roads, parking lots, and other impervious surface areas), and retrofitting urban areas with features that hold and treat stormwater.[726] The report also recommended that EPA adopt a watershed-based permitting system encompassing all discharges that could affect waterways in a particular drainage basin. Under this watershed approach, responsibility to implement watershed –based permits and control all types of municipal, industrial, and construction stormwater discharges would reside with MS4 permittees. The report criticized EPA's current approach, "which leaves much discretion to regulated entities to set their own standards through stormwater management plans and to self-monitor."[727]

After the NRC report was issued, U.S. EPA initiated information-gathering and public dialogue activities for possible regulatory changes that would respond to the NRC report and embrace the report's recommendations. As part of this project, US EPA was considering establishing specific requirements and standards to control stormwater discharges from new development and redevelopment that promote sustainable practices that mimic natural processes to infiltrate and recharge, evapotranspire, and harvest and reuse precipitation as follows:

> For example, there could be a national requirement for on-site stormwater controls such that post development hydrology mimics predevelopment hydrology on a site-specific basis. EPA could establish a suite of specific options of standards for meeting such a requirement, for example, on-site retention of a specific size storm event in an area, limits on the amount of effective impervious surfaces (defines as impervious surfaces with direct hydraulic connection to the downstream drainage (or stream) system, also referred to as directly connected impervious area), use of site-specific calculations to determine predevelopment hydrology, and/or use of regional specific standards to reflect local circumstances.[728]

U.S. EPA was also seeking input to require MS4s to address stormwater discharges in areas of existing development through retrofitting of the sewer system, drainage area, or individual structures with improved stormwater control measures.[729]

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[725] Exhibit K (3), 74 Federal Register 68617-68622, December 29, 2009, page 4.

[726] Exhibit K (3), 74 Federal Register 68617-68622, December 29, 2009, page 4.

[727] Exhibit K (39), Stormwater Permits, Status of EPAs Regulatory Program, September 9, 2015, page 12.

[728] Exhibit K (3), 74 Federal Register 68617-68622, December 29, 2009, pages 5-6.

[729] Exhibit K (3), 74 Federal Register 68617-68622, December 29, 2009, page 6.

In March 2014, however, U.S. EPA announced that it would defer action on the rule and, instead, provide incentives and technical assistance to address stormwater runoff. "In particular, the agency said that it will leverage existing requirements to strengthen municipal stormwater permits and will continue to promote green infrastructure as an integral part of stormwater management."[730]

ii. The prior permit required each copermittee, as a component of their Jurisdictional Urban Runoff Management Program (JURMP), to develop a model Standard Urban Storm Water Mitigation Plan (SUSMP) to reduce pollutants to the MEP and to maintain or reduce downstream erosion and stream habitat from all new development and significant redevelopment projects.

The prior permit recognized that two important changes occur with urban development. First, natural vegetated pervious ground cover is converted to impervious surfaces such as paved highways, streets, rooftops, and parking lots. While natural vegetated soil can both absorb rainwater and remove pollutants providing an effective natural purification process, pavement and concrete cannot. Second, urban development creates new pollution sources as human population density increases and brings with it higher levels of car emissions, car maintenance waste, municipal sewage, pesticides, household hazardous wastes, pet wastes, and trash, which can be washed or dumped into the MS4. As a result, the runoff leaving the developed urban area is significantly greater in volume, velocity, and pollutant load than the pre-development runoff in the same area. In addition, the increased volume and velocity of runoff from developed urban areas greatly accelerates the erosion of downstream natural channels. Numerous studies demonstrate a direct correlation between the degree of imperviousness of an area and the degradation of its receiving water quality. Individually and in combination, the discharge of pollutants and increased flows from the MS4s can cause the concentration of pollutants to exceed receiving water quality objectives and impair or threaten to impair designated beneficial uses.[731]

The prior permit also recognized that pollutants can be effectively reduced in urban runoff by the application of pollution prevention, source control, and treatment control BMPs. Source control BMPs (both structural and non-structural) minimize the contact between the pollutants and flows (for example, re-routing pollutant sources). Treatment control (or structural) BMPs remove pollutants from urban runoff. And, where feasible,

[730] Exhibit K (39), Stormwater Permits, Status of EPAs Regulatory Program, September 9, 2015, page 14.

[731] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3432-3433 (Order R9-2002-0001, Findings, paragraphs 4, 5, 9).

use of BMPs that utilize natural processes (grassy swales and constructed wetlands) should be assessed.[732]

> . . . . [This] more natural approach to storm water management seeks to filter and infiltrate runoff by allowing it to flow slowly over permeable vegetated surfaces. By "preserving and restoring the natural hydrologic cycle", filtration and infiltration can greatly reduce the volume/peak rate, velocity, and pollutant loads of urban runoff. The greatest opportunities for changing from a "conveyance" to a more natural management approach occur during the land use planning and zoning processes and when new development projects are under early design.[733]

Since copermittees authorize and realize the benefits from urban development, they must also exercise their legal authority to ensure that the resulting increased pollutant loads and flows do not further degrade receiving waters.[734]

Thus, the prior permit required each copermittee, as a component of their Jurisdictional Urban Runoff Management Program (JURMP), to address land use planning by minimizing the short and long-term impacts on receiving water quality from new development and redevelopment. In order to reduce pollutants and runoff flows from new development and redevelopment to the MEP, each copermittee was required to assess their General Plan to include water quality and watershed protection principles and policies to direct land use decisions, and require implementation of consistent water quality protection measures for development projects. Examples of water quality and watershed protection principles and policies to be considered include the following: (1) minimize the amount of impervious surfaces and directly connected impervious surfaces in areas of new development and redevelopment where feasible slow runoff and maximize on-site infiltration of runoff; (2) implement pollution prevention methods supplemented by pollutant source controls and treatment; (3) preserve, created, or restore areas that provide important water quality benefits, such as riparian corridors, wetlands, and buffer zones; (4) limit disturbances of natural water bodies and natural drainage systems caused by development including roads, highways, and bridges; (5) prior to making land use decisions, utilize methods to estimate increases in pollutant loads and flows resulting from projected future development, and require structural and non-structural BMPs to mitigate the projected increases in pollutant loads and flows; (6) avoid development of areas that are susceptible to erosion and sediment loss, or

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[732] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3433 (Order R9-2002-0001, Findings, paragraph 11).

[733] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3437 (Order R9-2002-0001, Findings, paragraph 33).

[734] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3434 (Order R9-2002-0001, Findings, paragraphs 16, 17).

develop guidance that identifies these areas and protects them from erosion and sediment loss; (7) reduce pollutants associated with vehicles and increasing traffic resulting from development; and (8) post-development runoff from a site shall not contain pollutant loads that cause or contribute to an exceedance of receiving water quality objectives and which have not been reduced to the MEP.[735]

Before project approval and issuance of a local building permit, the prior permit required the copermittees to require each proposed project to implement measures to ensure that pollutants and runoff from the development will be reduced to the MEP and will not cause or contribute to an exceedance of receiving water quality objectives. All development had to be in compliance with stormwater ordinances and the following requirements, which had to be included in local permits to ensure that pollutant discharges from development are reduced to the MEP; peak runoff velocities and runoff volumes from development are controlled; and that receiving water quality objectives are not violated throughout the life of the project:

- Require project proponent to implement source control BMPs.
- Require project proponent to implement site design/landscape characteristics that maximize infiltration, provide retention, slow runoff, and minimize impervious land coverage for all development projects.
- Require project proponent to implement buffer zones for natural water bodies. Where buffer zones are not feasible, require project proponent to implement other buffers such as trees, lighting restrictions, access restrictions, etc.
- Require industrial applicants to provide evidence of coverage under the General Industrial Permit.
- Require project proponent to ensure its grading or other construction activities meet the requirements of the model Standard Urban Storm Water Mitigation Plan (SUSMP), which is described below.[736]

In addition, the prior permit required the copermittees to collectively develop a model Standard Urban Storm Water Mitigation Plan (SUSMP) to reduce pollutants and to maintain or reduce downstream erosion and stream habitat from all new development and significant redevelopment projects (defined as the creation or addition of at least 5,000 square feet of impervious surfaces on an already existing developed site) for the following "priority project categories:"

- Home subdivisions of 10 or more housing units.

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[735] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3443-3444 (Order R9-2002-0001, section F.).

[736] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3444-3445 (Order R9-2002-0001, section F.1.b.1.).

- Commercial developments greater than 100,000 square feet. This category is defined as any development on private land that is not for heavy industrial or residential uses and includes hospitals, laboratories, and other medical facilities; educational institutions; recreational facilities; commercial nurseries; multi-apartment buildings; car wash facilities; mini-malls and other business complexes; shopping malls; hotels; office buildings; public warehouses; automotive dealerships; commercial airfields; and other light industrial facilities.
- Automotive repair shops.
- Restaurants, where the land area for development is greater than 5,000 square feet. If the land development is less than 5,000 square feet, the restaurant shall meet all SUSMP requirements, except for structural treatment BMP, numeric sizing criteria, and peak flow requirements.
- All hillside development greater than 5,000 square feet. This category is defined as any development which creates 5,000 square feet of impervious surface that is located in an area with known erosive soil conditions, and where the development will grade on any natural slope that is 25 percent or greater.
- Environmentally sensitive areas. All development and redevelopment located within or directly adjacent to (within 200 feet of an environmentally sensitive area) or discharging directly (outflow from a drainage conveyance system that is composed entirely of flows from the development or redevelopment site) to an environmentally sensitive area (where discharges from the development or redevelopment will enter receiving waters within the environmentally sensitive area), which either creates 2,500 square feet of impervious surface on a proposed project site or increases the area of imperviousness of a proposed project site to ten percent or more of its naturally occurring condition. Environmentally sensitive areas include, but are not limited to, all CWA section 303(d) impaired water bodies; areas designated as Areas of Special Biological Significance by the State Resources Water Control Board (Water Quality Control Plan for the San Diego Basin (1994) and amendments); water bodies designated with the RARE beneficial use by the State Resources Water Control Board (Water Quality Control Plan for the San Diego Basin (1994) and amendments); areas designated as preserves.
- Parking lots 5,000 square feet or more, or with 15 or more parking spaces and potentially exposed to urban runoff.

- Street, roads, highways, and freeways. This includes any paved surface that is 5,000 square feet or greater used for the transportation of automobiles, trucks, motorcycles, and other vehicles.[737]

The SUSMP was also required to include a list of recommended source control BMPs and structural treatment BMPs. All new priority development and significant redevelopment projects were required to implement a combination of BMPs selected from the recommended BMP list, which shall include source control BMPs and structural treatment control BMPs. The BMPs shall, at a minimum:

- Control the post-development peak stormwater runoff discharge rates and velocities to maintain or reduce pre-development downstream erosion and to protect stream habitat.
- Conserve natural areas where feasible.
- Minimize stormwater pollutants of concern in urban runoff from the new development or significant redevelopment through implementation of source control BMPs. Identification of pollutants of concern should include at a minimum consideration of any pollutants for which water bodies receiving the development's runoff are listed as impaired under CWA section 303(d), any pollutant associated with the land use type of the development, and any pollutant commonly associated with urban runoff.
- Remove pollutants of concern through implementation of structural treatment BMPs.
- Minimize directly connected impervious areas where feasible.
- Protect slopes and channels from eroding.
- Include storm drain stenciling and signage.
- Include properly designed outdoor material storage areas.
- Include proof of a mechanism, to be provided by the project proponent or copermittee, which will ensure ongoing long-term structural BMP maintenance.
- Be correctly designed so as to remove pollutants to the MEP.
- Be implemented close to pollutant sources, when feasible, and prior to discharging into receiving waters supporting beneficial uses.

[737] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3445-3446 (Order R9-2002-0001, section F.1.b.2.a.).

- Ensure that post-development runoff does not contain pollutant loads which cause or contribute to an exceedance of water quality objectives and which have not been reduced to the MEP.[738]

All structural treatment BMPs had to be located to infiltrate, filter, or treat the required runoff volume or flow prior to its discharge to any receiving water body supporting beneficial uses. In addition, all structural treatment BMPs for a single priority project had to collectively be sized to comply with the following specified numeric criteria for volume and flow:

- Volume-based BMPs shall be designed to infiltrate, filter, or treat the volume of runoff produced from a 24-hour 85th percentile storm event, as specified.
- Flow based BMPs shall be designed to infiltrate, filter, or treat either the maximum flow rate of runoff produced from a rainfall intensity of 0.2 inch of rainfall per hour, for each hour; or the maximum flow rate of runoff produced by the 85th percentile hourly rainfall intensity; or the maximum flow rate of runoff that achieves approximately the same reduction in pollutant loads and flows as achieved by mitigation of the 85th percentile hourly rainfall intensity multiplied by a factor to two.
- Alternatively, the copermittees could develop an equivalent method for calculating the numeric sizing criteria for volume and flow.[739]

As part of the SUSMP, the copermittees were also required to develop a procedure for pollutants of concern to be identified for each new development or significant redevelopment project. The procedure was required to include consideration of receiving water quality (including pollutants for which receiving waters are listed as impaired under section 303(d)); pollutants associated with land use type of the development project; pollutants expected to be present on site; changes in storm water discharge flow rates, velocities, durations, and volumes resulting from the development project; and sensitivity of receiving waters to changes in storm water discharges flow rates, velocities, durations, and volumes.[740]

[738] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3446-3447 (Order R9-2002-0001, section F.1.b.2.b.).

[739] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3447-3448 (Order R9-2002-0001, section F.1.b.2.c.).

[740] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3448 (Order R9-2002-0001, section F.1.b.2.e.).

In addition, the copermittees were required to develop a process by which the SUSMP requirements would be implemented, and at what stage of the planning process development projects would be required to meet all SUSMP requirements.[741]

The prior permit also required that the SUSMP contain a waiver provision that allows a copermittee to waive the requirement of implementing structural treatment BMPs for a project if infeasibility can be established. A waiver of infeasibility shall only be granted when all available structural treatment BMPs have been considered and rejected as infeasible. In addition, the prior permit gave the copermittees authority to require project proponents that received waivers to transfer the cost savings, as determined by the copermittee, to a stormwater mitigation fund to be used on projects to improve urban runoff quality within the watershed of the waived project.[742]

Finally, the prior permit contained JURMP provisions relating to construction sites and existing developments (including municipal, industrial, commercial, and residential). With respect to construction sites, each copermittee was required to implement pollution prevention methods and require construction site owners, developers, contractors, and other responsible parties to use the prevention methods. Each copermittee was also required to review and update their ordinances to require implementation of BMPs that addressed erosion prevention, seasonal restrictions on grading, slope stabilization requirements, phased grading, revegetation, preservation of natural hydrologic features, preservation of riparian buffers and corridors, maintenance of all source control and treatment control BMPs, and retention and proper management of sediment and other construction pollutants on site. Each copermitee was required to include in all individual proposed construction and grading permits measures to ensure that pollutants from the site would be reduced to the MEP and would not cause or contribute to an exceedance of water quality objectives, and that all activities would be in compliance with ordinances and the requirements of the prior permit. In addition, each copermittee was required to annually develop and update, prior to the rainy season, a watershed-based inventory of all construction sites, and prioritize the inventory by threat to water quality with respect to site slope, project size and type, sensitivity of receiving water bodies, proximity to receiving water bodies, non-stormwater discharges, and other relevant factors. Each copermittee was required to designate a set of minimum BMPs for high, medium, and low threat to water quality construction sites to be implemented year round, and inspect the construction sites for compliance.[743]

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[741] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3448 (Order R9-2002-0001, section F.1.b.2.f.).

[742] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3449 (Order R9-2002-0001, section F.1.b.2.g.).

[743] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3451-3454 (Order R9-2002-0001, section F.2).

With respect to existing development (municipal, industrial, commercial, and residential) each copermittee was required to minimize the short and long-term impacts on receiving water quality from all types of existing development. Generally, each copermittee had to describe and enforce pollution prevention methods on existing development; develop and update annually a watershed-based inventory of the developments and a description of the areas and activities that generate pollutants; and prioritize the inventory by threat to water quality standards. In addition, each copermittee was required to designate a set of minimum BMPs for high, medium, and low threat to water quality areas and activities, and require the implementation of the BMPs by each existing development. With respect to existing structural flood control devices owned and maintained by municipalities, the prior permit required each copermittee to evaluate the feasibility of retrofitting those devices and retrofit where needed.[744]

b. The test claim permit adds new requirements to update the model and local plans for review of priority development projects; implement Low-Impact Development (LID) site design BMPs at new development and redevelopment projects; develop a hydromodification plan to manage increases in runoff discharge rates and durations from priority development projects; and develop and implement a retrofitting program to reduce the impacts from hydromodification and promote LID BMPs.

The test claim permit contains findings similar to the prior permit, specifically that when natural vegetated pervious ground cover is converted to impervious surfaces such as paved highways, streets, rooftops, and parking lots, the natural absorption and infiltration abilities of the land are lost; that development creates new pollution sources as human population density increases; that development threatens environmentally sensitive areas (ESAs) including the CWA 303(d)-impaired water bodies; and that controlling runoff pollution by using a combination of onsite source control and site design BMPs augmented with treatment control BMPs before the runoff enters the MS4 is important.[745]

The test claim permit explains that while the copermittees have generally been implementing the jurisdictional urban runoff programs required by the prior permit, runoff discharges continue to cause or contribute to violations of water quality standards as evidenced by the copermittees monitoring results.[746]

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[744] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3345-3463 (Order R9-2002-0001, section F.3).

[745] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2121-2122, 2124 (Order No. R9-2009-0002, Finding C.10-13., Finding D.2.b.).

[746] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2122 (Order No. R9-2009-0002, Finding D.1.b.).

The Fact Sheet also explains that when the prior permit was adopted, studies showed that the level of imperviousness in an area strongly correlated with the quality of nearby receiving waters. Stream degradation occurred at levels of imperviousness as low as 10 to 20 percent, and resulted in a decline in the biological integrity and physical habitat conditions necessary to support natural biological diversity. A study and report by the Southern California Coastal Water Research Program on the effects of imperviousness in southern California streams found that local ephemeral and intermittent streams are even more sensitive to such effects than streams in other parts of the country, with a threshold of response at a two or three percent change of impervious cover. Urban stream flows have greater peaks and volumes, and shorter retention times, than natural stream flows. This results in stream degradation and less time for sediment and other pollutants to settle before being carried out the ocean, which then accelerates the erosion of the beds and banks within downstream receiving waters. The sediment and pollutants can be a significant cause of water quality degradation.[747] Thus, the test claim permit "contains new or modified requirements that are necessary to improve Copermittees' efforts to reduce the discharge of pollutants in storm water runoff to the MEP and achieve water quality standards."[748]

The claimants have pled sections F.1.d., F.1.h., and F.3.d., of the test claim permit, which require, in the continuing effort to reduce the discharges of stormwater pollution from the MS4 to the MEP and to prevent those discharges from causing or contributing to a violation of water quality standards, an updated plan for review of priority development projects; implementation of Low-Impact Development (LID) site design BMPs at new development and redevelopment projects; the development of a hydromodification plan to manage increases in runoff discharge rates and durations from priority development projects; and the development and implementation of a retrofitting program to reduce the impacts from hydromodification and promote LID BMPs.

"Low Impact Development (LID)" is defined in the test claim permit as "A storm water management and land development strategy that emphasizes conservation and the use of on-site natural features integrated with engineered, small-scale hydrologic controls to more closely reflect pre-development hydrologic functions."[749]

"Hydromodification" is defined as "[t]he change in the natural watershed hydrologic processes and runoff characteristics (i.e., interception, infiltration, overland flow,

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[747] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2341-2343 (Order No. R9-2009-0002, Fact Sheet).

[748] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2123 (Order No. R9-2009-0002, Finding D.1.c.).

[749] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2226-2227 (Order No. R9-2009-0002, Attachment C., (Definitions].

interflow and groundwater flow) caused by urbanization or other land use changes that result in increased stream flows and sediment transport. In addition, alteration of stream and river channels, installation of dams and water impoundments, and excessive streambank and shoreline erosion are also considered hydromodification, due to their disruption of natural watershed hydrologic processes."[750] The test claim permit finds that hydromodification measures for discharges to hardened channels is necessary to restore the channels and the beneficial uses of local receiving waters to their natural state, as follows:

> The increased volume, velocity, frequency and discharge duration of storm water runoff from developed areas has the potential to greatly accelerate downstream erosion, impair stream habitat in natural drainages, and negatively impact beneficial uses. Development and urbanization increase pollutant loads in storm water runoff and the volume of storm water runoff. Impervious surfaces can neither absorb water not remove pollutants and thus lose the purification and infiltration provided by natural vegetated soil. Hydromodification measures for discharges to hardened channels to their natural state, thereby restoring the chemical, physical, and biological integrity and Beneficial Uses of local receiving waters.[751]

The goal of the LID and hydromodification management requirements is to restore and preserve the natural hydrologic cycles typically impacted by urbanization and development by requiring appropriate site design and source control BMPs in the approval of development and redevelopment projects: "…[i]ncreased storm water runoff; decreased groundwater recharge; and flow constriction….can often be avoided or minimized by implementing LID and hydromodification BMPs."[752]

Sections F.1.d., F.1.h., and F.3.d. of the test claim permit are addressed below.

i. Section F.1.d. of the test claim permit imposes new requirements to update the Model Standard Stormwater Mitigation Plans (SSMPs) for

[750] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2226 (Order No. R9-2009-0002, Attachment C., (Definitions)).

[751] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2125 (Order No. R9-2009-0002, Finding D.2.g.).

[752] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2341 (Order No. R9-2009-0002, Fact Sheet).

review of priority development projects and implementation of LID BMPs.

a. Updated plans and priority development projects (section F.1.d.1.-3.)

Section F.1.d., of the test claim permit requires the Copermittees to "submit an *updated* model [Standard Storm Water Mitigation Plan] SSMP," for review by the Regional Board within two years of adoption of the Permit, and then "each Copermittee must *update* their own local SSMP, and amended ordinances consistent with the model SSMP. The model SSMP must meet the requirements of section F.1.d. of this Order to (1) reduce Priority Development Project discharges of stormwater pollutants from the MS4 to the MEP, and (2) prevent Priority Development Project runoff discharges from the MS4 from causing or contributing to a violation of water quality standards."[753] The Fact Sheet explains that copermittees are required to:

> . . . review and update their local SSMPs (also known in Orange County as Water Quality Management Plans – WQMPs) for compliance with the Order. The sections also require all Priority Development Projects falling under certain categories to meet SSMP requirements. The update is necessary to ensure that the Copermittees' local SSMPs are consistent with the changes that have been made to the Order's SSMP requirements. The requirement for the development/adoption of a Model SSMP has been removed since a model was completed and adopted in 2003.[754]

Priority development project categories are defined in the test claim permit the same as section F.1.b.2.a. of the prior permit, except that the test claim permit adds industrial sites, "retail gasoline outlets," and "all other pollutant-generating development projects that result in the disturbance of one acre or more of land," as categories of new priority development projects:

- All new development projects that create 10,000 square feet or more of impervious surfaces, including commercial, *industrial*, residential, mixed-use, and public projects. This category includes development projects on public or private land which fall under the planning and building authority of the Copermittees.
- Automotive repair shops;
- Restaurants where the land area for development is greater than 5,000 square feet. Restaurants where land development is less than 5,000 square feet must

[753] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2147 (Order No. R9-2009-0002, section F.1.d.).

[754] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2430 (Order No. R9-2009-0002, Fact Sheet).

meet all SSMP requirements except for structural treatment BMP, numeric sizing criteria (F.1.d.(6)), and hydromodification (F.1.h.);

- Hillside development greater than 5,000 square feet of impervious surface that is located on areas with known erosive soil conditions, where the development will grade on any natural slope that is twenty-five percent or greater;
- All developments located within or directly adjacent to, or discharging to, an environmentally sensitive area (ESA), where discharges from the development or redevelopment will enter receiving waters within the ESA, which either creates 2,500 square feet of impervious surface on the proposed site or increases the area of imperviousness to ten percent or more of its naturally occurring condition;
- Parking lots of 5,000 square feet or more of impervious surface or 15 or more parking spaces and potentially exposed to runoff;
- Street, roads, highways, and freeways of 5,000 square feet or more of paved surface;
- *Retail Gasoline Outlets* of 5,000 square feet or more or a projected Average Daily Traffic (ADT) of 100 or more vehicles per day.[755]
- *One acre threshold:* Within three years of adoption of the permit, all other pollutant-generating development projects that result in the disturbance of one acre or more of land shall be included as a priority development project.[756] "Pollutant generating Development Projects" are defined as "those projects that generate pollutants at levels greater than natural background levels."[757]

The Fact Sheet explains that industrial sites were added to the priority development categories "to be consistent with Phase II rules and to close loopholes."[758] Under the prior permit, industrial applicants had to only provide evidence of coverage under the General Industrial Permit.[759] Retail gasoline outlets were added because they "are points of confluence for motor vehicles for automotive related services such as repair,

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[755] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2148-2149 (Order No. R9-2009-0002, section F.1.d.1.).

[756] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2148 (Order No. R9-2009-0002, section F.1.d.1.c.).

[757] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2148, fn. 13 (Order No. R9-2009-0002, section F.1.d.1.c.).

[758] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2431 (Order No. R9-2009-0002, Fact Sheet).

[759] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3444 (Order R9-2002-0001, section F.1.b.1.d.).

refueling, tire inflation, and radiator fill-up. RGOs consequently produce significantly greater pollutant loadings of hydrocarbons and trace metals (including copper and zinc) than other developed areas. To meet storm water MEP standard, source control and structural treatment control BMPs are needed at RGOs . . ."[760] And the one acre pollutant generating development projects were added to be consistent with Phase II NPDES regulations for small municipalities.[761]

The test claim permit, in section F.1.d.2., also states that where a new development project feature, such as a parking lot, falls into a priority development project category, the entire project footprint is subject to the stormwater mitigation plan requirements. The Fact Sheet explains that this criterion was not included in the prior permit as follows:

> The most significant change is that where a Development Project feature, such as a parking lot, falls into a Priority Development Project Category, the entire project footprint is subject to SSMP requirements. This criterion was not included in Order No. R9-2002-0001. It is included, however, in the Model San Diego SSMP that was approved by the Regional Board in 2002. It is included in this Order because existing development inspections by Orange County municipalities show that facilities included in the Priority Development Project Categories routinely pose threats to water quality. This permit requirement will improve water quality and program efficiency by preventing future problems associated with partly treated storm water runoff from redevelopment sites. This approach to improving storm water runoff from existing developments is practicable because municipalities have a better ability to regulate new developments than existing developments.[762]

In addition, like section F.1.b.2.a. of the prior permit, the test claim permit defines priority development projects to also include significant redevelopment that creates, adds, or replaces at least 5,000 square feet of impervious surface on an already developed site and the existing development and/or the redevelopment project falls under the project categories identified above.[763]

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[760] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2432-2433 (Order No. R9-2009-0002, Fact Sheet).

[761] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2431 (Order No. R9-2009-0002, Fact Sheet).

[762] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2431 (Order No. R9-2009-0002, Fact Sheet).

[763] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2147-2148 (Order No. R9-2009-0002, section F.1.d.1., and 2.).

The prior permit, in section F.1.b.e., required claimants to develop a procedure for pollutants or conditions of concern to be identified for each new development or significant redevelopment project. The test claim permit now requires each Copermittee, as part of the updated SSMP, to implement an *updated* procedure for identifying pollutants of concern for each priority development project, which must include receiving water quality (including pollutants for which receiving waters are listed as impaired under section 303(d) of the Clean Water Act), land-use type of the development project and pollutants associated with that land use type, and pollutants expected to be present on site.[764]

b. LID BMP requirements (section F.1.d.4.)

Section F.1.d.4. of the test claim permit states that each copermittee "must require each Priority Development Project to implement LID BMPs which will collectively minimize directly connected impervious areas, limit loss of existing infiltration capacity, and protect areas that provide important water quality benefits necessary to maintain riparian and aquatic biota, and/or are particularly susceptible to erosion and sediment loss."[765] For each priority development project, the copermittees must require LID BMPs or make a finding of infeasibility in accordance with the LID waiver program.

In addition, copermittees are required to incorporate formalized consideration, such as thorough checklists, ordinances, or other means of LID BMPs into the plan review process for a priority development process. The review of each project must include an assessment of potential collection of stormwater for on-site or off-site reuse opportunities. The review of each project must also include an assessment of techniques to infiltrate, filter, store, evaporate, or retain runoff close to the source of runoff.

Within two years after adoption of the permit, each copermittee is required to review its local codes, policies, and ordinances and identify barriers to the implementation of LID BMPs, and take appropriate actions to remove the barriers.[766]

The following LID BMPs are required to be implemented at all priority development projects where technically feasible:

- Maintain or restore natural storage reservoirs and drainage corridors.
- Projects with landscaped or other pervious areas must, where feasible, drain runoff from impervious areas (rooftops, parking lots, sidewalks, walkways, patios)

[764] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2149 (Order No. R9-2009-0002, section F.1.d.3.).

[765] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2149-2150 (Order No. R9-2009-0002, section F.1.d.4.).

[766] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2149-2150 (Order No. R9-2009-0002, section F.1.d.4.).

into pervious areas prior to discharge to the MS4. The amount of runoff from impervious areas that is to drain to pervious areas shall not exceed the total capacity of the project's pervious areas to infiltrate or treat runoff, taking into consideration the pervious areas' geologic and soil conditions, slope, and other relevant factors.

- Projects with landscaped or other pervious areas must, where feasible, properly design and construct the pervious areas to effectively receive and infiltrate or treat runoff from impervious areas prior to discharge to the MS4. Soil compaction for these areas shall be minimized. The amount of the impervious areas that are to drain to pervious areas must be based on the total size, soil condition, slope, and other relevant factors.
- Projects with low traffic areas and appropriate soil conditions must construct walkways, trails, overflow parking lots, alleys, or other low traffic areas with permeable surfaces, such as pervious concrete, porous asphalt, unit pavers, and granular materials.
- To protect ground water resources, priority development projects must comply with treatment control BMPs pursuant to Section F.1.(c)(6), that are designed to primarily function as centralized infiltration devices (such as large infiltration trenches and infiltration basins).[767]

The LID BMPs shall be "sized and designed to ensure onsite retention without runoff, of the volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the County of Orange's 85th Percentile Precipitation Map," unless technically infeasible.[768] And the LID BMPs shall be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, and flies.[769]

The Fact Sheet explains that section F.1.d.4. has been modified to clarify some elements of LID.[770] Under the prior permit, all development had to be in compliance with stormwater ordinances and site design requirements, which shall be included in local permits to ensure that pollutant discharges from development are reduced to the MEP; peak runoff velocities and runoff volumes from development are controlled; and

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[767] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2150 (Order No. R9-2009-0002, section F.1.d.4.).

[768] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2151 (Order No. R9-2009-0002, section F.1.d.4.).

[769] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2151 (Order No. R9-2009-0002, section F.1.d.4.).

[770] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2433 (Order No. R9-2009-0002, Fact Sheet).

that receiving water quality objectives are not violated throughout the life of the project. The site design requirements included the implementation of source control BMPs; site design and landscape characteristics that maximize infiltration, provide retention, slow runoff, and minimize impervious land coverage; and buffer zones for natural water bodies.[771] Thus, the claimants have always had to go through a plan review process for the existing priority development projects that had to include an assessment of "techniques to infiltrate, filter, store, evaporate, or retain runoff close to the source of runoff." And, all existing priority development projects under the prior permit had to implement source control BMPs. As relevant here, the BMPs under the prior permit, at a minimum, had to conserve natural areas where feasible; minimize directly connected impervious areas where feasible; protect slopes and channels from eroding; be correctly designed to remove pollutants to the MEP; and be implemented close to pollutant sources and prior to discharge into receiving waters supporting beneficial uses.[772] In addition, the prior permit required that each copermittee protect groundwater quality by applying restrictions to the use of structural treatment BMPs that are designed to primarily function as infiltration devices (such as infiltration trenches and basins).[773]

Therefore, LID site design BMPs and protection of groundwater quality have always been required and had to be reviewed by the copermittee for existing categories of priority development projects. But under the prior permit, the project proponent could select the BMPs from a list of recommended BMPs contained in a copermittee's local SSMP.[774]

The test claim permit now directs the copermittees to require all priority development projects to employ "certain classes of site design BMPs."[775] For example, and as stated in section F.1.d.4(b) of the permit, "projects with landscaped or other pervious areas must, where feasible, drain runoff from impervious areas (rooftops, parking lots, sidewalks, walkways, patios) into pervious areas prior to discharge to the MS4." The Fact Sheet explains that the open-ended approach to requirements for site design BMPs "has proven to be ineffective in integrating site design BMPs in project designs," and that "audits conducted in 2005 for four Copermittees found that municipalities need

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[771] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3444-3445 (Order R9-2002-0001, section F.1.b.1.).

[772] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3444-3445 (Order R9-2002-0001, section F.1.b.1.).

[773] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3449 (Order R9-2002-0001, section F.2.h.).

[774] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3446 (Order R9-2002-0001, section F.1.b.2.).

[775] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2434 (Order No. R9-2009-0002, Fact Sheet).

to work with project applicants to improve the quality of site design BMPs."[776] Thus, the test claim permit establishes more specific site design BMP criteria for the existing and new priority development projects.

The Fact Sheet also explains that the test claim permit now requires that LID BMPs be sized and designed to ensure onsite retention without runoff, of the volume of runoff produced form a 24-hour 85th percentile storm event.[777] Under the prior permit, these sizing requirements applied only to structural treatment BMPs.[778] The change is consistent with other municipal stormwater NPDES permits adopted by the Los Angeles and Santa Ana Regional Boards.[779]

Finally, the requirement under the test claim permit to review local codes, policies, and ordinances and identify barriers to the implementation of LID BMPs, and take appropriate actions to remove the barriers within two years of the adoption of the permit is a new requirement when compared to the prior permit.

c. Source control BMP requirements (section F.1.d.5.)

Section F.1.d.5. of the test claim permit states that each copermittee must require each priority development project to implement source control BMPs to prevent illicit discharges into the MS4; minimize stormwater pollutants of concern in runoff; eliminate irrigation runoff; include storm drain system stenciling or signage; include properly designed outdoor material storage areas; include properly designed outdoor work areas; include properly designed trash storage areas; and include water quality requirements applicable to individual priority project categories.[780]

These requirements are new for the new categories of priority development projects (industrial, retail gasoline outlets, one acre pollutant generating development projects). However, these requirements are not new with respect to the existing categories of priority development projects. Federal law has long required municipalities to prevent

[776] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2434 (Order No. R9-2009-0002, Fact Sheet).

[777] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2434 (Order No. R9-2009-0002, Fact Sheet).

[778] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3447, 2434 (Order No. R9-2002-0001, section F.1.b.2.b.); Order No. R9-2009-0002, Fact Sheet).

[779] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2434 (Order No. R9-2009-0002, Fact Sheet).

[780] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2151 (Order No. Order No. R9-2009-0002, section F.1.d.5.).

illicit discharges into the MS4,[781] and the remaining source control BMPs were required by section F.1.b.2.b., of the prior permit as the "minimum."[782]

d. Treatment Control BMP Requirements (Section F.1.d.6.)

Section F.1.d.6. of the test claim permit states that each copermittee must also require each priority development project "not implementing LID capable of meeting the design storm criteria for the entire site and meeting technical infeasibility eligibility," to implement treatment control BMPs that meet the following requirements:

- Be collectively sized to comply with numeric sizing criteria for *volume-based treatment* control BMPs (to mitigate the volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the County of Orange's 85th Percentile Precipitation Isopluvial Map); or comply with *flow-based treatment* control BMPs (to infiltrate, filter, or treat the maximum flow rate of runoff produced from a rainfall intensity of 0.2 inches of rainfall per hour, for each hour of a storm event, or the maximum flow rate of runoff produced by the 85th percentile hourly rainfall intensity, as determined from the local historical rainfall record, multiplied by a factor of two).
- Mitigate (treat through infiltration, settling, filtration, or other unit processes) the required volume or flow of runoff from all developed portions of the project, including landscaped areas.
- Be located so as to remove pollutants from runoff prior to discharge to any waters of the U.S.
- Be ranked with high or medium pollutant removal efficiency for the project's most significant pollutants of concern, as identified in the copermittee's model SSMP. Treatment control BMPs with a low removal efficiency ranking must only be approved by a Copermittee when a feasibility analysis has been conducted which exhibits that implementation of treatment control BMPs with high or medium removal efficiency rankings are infeasible for a priority development project or portion thereof.
- Be correctly sized and designed to remove stormwater pollutants to the MEP; target removal of pollutants of concern; be implemented close to pollutant sources and prior to discharge into the waters of the U.S.; not be constructed within waters of the U.S.; include proof of a mechanism under which ongoing long-term maintenance will be conducted to ensure proper maintenance for the

[781] United States Code, title 33, section 1342(P)(3)(B)(ii), (Public Law 100-4).

[782] Exhibit C, Water Boards' Comments on the Test Claim filed October 21, 2016, pages 3446-3447 (Order No. R9-2002-0001, section F.1.b.2.b.).

life of the project; and be designed and implemented to avoid the creation of nuisance or pollution associated with vectors.[783]

The Fact Sheet explains that the treatment control BMP requirements of the test claim permit are consistent with the prior permit, with two exceptions. First, the test claim permit, in the first bullet above, limits the selection of methods used to determine the appropriate volume of stormwater runoff to be treated. The Fact Sheet states the following:

> The modification ensures that priority development project proponents utilize the most accurate information to determine the volume or flow of runoff that must be treated. Using detailed local rainfall data, the County of Orange has developed the 85th Percentile Precipitation Isopluvial Map, which exhibits the size of the 85th percentile storm event throughout Orange County. [Footnote omitted.] Since this map uses detailed local rainfall data, it is more accurate for calculating the 85th percentile storm event than other methods which were included in Order No. R9-2002-0001. The other methods found in Order No. R9-2002-0001 were included as options to be used in the event that detailed accurate rainfall data did not exist for various locations within Orange County. The development of the 85th Percentile Precipitation Isopluvial Map makes these other less accurate methods superfluous. Therefore, these other methods for calculating the 85th percentile storm even have been removed from the current Order.[784]

Thus, the prior permit required treatment control BMPs to be designed to mitigate the volume of stormwater runoff produced from a 85th percentile storm event, and this requirement is not new. But the method of determining the volume or flow of runoff is now limited, for purposes of accuracy, to data from the 85th Percentile Precipitation Isopluvial Map. Except for the new categories of priority development projects (industrial, retail gasoline outlets, one acre pollutant generating development projects), no new activities are imposed by the first bullet.

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[783] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2152 (Order No. R9-2009-0002, section F.1.d.6.; see also footnote 15 which states the following: "This section only applies to those PDPs not implementing LID capable of meeting the design storm criteria for the entire site and meeting technical infeasibility eligibility. Low-Impact Development (LID) and other site design BMPs that are correctly designed to effectively remove pollutants from runoff are considered treatment control BMPs.").

[784] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2437 (Order No. R9-2009-0002, Fact Sheet).

Second, the test claim permit, in the fourth bullet above, requires that treatment control BMPs selected for implementation at priority development projects are now required to have a removal efficiency rating for significant pollutants of concern that is higher than the "low removal efficiency," unless a feasibility analysis justifies a low removal efficiency. This was not required in the prior permit. The Fact Sheet states the following:

> This requirement is needed because to date, the Copermittees have generally approved low removal efficiency treatment control BMPs without justification or evidence that use of higher efficiency treatment BMPs was considered and found to be infeasible. Specifically, it has been found during audits of the Copermittees' SSMP programs that many SSMP reports do not adequately describe the selection of treatment control BMPs. [Footnote omitted.] Moreover, USEPA's contractor Tetra Tech, Inc. recommends that "project proponents should begin with the treatment control that is most effective at removing the pollutants of concern . . . and provide justification if that treatment control BMP is not selected. [Footnote omitted.]
>
> In the ROWD, the Copermittees acknowledge the need for further attention to the selection and implementation of effective treatment BMPs. They propose to revise the model WQMP table of BMP effectiveness. The requirement is needed to provide clarification that selection of low efficiency treatment control BMPs over high efficiency BMPs without justification does not meet permit requirements and is not in compliance with the storm water MEP standard.[785]

Thus, the requirement that each copermittee must require all proponents of existing and new priority development projects to implement treatment control BMPs that have a removal efficiency rating for significant pollutants of concern that is higher than the "low removal efficiency," unless a feasibility analysis justifies a low removal efficiency, is new.

e. LID waiver program requirements (section F.1.d.7.)

Pursuant to section F.1.d.7. of the test claim permit, the copermittees are required to develop (collectively or individually) a LID waiver program to incorporate into the SSMP, which would allow a priority development project to substitute implementation of all or some of the required LID BMPs with implementation of treatment control BMPs and a mitigation project, payment into an in-lieu funding program, or watershed equivalent

[785] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2437-2438 (Order No. R9-2009-0002, Fact Sheet).

BMPs consistent with section F.1.d.11.[786] The LID BMP waiver program must meet the following requirements:

- Prior to implementation, the LID waiver program must clearly exhibit that it will not allow priority development projects to result in a net impact (after consideration of any mitigation and in-lieu payments) from pollutant loadings over and above the impact caused by projects meeting LID requirements.
- For each participating priority development project, a technical feasibility analysis must be included demonstrating that it is technically infeasible to implement LID BMPs. The copermittees are required to develop criteria for the technical feasibility analysis including a cost benefit analysis, examination of LID BMPs considered, and alternatives chosen. Each priority development project must demonstrate that LID BMPs were implemented as much as feasible given the site's unique conditions. Analysis must be made of the pollutant loading for each project. In addition, the estimated impacts from not implementing the required LID BMPs must be fully mitigated. Technical infeasibility may result from the following conditions: locations cannot meet the infiltration and groundwater protection requirements; smart growth and infill or redevelopment locations where the density or nature of the project would create significant difficulty for compliance with the onsite volume retention requirements; or other site, geologic, soil, or implementation constraints identified in the local SSMP document.
- The LID waiver program must include mechanisms to verify that each priority development project is in compliance with all applicable SSMP requirements.
- The LID waiver program must develop and implement a review process verifying that the BMPs meet the designed design criteria.

[786] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2153 (Order No. R9-2009-0002, section F.1.d.7.). Section F.1.d.11. states in relevant part the following: "Where a development project, greater than 100 acres in total project size or smaller than 100 acres in size yet part of a larger common plan of development that is over 100 acres, has been prepared using watershed and/or sub-watershed based water quality, hydrologic, and fluvial geomorphologic planning principles that implement regional LID BMPs in accordance with the sizing and location criteria of this Order and acceptable to the Regional Board, such standards shall govern review of projects with respect to Section F.1 of this Order and shall be deemed to satisfy this Order's requirements for LID site design, buffer zone, infiltration and groundwater protection standards, source control, treatment control, and hydromodification control standards. Regional BMPs must clearly exhibit that they will not result in a net impact from pollutant loadings over and above the impact caused by capture and retention of the design storm. . . ." (Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2157 (Order No. R9-2009-0002, section F.1.d.11.).

- The LID waiver program must include performance standards for treatment control BMPs.
- Each participating priority development project must mitigate for the pollutant loads expected to be discharged due to not implementing the LID BMPs in Section F.1.d.4.
- A copermittee may choose to implement a pollutant credit system as part of the waiver program, provided that such a credit system clearly exhibits that it will not allow priority development projects to result in a net impact from pollutant loadings over and above the impact caused by projects meeting LID requirements.
- The LID waiver program shall include a stormwater mitigation fund developed by the copermittees to be used for water quality improvement projects that may serve in lieu of the priority development project's required mitigation.[787]

The requirement to develop a LID BMP waiver program is new. Under the prior permit, a copermittee was authorized to waive a project from implementing *structural treatment* BMPs, but was not required to develop a LID BMP waiver program.[788] The Fact Sheet explains the new requirement as follows:

> . . . the Regional Board has added to the Order a requirement for the Copermittees to develop such a [LID BMP waiver] program. The program would provide the opportunity for development projects to avoid partial or full LID BMP implementation in exchange for implementation of treatment control BMPs and mitigation. The program would maintain equal water quality benefits as properly implemented LID BMPs when partial LID BMPs are coupled with a mitigation project or in-lieu funding.
>
> The Order includes specific minimum requirements so that the program will achieve similar water quality benefits. Any program which allows development projects to forgo LID BMP implementation must include provisions which will achieve similar water quality benefits. To ensure that

[787] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2153-2155 (Order No. R9-2009-0002, section F.1.d.7.a.-h.). The last requirement in section F.1.d.7.i., requiring the permittees to notify the Regional Board in their annual reports of each priority development project choosing to participate in the LID waiver program, is addressed in Section IV.C.9., of this Decision.

[788] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3449 (Order No. R9-2002-0001, section F.1.b.2.g.).

this is the case for the LID BMP waiver program, minimum provisions for the program have been added to the Order.[789]

f. Site design and treatment control BMP design standards (section F.1.d.8.)

Section F.1.d.8. of the test claim permit requires each copermittee, as part of their local SSMP, to develop and require priority development projects to implement site design and maintenance criteria for each site design and treatment control BMP listed in the local SSMP to determine feasibility and applicability so that the BMPs are constructed correctly and are effective at pollutant removal, runoff control, and vector minimization.

This requirement is new. The Fact Sheet explains why this activity was added as follows:

> Correct BMP design is critical to ensure that BMPs are effective and perform as intended. Without design criteria, there is no assurance that this will occur, since there is no standard for design or review. As an example, Ventura County has developed a BMP manual that includes standard design procedure forms for BMPs. Ventura County's *Technical Guidance Manual for Storm Water Quality Control Measures* is available at [website omitted]. California Stormwater Quality Association (CASQA) also confirms the necessity of design criteria when it includes such criteria in its New Development and Redevelopment BMP Handbook. [Footnote omitted.] This issue is noted in the ROWD, and the Copermittees propose to develop standard design checklist/plans/details for selected source control and treatment BMPs.[790]

g. Implementation process (section F.1.d.9.)

Section F.1.d.9. requires each copermittee to implement a process to verify compliance with SSMP requirements. The process must identify the point in the planning process that priority development projects will be required to meet SSMP requirements and implement post-construction BMPs prior to occupancy. The process must also identify the roles and responsibilities of various municipal departments in implementing SSMP requirements.

The same requirement was imposed by the prior permit, under section F.1.b.2.f., and as explained by the Fact Sheet for the test claim permit, "[t]his requirement was included in

[789] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2438 (Order No. R9-2009-0002, Fact Sheet).

[790] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2439 (Order No. R9-2009-0002, Fact Sheet).

the previous Order No. R9-2002-0001."[791] Thus, the requirement to develop and implement a process to verify compliance with existing requirements for existing priority development projects is not new.

However, claimants now have to verify that priority development project proponents comply with the new activities required by the test claim permit, and have to verify that the new categories of priority development projects (industrial, retail gasoline outlets, and one-acre pollutant generating development projects) comply with all SSMP requirements. In these two respects, section F.1.d.9. imposes new requirements.

h. Treatment control BMP review (section F.1.d.10.)

Section F.1.d.10. of the test claim permit states that during the third year of implementation of the permit, the copermittees are required to review and update the BMPs that are listed in their local SSMPs for treatment control. The update must include the removal of obsolete or ineffective BMPs, and the addition of LID BMPs that can be used for treatment. The update must also add appropriate LID BMPs to any discussion addressing pollutant removal inefficiencies of treatment control BMPs. In addition, the update must incorporate findings from BMP effectiveness studies conducted by the copermittees for projects funded wholly or in part by the State or Regional Water Boards. And each copermittee must implement a mechanism for annually incorporating findings from local treatment BMP effectiveness studies (e.g., ones conducted by, or on behalf of, public agencies in Orange County) into SSMP project reviews and permitting.[792]

The requirement to review and update the BMPs that are listed in the local SSMPs for treatment control, as specified in the permit, is new. As explained in the Fact Sheet,

> Section F.1.d(10) . . . requires Copermittees to keep their SSMPs up to date with BMP effectiveness studies for low impact design and treatment control BMPs. The ROWD includes commitments to develop a library of BMP performance reports and to revise the model WQMP table for the latest information on BMPs. This requirement will ensure that two important types of information be included in those efforts. Site design BMPs and treatment BMPs that are assessed as part of contract with the State Board and Regional Board. The later types of projects include those funded with Clean Beach Initiative grants and other grants. Projects funded with such state grants must include effectiveness assessments using a quality assurance plan. As a result, such studies generally

[791] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3448, 2439 (Order No. R9-2002-0001; Order No. R9-2009-0002, Fact Sheet).

[792] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2156 (Order No. R9-2009-0002, section F.1.d.10.).

provide reliable sources of local data and should be included in local SSMPs.[793]

ii. Section F.1.h. imposes new requirements to develop and implement hydromodification plans and controls for priority development projects to ensure that estimated post-project runoff discharge rates and durations do not exceed pre-development discharge rates and durations.

Section F.1.h. of the test claim permit requires each copermittee to collaborate with other copermittees to develop and implement a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects, *except* pursuant to section F.1.h.3. where the project discharges stormwater runoff into underground storm drains discharging directly to bays or the ocean, or discharges into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to ocean waters, enclosed bays, estuaries, or water storage reservoirs and lakes. The HMP shall be incorporated into the local SSMP and implemented by each copermittee so that estimated post-project runoff discharge rates and durations do not exceed pre-development discharge rates and durations.

Section F.1.h.1. states that the HMP is required to:

- Identify a method for assessing susceptibility of channel segments which receive runoff discharges from priority development projects. The geomorphic stability within the channel shall be assessed. A performance standard shall be created that ensures that the geomorphic stability within the channel not be comprised as a result of receiving runoff discharges from priority development projects.
- Utilize continuous simulation of the entire rainfall record (or other method acceptable to the Regional Board) to identify a range of runoff flows for which priority development projects post-project runoff flow rates and durations shall not exceed pre-development (naturally occurring) runoff flow rates and durations by more than 10 percent, and which will result in increased potential for erosion or other significant adverse impacts to beneficial uses.
- Require priority development projects to implement hydrologic control measures so that post-development runoff flow rates and duration (1) do not exceed pre-project runoff flow and duration rates by more than 10 percent; (2) do not result in channel conditions that do not meet channel standards for segments downstream of priority development project discharge points; and (3) compensate for the loss of sediment supply due to development. Hydrologic control measures can include LID BMPs or detention basins, and in some cases,

[793] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2439 (Order No. R9-2009-0002, Fact Sheet).

the requirements to incorporate LID BMPs will satisfy the requirements for hydomodification management.[794]

- Include other performance criteria (numeric or otherwise) for priority development projects that are necessary to prevent runoff from the projects from increasing or contributing unnatural rates of erosion of channel beds and banks, silt pollutants generation, or other impacts to beneficial uses and stream habitat due to increased erosive force.
- Include a review of pertinent literature.
- Identify areas within the San Juan Hydrologic Unit where historic hydromodification has resulted in a negative impact to benthic macroinvertebrate and periphyton by identifying areas with low or very low Index of Biotic Integrity (IBI) scores.
- Include a protocol to evaluate potential hydrograph changes impacts to downstream watercourses from priority development projects.
- Include a description of how the copermittees will incorporate the HMP requirements into their local approval process.
- Include criteria on selection and design of management practices and measures (such as detention, retention, and infiltration) to control flow rates and durations, and address potential hydromodification impacts.
- Include technical information supporting any standards and criteria proposed.
- Include a description of inspections and maintenance to be conducted for management practices and measures to control flow rates and durations and address potential hydromodification impacts.
- Include a description of pre and post project monitoring and program evaluation (including IBI score) to be conducted to assess the effectiveness of implementation of the HMP.
- Include mechanisms for assessing and addressing cumulative impacts within a watershed on channel morphology.
- Include information on evaluation of channel form and condition, including slope, discharge, vegetation, underlying geology, and other appropriate information.[795]

[794] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2442-2443 (Order No. R9-2009-0002, Fact Sheet).

[795] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2159-2161 (Order No. R9-2009-0002, section F.1.h.1.).

Section F.1.h.2. states that the HMP must also include "a suite of management measures to be used on Priority Development Projects to protect and restore downstream beneficial uses and to prevent adverse physical changes to downstream channels. The measures must be prioritized in the following order: hydrologic control measures, on-site management controls; regional controls located upstream; and in-stream controls. Where stream channels are adjacent to, or are to be modified by the project, management measures must include buffer zones and setbacks."[796]

Section F.1.h.4. requires the copermittees to submit a draft HMP that has been available for public review and comment to the Regional Board within 2 years of adoption of the permit. The draft must include an analysis that identifies the appropriate limiting range of flow rates pursuant to F.1.h.1.b. As stated in the preamble to section F.1.h., the "Executive Officer [of the Regional Board] will determine the need for a public hearing." Within 180 days of receiving the Regional Board's comments on the draft HMP, the copermittees shall submit a final HMP that addresses the comments. Within 90 days of receiving a finding of adequacy from the executive officer, each copermittee shall incorporate and implement the HMP for all priority development projects, except those identified in section F.1.h.3. (where the project discharges stormwater runoff into underground storm drains discharging directly to bays or the ocean, or discharges into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to ocean waters, enclosed bays, estuaries, or water storage reservoirs and lakes).[797]

Section F.1.h.5. requires each copermittee, within one year of adoption of the permit and before the final HMP is approved, to ensure that all priority development projects are implementing interim hydromodification criteria "by comparing the pre-development (naturally occurring) and post-project flow rates and durations using a continuous simulation hydrologic model." Each copermittee is required to submit a signed certification statement to the Regional Board verifying implementation of the interim hydromodification criteria.[798]

Under the prior permit, the claimants were required to require and "ensure" that the existing priority development projects implement BMPs that control post-development stormwater runoff discharge rates and velocities to maintain pre-development downstream erosion and ensure that post-development runoff does not contain any

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[796] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2161-2162 (Order No. R9-2009-0002, section F.1.h.2.).

[797] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2162 (Order No. R9-2009-0002, section F.1.h.4.).

[798] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2162-2163 (Order No. R9-2009-0002, section F.1.h.5.).

pollutant loads that cause or contribute to an exceedance of water quality objectives.[799] Thus, except for the new categories of priority development projects (industrial, retail gasoline outlets, and one-acre pollutant generating development projects) ensuring, or verifying that the interim criteria is being implemented is not new. However, submitting a signed certification statement to the Regional Board verifying implementation of the interim hydromodification criteria is a new requirement.

In addition, the claimants were not required to develop a draft HMP, make the draft available for public review and comment, submit the draft to the Regional Board, prepare a final HMP, and ensure and verify with a signed certification statement that all priority development projects are implementing interim hydromodification criteria. These are new requirements.

Moreover, the test claim permit provides greater specificity and detail with respect to the requirement to implement the requirements of the HMP for all priority development projects. As explained in the Fact Sheet,

> Hydromodification expands and clarifies current requirements for control of MS4 discharges to limit hydromodification effects caused by changes in runoff resulting from development and urbanization. The requirements are based on findings and recommendations of the Orange County Storm Water Program, the Stormwater Monitoring Coalition (SMC) [footnotes omitted] and the Storm Water Panel on Numeric Effluent Limits (Numeric Effluent Panel.) [Footnotes omitted.] Added specificity is needed due to the current lack of a clear standard for controlling hydromodification resulting from development. More specific requirements are also warranted because hydromodification is increasingly recognized as a major factor affecting water quality and beneficial uses, and the Copermittees have proposed only vague and voluntary modifications to the Model WQMP. The Order is intended to ensure the intent of the proposed modifications is incorporated into each Copermittees' SSMP.[800]

iii. Section F.3.d. imposes new requirements to develop a retrofitting program for existing development, encourage owners to retrofit existing developments, and track completed retrofit BMPs.

The claimants have also pled section F.3.d. of the test claim permit, which requires each copermittee to develop and implement a retrofitting program. The goals of the retrofitting program are to reduce impacts from hydromodification, promote LID, support riparian and aquatic habitat restoration, reduce the discharges of stormwater pollutants

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[799] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3445-3447 (Order No. R9-2002-0001, sections F.1.2., F.1.2.b.i., and xiv.).

[800] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2440 (Order No. R9-2009-0002, Fact Sheet).

from the MS4 to the MEP, and prevent discharges from the MS4 from causing or contributing to a violation of water quality standards. The permit states that where feasible, and at the discretion of the copermittee, the existing development retrofitting program may be coordinated with flood control projects and infrastructure improvement programs.

The retrofitting program is required to meet the following provisions:

- Identify and inventory existing developments (municipal, industrial, commercial, and residential) as candidates for retrofitting. Potential candidates for retrofitting include development that contributes to pollutants of concern to a TMDL or environmentally sensitive area; receiving waters channelized or otherwise hardened; development tributary to receiving waters that are channelized or otherwise hardened; development tributary to receiving waters that are significantly eroded; developments tributary to an ASBS (Areas of Special Biological Significance) or SWQPA (State Water Quality Protected Areas); and development that causes hydraulic constriction. (Section F.3.d.1.)
- Evaluate and rank the inventoried existing developments to prioritize retrofitting based on the following criteria: feasibility, cost effectiveness, pollutant removal effectiveness, impervious area potentially treated, maintenance requirements, landowner cooperation, neighborhood acceptance, aesthetic qualities, and efficacy at addressing concern. (Section F.3.d.2.)
- Consider the results of the evaluation in prioritizing work plans for the following year. Highly feasible projects expected to benefit water quality should be given a high priority to implement source control and treatment control BMPs. "Where feasible, the retrofit projects should be designed in accordance with the SSMP requirements within sections F.1.d.(3)-(8)." In addition, the copermittees shall encourage retrofit projects to implement hydromodification requirements where feasible pursuant to section F.1.h. (Section F.3.d.3.)
- When requiring retrofitting on existing development, the copermittees "will cooperate with private landowners to encourage retrofitting projects." To encourage private landowners to retrofit, the copermittee "may consider" demonstration retrofit projects, retrofits on public land and easements, education and outreach, subsidies for retrofit projects, requiring retrofit as mitigation or ordinance compliance, public and private partnerships, and fees for existing discharges to the MS4. (Section F.3.d.4.)
- The completed retrofit BMPs shall be tracked and inspected in accordance with section F.1.f. (Section F.3.d.5.)
- Where constraints on retrofitting preclude effective BMP deployment on existing developments at locations critical to protect receiving waters, a copermittee may

propose a regional mitigation project to improve water quality. (Section F.3.d.6.)[801]

Based on the plain language of section F.3.d.1.-4., claimants are required to develop a retrofitting program by identifying and creating an inventory of existing developments for retrofit, evaluating and ranking those projects for retrofit, and encouraging retrofit projects to be designed in accordance with SSMP LID and hydromodification requirements in sections F.1.d.3.-8. and F.1.h. These requirements are new, when compared to the prior permit. The prior permit simply required the claimants to evaluate the feasibility of retrofitting existing structural flood control devices and retrofit where needed.[802] In addition, the Fact Sheet confirms that section F.3.d. was added to the permit to impose specific requirements for the retrofit process and when appropriately applied, retrofitting existing development meets the MEP.[803] The Fact Sheet further states the following:

> Existing BMPs are not sufficient, as evidenced by 303(d) listings and exceedances of Water Quality Objectives from the Copermittees monitoring reports. More advanced BMPs, including the retrofitting of existing development with LID, are part of the iterative process. Previous permits limited the requirement of treatment control BMPs to new development and redevelopment. Based on the current rate of redevelopment compared to existing BMPs, the use of LID only on new and redevelopment will not adequately address current water quality problems, including downstream hydromodification. Retrofitting existing development is practicable for a municipality through a systematic evaluation, prioritization and implementation plan focused on impaired water bodies, pollutants of concern, areas of downstream hydromodification, feasibility and effective communication and cooperation with private property owners.[804]

However, the permit does *not* require the claimants to require an existing development to be retrofitted for LID and hydromodification. The permit gives the claimants authority to require the property owner of an existing development to retrofit for violations of local ordinances.

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[801] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2184-2185 (Order No. R9-2009-0002, section F.3.d.).

[802] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3456 (Order No. R9-2002-0001, section F.3.).

[803] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2459 (Order No. R9-2009-0002, Fact Sheet).

[804] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2459 (Order No. R9-2009-0002, Fact Sheet).

Nor does the permit require the copermittees to retrofit existing public properties. As stated in section F.3.d.4., "To encourage private landowners to retrofit, the copermittee may consider demonstration retrofit projects, retrofits on public land and easements . . . ." Thus, all activities that flow from the discretionary decision of a copermittee to retrofit existing public developments are likewise not required by the test claim permit.[805]

Moreover, even if a property owner of an existing development, other than a copermittee, decides to retrofit and seeks a permit to do so, then the copermittee is required by section F.1.c. of test claim permit, prior to approval and issuance of the permit, to prescribe the necessary requirements so that the project discharges stormwater pollutants from the MS4 will be reduced to the MEP, will not cause or contribute to a violation of water quality standards, and will comply with all requirements of the test claim permit and ordinances adopted by the permittee, including those in compliance with sections F.1.d.3.-8. and F.1.h. The claimants, however, did not plead section F.1.c. of the test claim permit and, thus, the activities and process to approve permits for retrofit projects is not eligible for reimbursement.

Section F.3.d.5., however, does require that once a property owner of an existing development, other than a copermittee, decides to retrofit, the completed retrofit BMPs shall be tracked and inspected in accordance with section F.1.f. of the test claim permit, and that requirement is new.

c. Reimbursement under article XIII B, section 6, is not required to comply with the new requirements imposed by sections F.1.d. and F.1.h. with respect to municipal priority development or significant redevelopment projects.

The claimants contend that all activities imposed by these sections are newly required, impose a new program or higher level of service, and increased costs mandated by the state.[806]

The Water Boards contend that the provisions are mandated by federal law, do not impose a new program or higher level of service because they are not unique to local government, and do not result in increased costs mandated by the state.[807]

For the reasons below, the Commission finds that the new requirements imposed by Sections F.1.d. and F.1.h. are not eligible for reimbursement under article XIII B, section

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[805] *Coast Community College Dist. v. Commission on State Mandates* (2022) (2022) 13 Cal.5th 800, 815; *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727; *City of Merced v. State* (1984) 153 Cal.App.3d 777.

[806] Exhibit A, Test Claim, filed June 30, 2011, pages 67-84, 97-101.

[807] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 13-21, 32-36, 42-44.

6 of the California Constitution with respect to municipal priority development or significant development projects.

i. The LID and hydromodification requirements of the test claim permit with respect municipal priority development projects are not mandated by the state and do not impose a new program or higher level of service because such costs are incurred at the discretion of the local agency, are not unique to government, and do not provide a governmental service to the public.

As stated above, any new development or significant redevelopment of a municipal priority development project is required by the test claim permit to comply with the following new or more specific activities:

a. When a new development project feature, such as a parking lot, falls into a priority development category, the entire project footprint must comply with the requirements of the SSMP. (F.1.d.2.)

b. Project proponents must employ the following *specified* classes of site design BMPs in accordance with section F.1.d.4.b.ii.-iv.:

   - Projects with landscaped or other pervious areas must, where feasible, must drain runoff from impervious areas (rooftops, parking lots, sidewalks, walkways, patios) into pervious areas prior to discharge to the MS4. The amount of runoff from impervious areas that is to drain to pervious areas shall not exceed the total capacity of the project's pervious areas to infiltrate or treat runoff, taking into consideration the pervious areas' geologic and soil conditions, slope, and other relevant factors.
   - Projects with landscaped or other pervious areas must, where feasible, properly design and construct the pervious areas to effectively receive and infiltrate or treat runoff from impervious areas prior to discharge to the MS4. Soil compaction for these areas shall be minimized. The amount of the impervious areas that are to drain to pervious areas must be based on the total size, soil condition, slope, and other relevant factors.
   - Projects with low traffic areas and appropriate soil conditions must construct walkways, trails, overflow parking lots, alleys, or other low traffic areas with permeable surfaces, such as pervious concrete, porous asphalt, unit pavers, and granular materials.

c. LID BMPS shall be sized and designed to ensure onsite retention without runoff, of the volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the County of Orange's 85th Percentile Precipitation Map, unless technically infeasible. (F.1.d.4.d.)

d. The treatment control BMPs for each priority development project "not implementing LID capable of meeting the design stormwater criteria for the entire

site and meeting technical infeasibility eligibility," shall be ranked with high or medium pollutant removal efficiency for the project's most significant pollutants of concern. (F.1.d.6.d.i.)

e. Implement site design and maintenance criteria for each site design and treatment control BMP required. (F.1.d.8.)

f. Implement the requirements of the approved HMP for all priority development projects, except those identified in section F.1.h.3 (i.e., where the project discharges stormwater runoff into underground storm drains discharging directly to bays or the ocean, or discharges into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to ocean waters, enclosed bays, estuaries, or water storage reservoirs and lakes). (F.1.h.4.)

The claimants contend that these activities are eligible for reimbursement under article XIII B, section 6 of the California Constitution when they propose new public development or redevelopment projects and incur costs related to LID and hydromodification for municipal projects including recreational facilities, parking lots, streets, roads, highways, and other projects large enough to exceed specified thresholds. The claimants assert that development and upkeep of these municipal land uses is not optional, but are an integral part of the copermittees' function as municipal entities. The claimants further assert that the failure to make necessary repairs, upgrades, and extensions can expose the copermittees to liability.[808]

The Commission finds that the LID and hydromodification requirements of the test claim permit with respect municipal priority development projects are not mandated by the state.

The courts have explained that even though the test claim statute or executive order may contain new requirements, the determination of whether those requirements are mandated by the state depends on whether the claimant's participation in the underlying program is voluntary or compelled.[809] When local government elects to participate in

[808] Exhibit A, Test Claim, filed June 30, 2011, pages 70-71 (relying on *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727; *City of Merced v. State* (1984) 153 Cal.App.3d 777; and *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859); see also, Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 27-28, contending that "the construction of essential infrastructure is the only reasonable means by which core mandatory governmental functions can be carried out; Claimants were "compelled as a practical matter" to construct that infrastructure."

[809] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 731.

the underlying program, then reimbursement under article XIII B, section 6 is not required.[810]

Thus, the issue is whether the underlying decision of the claimants to develop or redevelop priority the municipal projects at issue is mandated by the state, or is a discretionary decision of local government. Activities undertaken at the option or discretion of local government, without legal or practical compulsion, do not trigger a state-mandated program within the meaning or article XIII B, section 6.[811]

The courts have identified two distinct theories for determining whether a program is compelled, or mandated by the state: legal compulsion and practical compulsion.[812] In the recent case of *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815, the California Supreme Court reiterated the legal standards applicable to these two theories of mandate:

> Legal compulsion occurs when a statute or executive action uses mandatory language that require[s] or command[s] a local entity to participate in a program or service… Stated differently, legal compulsion is present when the local entity has a mandatory, legally enforceable duty to obey. This standard is similar to the showing necessary to obtain a traditional writ of mandate, which requires the petitioning party to establish the respondent has a clear, present, and usually ministerial duty to act. ... Mandate will not issue if the duty is ... mixed with discretionary power.
>
> Thus, as a general matter, a local entity's voluntary or discretionary decision to undertake an activity cannot be said to be legally compelled, even if that decision results in certain mandatory actions.[813]
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> * * *
>
> "[P]ractical compulsion," [is] a theory of mandate that arises when a statutory scheme does not command a local entity to engage in conduct, but rather induces compliance through the imposition of severe

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[810] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 743.

[811] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 73-76; *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727; *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1366.

[812] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 807, 815.

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

consequences that leave the local entity no reasonable alternative but to comply.[814]

Thus, in the absence of legal compulsion, the courts have acknowledged the possibility that a state mandate can be found if local government can show that it faces "certain and severe penalties, such as double taxation or other draconian consequences," leaving local government no choice but to comply with the conditions established by the state.[815]

All costs incurred by a municipality as a project proponent under the LID and hydromodification sections of the test claim permit can be analogized to *City of Merced v. State* (1984) 153 Cal.App.3d 777 and *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727. In *City of Merced*, the statute at issue required a local government when exercising the power of eminent domain to compensate a business owner for the loss of business goodwill, as part of compensating for the property subject to the taking.[816] The court found that nothing *required* the local entity to exercise the power of eminent domain, and thus any costs experienced as a result of the requirement to compensate for business goodwill was the result of an initial discretionary act.[817]

In *Kern*, the statute at issue required certain local school committees to comply with notice and agenda requirements in conducting their public meetings.[818] There, the Court held that the underlying school site councils and advisory committees were part of several separate voluntary grant-funded programs, and therefore any notice and agenda costs were an incidental impact of participating or continuing to participate in those programs.[819] The Court acknowledged that the district was already participating in the underlying programs, and "as a practical matter, they feel they must participate in the programs, accept program funds, and…incur expenses necessary to comply with the procedural conditions imposed on program participants."[820] However, the Court

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[814] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.

[815] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816-817.

[816] *City of Merced v. State* (1984) 153 Cal.App.3d 777, 782.

[817] *City of Merced v. State* (1984) 153 Cal.App.3d 777, 783.

[818] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 732.

[819] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 744-745.

[820] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 753.

held that "[c]ontrary to the situation that we described in *City of Sacramento* [*v. State* (1990)] 50 Cal.3d 51, a claimant that elects to discontinue participation in one of the programs here at issue does not face 'certain and severe…penalties' such as 'double…taxation' or other 'draconian' consequences, but simply must adjust to the withdrawal of grant money along with the lifting of program obligations."[821]

The claimants specifically dispute the application of *City of Merced* and *Kern High School Dist.*, stating the test claim permit is not a voluntary program.[822] Furthermore, the claimants argue that since issuing the *Kern High School Dist*. decision, the California Supreme Court has rejected the application of *City of Merced* in circumstances beyond those strictly present in *Kern High School Dist.*[823] The claimants cite *San Diego Unified School Dist. v. Commission* (2004) 33 Cal.4th 859, 887-888, in which the Court stated "there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement…whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."[824]

The claimants misinterpret *San Diego Unified*, and place too much emphasis on dicta. In *San Diego Unified* the Court discussed the example of *Carmel Valley Fire Protection Dist. v. State* (1987) 190 Cal.App.3d 521, in which an executive order requiring that county firefighters be provided with protective clothing and safety equipment was held to impose a reimbursable state mandate for the costs of the clothing and equipment.[825] The *San Diego Unified* Court reasoned that under a strict application of the rule of *City of Merced* "such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc."[826] In a footnote the Court acknowledged the argument made by amici and discussed by the Court of Appeal, below, that based on a school district's legal obligation to maintain a safe

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[821] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 754 [citing *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74 (The "certain and severe…penalties" and "double…taxation" referred to the situation in *City of Sacramento* in which the state was compelled, by the potential loss of *both* federal tax credits *and* subsidies provided to businesses statewide, to impose mandatory unemployment insurance coverage on public agencies consistent with a change in federal law.)].

[822] Exhibit A, Test Claim, filed June 30, 2011, page 70.

[823] Exhibit A, Test Claim, filed June 30, 2011, pages 70-71.

[824] Exhibit A, Test Claim, filed June 30, 2011, page 71 [citing *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888].

[825] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521.

[826] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887-888.

educational environment for both students and staff, it is inevitable that at least *some* expulsion proceedings will occur, and thus the hearing procedures should not be said to be entirely the result of voluntary or discretionary activity.[827] However, the Court did not decide *San Diego Unified* on that ground, finding instead that hearing costs incurred relating to so-called discretionary expulsion proceedings under the Education Code were adopted to implement a federal due process mandate, and were, in context, de minimis, and were therefore nonreimbursable.[828] Therefore the language cited by claimants is merely dicta, and case does not reach a *conclusion* with respect to the prospective application of the *City of Merced* and *Kern* rules.

After these cases, the Third District Court of Appeal decided *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, which addressed the Peace Officers Procedural Bill of Rights Act (POBRA) that imposed requirements on all law enforcement agencies. The court held that the POBRA legislation did not constitute a state-mandated program on school districts because school districts are authorized, but not required, by state law to hire peace officers, and thus there was no legal compulsion to comply with POBRA.[829] In considering whether the districts were practically compelled to hire peace officers, the court found that it was "not manifest on the face of the statutes cited nor is there any showing in the record that hiring its own peace officers, rather than relying upon the county or city in which it is embedded, is the only way as a practical matter to comply."[830] The court emphasized that practical compulsion requires a *concrete* showing that a failure to engage in the activities at issue will result in certain and severe penalties or other draconian consequences, leaving the districts no choice but to comply.[831] Thus, the court denied reimbursement for school districts to comply with the POBRA statutes.

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[827] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 887, Fn. 22.

[828] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 888 ["As we shall explain, we conclude, regarding the reimbursement claim that we face presently, that all hearing procedures set forth in Education Code section 48918 properly should be considered to have been adopted to implement a federal due process mandate, and hence that all such hearing costs are nonreimbursable under article XIII B, section 6…"]

[829] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1368.

[830] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1367.

[831] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1367 ("The Commission submits that this case should be distinguished from *City of Merced* and *Kern High School Dist.* because the districts

Therefore, based on these cases, where statutory or regulatory requirements result from an apparently or facially *discretionary* decision, and are therefore not *legally* compelled, they may be *practically* compelled if the failure to act would subject the claimant to "certain and severe…penalties" such as "double…taxation" or other "draconian" consequences, which may occur if the discretionary act is "the only reasonable means to carry out [the claimant's] core mandatory functions.[832] Substantial evidence in the record is required to make a finding of practical compulsion.[833]

Here, claimants assert, without support, that certain municipal projects, including roads and streets "are not optional."[834] Rather, "[t]hey are integral to the Permittee's function as municipal entities [*sic*], and the failure to make necessary repairs, upgrades, and extensions can expose the Permittees to liability."[835] This amounts to asserting *both* that the projects are "the only reasonable means to carry out their core mandatory functions"[836] *and* that potential tort liability constitutes "certain and severe…penalties" or other "draconian" consequences.[837]

The claimants' position is not supported by the law or any evidence in the record. First, the requirements detailed in the test claim permit do not apply to maintenance activities, based on the plain language of the order. Section F.1.d.(1)(b) defines significant redevelopment projects triggering the planning requirements as those that include the

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"employ peace officers when necessary to carry out the essential obligations and functions established by law." However, the "necessity" that is required is facing " 'certain and severe ... penalties' such as 'double ... taxation' or other 'draconian' consequences."…That cannot be established in this case without a *concrete showing* that reliance upon the general law enforcement resources of cities and counties will result in such severe adverse consequences"). Emphasis added.

[832] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 754 [citing *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74]; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (*POBRA*).

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

[834] Exhibit A, Test Claim, filed June 30, 2011, page 68.

[835] Exhibit A, Test Claim, filed June 30, 2011, page 68-69; see also Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 27-28.

[836] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (*POBRA*).

[837] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 754.

addition or replacement of 5,000 square feet or more of impervious surface on a developed site.[838] In addition, there is nothing in state statute or case law that imposes a legal obligation on local agencies to construct, expand, or improve municipal projects, including roads.[839]

Moreover, there is no evidence that local agencies are practically compelled, as the only reasonable means necessary to carry out core mandatory functions, to develop or redevelop priority municipal projects.[840] Nor is there evidence that a failure to develop or redevelop priority municipal projects would subject the claimant to "certain and severe…penalties" such as "double…taxation" or other "draconian" consequences.[841]

Therefore, the Commission finds that the new requirements of the test claim permit, in sections F.1.d. and h. listed above, as applied to local agency municipal project proponents are not mandated by the state.

ii. The LID and hydromodification prevention requirements imposed on priority development project proponents are not unique to local government and do not provide a peculiarly governmental service to

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[838] Exhibit A, Test Claim, filed June 30, 2011, page 2147 (Order No. R9-2009-0002, section F.1.d.1.b.).

[839] For example, see Government Code section 23004 (counties *may* purchase, receive by gift or bequest, and hold land within its limits, or elsewhere when permitted by law; and manage, sell, lease, or otherwise dispose of its property as the interests of its inhabitants require); Government Code sections 37350-37353 (cities *may* purchase, lease, receive, hold, and enjoy real and personal property, and control and dispose of it for the common benefit; may erect and maintain buildings for municipal purposes; and may acquire property for parking motor vehicles, and for opening and laying out any street; Government Code 37111 ("When the legislative body deems it necessary that land purchased for park or other purposes be used for construction of public buildings or creation of a civic center, it *may* adopt an ordinance by a four-fifths vote declaring the necessity and providing for such use"); Streets and Highways Code, sections 1800 ["The legislative body of any city *may* do any and all things necessary to lay out, acquire, and construct any section or portion of any street or highway within its jurisdiction as a freeway, and to make any existing street or highway a freeway."]; 1801 ["The legislative body of any city *may* close any street or highway within its jurisdiction at or near the point of its intersection with any freeway, or *ma*y make provision for carrying such street or highway over, under, or to a connection with the freeway, and *may* do any and all necessary work on such street or highway."].

[840] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368 (POBRA).

[841] *Department of Finance v. Commission on State Mandates* (*Kern)* (2003) 30 Cal.4th 727, 754 [citing *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74].

the public within the meaning of article XIII B, section 6, and therefore do not constitute a new program or higher level of service subject to article XIII B, section 6 of the California Constitution.

Article XIII B, section 6 requires reimbursement whenever the Legislature or a state agency mandates a new program or higher level of service that results in costs mandated by the state.

The California Supreme Court explained in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, that a new program or higher level of service means "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local government and do not apply generally to all residents and entities in the state," as follows:

> Looking at the language of section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs." But the term "program" itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term – *programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state*.[842]

The Court further held that "the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions *peculiar to government*, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities."[843] The law at issue in the *County of Los Angeles* case addressed increased worker's compensation benefits for government employees, and the Court concluded that:

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

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

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

> compensation is *not* a program administered by local agencies to *provide service to the public*.[844]

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

> Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers. In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. [Citation omitted.] Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.[845]

In *City of Sacramento*, the Court considered whether a state law extending mandatory unemployment insurance coverage to include local government employees imposed a reimbursable state mandate.[846] The Court followed *County of Los Angeles*, holding that "[b]y requiring local governments to provide unemployment compensation protection to their own employees, the state has not compelled provision of new or increased 'service to the public' at the local level…[nor] imposed a state policy 'uniquely' on local governments."[847] Rather, the Court observed that most employers were already required to provide unemployment protection to their employers, and "[e]xtension of this requirement to local governments, together with the state government and nonprofit corporations, merely makes the local agencies 'indistinguishable in this respect from private employers.'"[848]

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

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

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

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

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

A few other examples are instructive. In *Carmel Valley*, the claimants sought reimbursement from the state for protective clothing and equipment required by regulation, and the State argued that private sector firefighters were also subject to the regulations, and thus the regulations were not unique to government.[849] The court rejected that argument, finding that "police and fire protection are two of the most essential and basic functions of local government."[850] And since there was no evidence on that point in the trial court, the court held "we have no difficulty in concluding as a matter of judicial notice that the overwhelming number of fire fighters discharge a classic governmental function."[851] Thus, the court found that the regulations requiring local agencies to provide protective clothing and equipment to firefighters carried out the governmental function of providing services to the public. The court also found that the requirements were uniquely imposed on government because:

> The executive orders manifest a state policy to provide updated equipment to all fire fighters. Indeed, compliance with the executive orders is compulsory. The requirements imposed on local governments are also unique because fire fighting is overwhelmingly engaged in by local agencies. Finally, the orders do not generally apply to all residents and entities in the State but only to those involved in fire fighting.[852]

Later, in *County of Los Angeles*, counties sought reimbursement for elevator fire and earthquake safety regulations that applied to all elevators, not just those that were publicly owned.[853] The court found that the regulations were plainly not unique to government.[854] The court also found that the regulations did not carry out the *governmental* function of providing a service to the public, despite declarations by the county that without those elevators, "no peculiarly governmental functions and no purposes mandated on County by State law could be performed in those County

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[849] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521.

[850] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537 [quoting *Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107].

[851] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537.

[852] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 538.

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

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

buildings . . . ."[855] The court held that the regulations did not constitute an increased or higher level of service, because "[t]he regulations at issue do not mandate elevator service; they simply establish safety measures."[856] The court continued:

> In determining whether these regulations are a program, the critical question is whether the mandated program carries out the governmental function of providing services to the public, not whether the elevators can be used to obtain these services. Providing elevators equipped with fire and earthquake safety features simply is not "a governmental function of providing services to the public." [FN 5 This case is therefore unlike *Lucia Mar, supra*, 44 Cal.3d 830, in which the court found the education of handicapped children to be a governmental function (44 Cal.3d at p. 835) and *Carmel Valley, supra*, where the court reached a similar conclusion regarding fire protection services. (190 Cal.App.3d at p. 537.)[857]

Here, the claimants have alleged the LID and hydromodification prevention requirements *as applied to municipal projects*, including "municipal yards, recreation centers, civic centers, and road improvements."[858] However, the LID and hydromodification prevention requirements applicable to all priority development projects are not uniquely imposed on government. Many of the categories of "priority development projects" in the test claim permit, especially automotive repair shops, parking lots, restaurants, and gas stations, contemplate a private person or entity as the project proponent, rather than a municipal entity. The LID and hydromodification prevention requirements are triggered based on the size and impact of a development project, not whether its proponent is a private or government entity.[859] In this respect, the requirements of the test claim permit are not unique to government, but apply only *incidentally* to the permittees, when the permittees are themselves the proponent of a project that meets the criteria of the Permit. This is no different from the situation addressed in the *County of Los Angeles I* and *City of Sacramento* cases; in each of those cases the alleged mandate applied to the local government as an employer, and applied in substantially the same manner as to all other employers, and for that reason the law at issue was not considered a "program" uniquely imposed on local government

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

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

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

[858] Exhibit A, Test Claim, filed June 30, 2011, pages 70-71.

[859] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2148 (Order No. R9-2009-0002, section F.1.d.1.c.).

within the meaning of article XIII B.[860] An even closer analogy is seen in *County of Los Angeles v. Department of Industrial Relations*, in which the regulations complained of applied to publicly- and privately-owned elevators alike, and the court found that this did not constitute a unique requirement imposed on local government.[861] The LID and hydromodification prevention requirements apply equally to both municipal and private development projects.

Moreover, the new LID and hydromodification requirements imposed on all new public and private new development and significant redevelopment does not provide a *governmental* service to the public.

Accordingly, the Commission finds that the new requirements of the test claim permit, in sections F.1.d. and h. listed above, as applied to local agency municipal priority development or significant redevelopment projects are not mandated by the state and do not impose a new program or higher level of service.

iii. The remaining new activities required by sections F.1.d. and h. and F.3.d. are regulatory in nature, are mandated by the state, and impose a new program or higher level of service.

The remaining activities are regulatory in nature and apply uniquely to the claimants as local agencies. In this capacity, and as stated above, the following administrative and planning activities are newly required of claimants:

a. Submit an updated model Standard Stormwater Mitigation Plan (SSMP) for review by the Regional Board within two years of adoption of the permit, that meets the requirements of Section F.1.d., of the permit to reduce priority development project discharges of stormwater pollutants from the MS4 to the MEP and to prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. (F.1.d.)

b. Update local SSMPs and amended ordinances consistent with the updated model SSMP. (F.1.d.)

c. As part of the SSMP, implement an updated procedure for identifying pollutants of concern for each priority development project, which must include receiving water quality, land use type, and pollutants expected to be present on site. (F.1.d.3.)

d. Within two years after adoption of the permit, review local codes, policies, and ordinances and identify barriers to the implementation of LID BMPs, and take appropriate actions to remove the barriers. (F.1.d.4.)

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

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

e. Develop a LID BMP waiver program to incorporate into the SSMP. (F.1.d.7.)

f. Develop site design and maintenance criteria for each site design and treatment control BMP listed in the SSMP. (F.1.d.8.)

g. During the third year of implementation of the permit, review and update the BMPs that are listed in the local SSMPs for treatment control. The update must include the removal of obsolete or ineffective BMPs and the addition of LID BMPs that can be used for treatment. The update must also add appropriate LID BMPs to any discussion addressing pollutant removal inefficiencies of treatment control BMPs. In addition, the update must incorporate findings from BMP effectiveness studies conducted by the copermittees for projects funded wholly or in part by the State or Regional Board, and implement a mechanism for annually incorporating those findings into SSMP project reviews and permitting. (F.1.d.10.)

h. Collaborate with other copermittees to develop a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects, *except* those identified in section F.1.h.3. Submit a draft HMP that has been available to public review and comment, to the Regional Board within two years of adoption of the permit. Within 180 days of receiving the Regional Board's comments on the draft HMP, submit a final HMP to the Regional Board that addresses the comments. Within 90 days of receiving a finding of adequacy from the executive officer, incorporate the HMP into the local SSMPs so that estimated post-project runoff discharge rates and durations do not exceed pre-development discharge rates and durations. (F.1.h.1., 2., 4.)

i. Before the final HMP is approved and within one year of adoption of the permit, submit a signed certification statement to the Regional Board verifying that all priority development projects are implementing interim hydromodification criteria "by comparing the pre-development (naturally occurring) and post-project flow rates and durations using a continuous simulation hydrologic model." (F.1.h.5.)

j. Develop a retrofitting program for existing developments (municipal, industrial, commercial, and residential) by identifying and creating an inventory of existing developments for retrofit, evaluating and ranking those projects for retrofit, and encouraging retrofit projects to be designed in accordance with SSMP LID and hydromodification requirements. (F.3.d.1.-4.)

In accordance with section F.1.d.9., of the test claim permit, the claimants are also required to verify that the proponents of existing categories of new development or significant redevelopment for residential, commercial, and mixed-use projects, comply with the following new or more specific activities:

a. When a new development project feature, such as a parking lot, falls into a priority development category, the entire project footprint must comply with the requirements of the SSMP. (F.1.d.2.)

b. Project proponents must employ the following *specified* classes of site design BMPs in accordance with section F.1.d.4.b.ii.-iv.:

    i. Projects with landscaped or other pervious areas must, where feasible, must drain runoff from impervious areas (rooftops, parking lots, sidewalks, walkways, patios) into pervious areas prior to discharge to the MS4. The amount of runoff from impervious areas that is to drain to pervious areas shall not exceed the total capacity of the project's pervious areas to infiltrate or treat runoff, taking into consideration the pervious areas' geologic and soil conditions, slope, and other relevant factors.

    ii. Projects with landscaped or other pervious areas must, where feasible, properly design and construct the pervious areas to effectively receive and infiltrate or treat runoff from impervious areas prior to discharge to the MS4. Soil compaction for these areas shall be minimized. The amount of the impervious areas that are to drain to pervious areas must be based on the total size, soil condition, slope, and other relevant factors.

    iii. Projects with low traffic areas and appropriate soil conditions must construct walkways, trails, overflow parking lots, alleys, or other low traffic areas with permeable surfaces, such as pervious concrete, porous asphalt, unit pavers, and granular materials.

c. LID BMPS shall be sized and designed to ensure onsite retention without runoff, of the volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the County of Orange's 85th Percentile Precipitation Map, unless technically infeasible. (F.1.d.4.d.)

d. The treatment control BMPs for each priority development project "not implementing LID capable of meeting the design stormwater criteria for the entire site and meeting technical infeasibility eligibility," shall be ranked with high or medium pollutant removal efficiency for the project's most significant pollutants of concern. (F.1.d.6.d.i.)

e. Implement site design and maintenance criteria for each site design and treatment control BMP required. (F.1.d.8.)

f. Implement the requirements of the approved HMP for all priority development projects, except those identified in section F.1.h.3. (i.e., where the project discharges stormwater runoff into underground storm drains discharging directly to bays or the ocean, or discharges into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to

ocean waters, enclosed bays, estuaries, or water storage reservoirs and lakes). (F.1.h.4.)

The claimants are also now required to verify that proponents of the *new* categories of priority development projects (industrial, retail gasoline outlets, and one acre pollutant generating development projects) comply with all requirements of the SSMP and HMP. (Sections F.1.d.2.; F.1.d.3.-8.; F.1.h.1., 2.)

And the claimants are required by section F.3.d.5. of the test claim permit to track and inspect completed retrofit BMPs in accordance with section F.1.f. of the test claim permit.

d. <u>These remaining regulatory activities required by the test claim permit are mandated by the state.</u>

In the 2016 decision in *Department of Finance v. Commission on State Mandates*, the California Supreme Court identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state and or the federal government:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[862]

The court also held that if the state, in opposition, contends its requirements are federal mandates, the state has the burden to establish the requirements are in fact mandated by federal law.[863]

Applying that test to the permit issued by the Los Angeles Regional Water Board in the *Department of Finance* case, the court found that the Water Board was not required by federal law to impose any specific permit conditions, including the requirements to install and maintain trash, and inspect commercial, industrial, and construction sites. The court explained that the Clean Water Act broadly directs the Water Board to issue permits with conditions designed to reduce pollutant discharges to the MEP, and the federal regulations give broad discretion to the Water Boards to determine which specific controls are necessary to meet the MEP standard.[864] The court also found that

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[862] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765. This case addressed a challenge by the State to the Commission's Decision in *Municipal Storm Water and Urban Runoff Discharges,* 03-TC-04, 03-TC-20, 03-TC-21.

[863] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 769.

[864] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 767-768, citing to 40 Code of Federal Regulations section 122.26(d)(2)(iv).

the Commission did not have to defer to the Regional Board's conclusion that the challenged requirements were federally mandated since the determination is largely a question of law. However, "[h]ad the Regional Board found, when imposing the disputed permit conditions, that those conditions were the *only means by which the maximum extent practicable standard could be implemented*, deference to the board's expertise in reaching that finding would be appropriate."[865]

In 2017, the Third District Court of Appeal applied the Supreme Court's test to an NPDES permit issued by the San Diego Regional Water Board, which contained LID and hydromodification plan requirements similar to the test claim permit at issue in this case.[866] The court held that there is no dispute that the Clean Water Act and its regulations grant the San Diego Regional Board discretion to meet the MEP standard. "The CWA requires NPDES permits for MS4's to 'require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions *as the Administrator or the State determines appropriate* for the control of such pollutants."[867] The EPA regulations also describe the discretion the State will exercise to meet the MEP standard. The regulations require a permit application by an MS4 to propose a management program, as specified, which "*will be considered by the Director when developing permit conditions* to reduce pollutants in discharges to the maximum extent practicable."[868]

Despite this language, the State argued in that case that the Regional Board "really did not exercise discretion" in imposing the challenged requirements since the Regional Board made a finding that its requirements were "necessary" to reduce pollutant discharges to the MEP. The State also contended that it did not make a true choice because the requirements were based on proposals in the application, which were modified by the Regional Board to achieve the federal standard.[869]

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[865] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 769-770 (emphasis added).

[866] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, which challenged the Commission's Decision in *Discharge of Stormwater Runoff*, *San Diego Regional Board Order No. R9-0007-0001*, 07-TC-09.

[867] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 681, citing to United States Code, title 33, section 1342(p)(3)(B)(iii), emphasis in original.

[868] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 681, citing to Code of Federal Regulations, title 40, section 122.26(d)(2)(iv), emphasis in original.

[869] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 681-682.

The court disagreed with the State's arguments. The court held that the State misconstrued the Supreme Court's decision in the 2016 case, where the Supreme Court made it clear that "except where a regional board finds the conditions are the *only means* by which the 'maximum extent practicable' standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard."[870] "That the San Diego Regional Board found the permit requirements were 'necessary' to meet the standard establishes only that the San Diego Regional Board exercised its discretion."[871]

With respect to the hydromodification plan requirements in the permit, the State claimed the requirement arises from EPA regulations (40 C.F.R. 122.26(d)(2)(iv)(A)(2)) requiring the permit applicant to include in its application a description of planning procedures to develop and enforce controls to reduce the discharge of pollutants from MS4s that receive discharges from areas of new development and significant redevelopment. The court held, however, that the regulation does not require a hydromodification plan, nor does it restrict the Regional Board from exercising its discretion to require a specific type of plan to address the impacts of new development. The hydromodification plan requirements were held to be mandated by the state.[872]

The LID provisions in that case required the permittees to implement specified LID BMPs at most new development and redevelopment projects, and required the permittees to develop a model SUSMP to establish LID BMPs that meet or exceed the requirements. The State, relying on the same federal regulation cited in the paragraph above, argued that the requirements were necessary to achieve federal law. The court held that "nothing in the application regulation required the San Diego Regional Board to impose these specific requirements. As a result, they are state mandates subject to [article XIII B] section 6."[873]

The same analysis and findings apply to the claimants' administrative, planning, and verification activities relating to the LID, hydromodification, and retrofit provisions cited above. Like the 2017 case, the test claim permit here also states that it "contains new or modified requirements that are *necessary* to improve Copermittees' efforts to reduce the discharge of pollutants in storm water runoff to the MEP and achieve water quality

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[870] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 citing to *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.

[871] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

[872] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 684.

[873] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 685.

standards."[874] The Water Board relies on this language and also cites to comments made by a representative from US EPA that he could not "really overemphasize the importance of incorporating these L.I.D. provisions in the permit" to contend that the requirements are mandated by federal law.[875]

Although, as stated in the background, US EPA was considering the adoption of LID and hydromodification regulations, those regulations were never adopted. As a result, the federal government continues to encourage such provisions, but does not require these activities. As determined by the Third District Court of Appeal, the Regional Board exercised the discretion provided by federal law to impose these conditions. Moreover, there is no evidence in the record that these conditions were the "only means by which the MEP standard could be met."

Accordingly, the remaining new activities related to the claimants' regulatory activities for the LID, hydromodification, and retrofit provisions are mandated by the state.

e. <u>The new mandated activities constitute a new program or higher level of service.</u>

Article XIII B, section 6 requires reimbursement whenever the Legislature or any state agency mandates a new program or higher level of service that results in costs mandated by the state. "New program or higher level of service" is defined as "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state."[876] Only one of these alternatives is required to establish a new program or higher level of service.[877]

Here, the new mandated activities cited above are expressly directed toward the local agency permittees under their regulatory authority, and thus are unique to local government. The requirements ensure that priority development projects incorporate LID and hydromodification prevention principles in the planning process at an early

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[874] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2123 (Order No. R9-2009-0002, Findings D.1.c.).

[875] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 13, 18-19, 32-36, and quoting from page 34 [transcript testimony from John Kemmerer at the November 18, 2009 Regional Board Hearing.

[876] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

[877] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

stage, and are intended to promote water quality and reduce the discharge of pollutants from new development and significant redevelopment activities.[878] "The challenged requirements are not bans or limits on pollution levels, they are mandates to perform specific actions" designed to reduce pollution entering stormwater drainage systems and receiving waters.[879] Thus, the new mandated activities also provide a governmental service to the public.

Accordingly, the following provisions of the test claim permit mandate a new program or higher level of service.

1. The following administrative and planning activities:
    a. Submit an updated model Standard Stormwater Mitigation Plan (SSMP) for review by the Regional Board within two years of adoption of the permit, that meets the requirements of Section F.1.d of the permit to reduce priority development project discharges of stormwater pollutants from the MS4 to the MEP and to prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. (F.1.d.)
    b. Update local SSMPs and amended ordinances consistent with the updated model SSMP. (F.1.d.)
    c. As part of the SSMP, implement an updated procedure for identifying pollutants of concern for each priority development project, which must include receiving water quality, land use type, and pollutants expected to be present on site. (F.1.d.3.)
    d. Within two years after adoption of the permit, review local codes, policies, and ordinances and identify barriers to the implementation of LID BMPs, and take appropriate actions to remove the barriers. (F.1.d.4.)
    e. Develop a LID BMP waiver program to incorporate into the SSMP. (F.1.d.7.)
    f. Develop site design and maintenance criteria for each site design and treatment control BMP listed in the SSMP. (F.1.d.8.)
    g. During the third year of implementation of the permit, review and update the BMPs that are listed in the local SSMPs for treatment control. The update must include the removal of obsolete or ineffective BMPs and the addition of LID BMPs that can be used for treatment. The update must also add appropriate LID BMPs to any discussion addressing pollutant removal inefficiencies of treatment control BMPs. In addition, the update must

[878] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2147 (Order No. R9-2009-0002, section F.1.d).

[879] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560.

incorporate findings from BMP effectiveness studies conducted by the copermittees for projects funded wholly or in part by the State or Regional Board, and implement a mechanism for annually incorporating those findings into SSMP project reviews and permitting. (F.1.d.10.)

h. Collaborate with other copermittees to develop a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects, *except* those identified in section F.1.h.3. Submit a draft HMP that has been available to public review and comment, to the Regional Board within two years of adoption of the permit. Within 180 days of receiving the Regional Board's comments on the draft HMP, submit a final HMP to the Regional Board that addresses the comments. Within 90 days of receiving a finding of adequacy from the executive officer, incorporate the HMP into the local SSMPs so that estimated post-project runoff discharge rates and durations do not exceed pre-development discharge rates and durations. (F.1.h.1., 2., 4.)

i. Before the final HMP is approved and within one year of adoption of the permit, submit a signed certification statement to the Regional Board verifying that all priority development projects are implementing interim hydromodification criteria "by comparing the pre-development (naturally occurring) and post-project flow rates and durations using a continuous simulation hydrologic model." (F.1.h.5.)

j. Develop a retrofitting program for existing developments (municipal, industrial, commercial, and residential) by identifying and creating an inventory of existing developments for retrofit, evaluating and ranking those projects for retrofit, and encouraging retrofit projects to be designed in accordance with SSMP LID and hydromodification requirements. (F.3.d.1.-4.)

2. In accordance with section F.1.d.9., of the test claim permit, verify that the proponents of existing categories of new development or significant redevelopment for residential, commercial, and mixed-use projects, comply with the following activities:

   a. When a new development project feature, such as a parking lot, falls into a priority development category, the entire project footprint must comply with the requirements of the SSMP. (F.1.d.2.)

   b. Project proponents must employ the following *specified* classes of site design BMPs in accordance with section F.1.d.4.b.ii.-iv.:

      - Projects with landscaped or other pervious areas must, where feasible, drain runoff from impervious areas (rooftops, parking lots, sidewalks, walkways, patios) into pervious areas prior to discharge to the MS4. The amount of runoff from impervious areas that is to drain to pervious areas shall not exceed the total capacity of the project's pervious areas to

infiltrate or treat runoff, taking into consideration the pervious areas' geologic and soil conditions, slope, and other relevant factors.

- Projects with landscaped or other pervious areas must, where feasible, properly design and construct the pervious areas to effectively receive and infiltrate or treat runoff from impervious areas prior to discharge to the MS4. Soil compaction for these areas shall be minimized. The amount of the impervious areas that are to drain to pervious areas must be based on the total size, soil condition, slope, and other relevant factors.
- Projects with low traffic areas and appropriate soil conditions must construct walkways, trails, overflow parking lots, alleys, or other low traffic areas with permeable surfaces, such as pervious concrete, porous asphalt, unit pavers, and granular materials.

c. LID BMPS shall be sized and designed to ensure onsite retention without runoff, of the volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the County of Orange's 85th Percentile Precipitation Map, unless technically infeasible. (F.1.d.4.d).

d. The treatment control BMPs for each priority development project "not implementing LID capable of meeting the design stormwater criteria for the entire site and meeting technical infeasibility eligibility," shall be ranked with high or medium pollutant removal efficiency for the project's most significant pollutants of concern. (F.1.d.6.d.i).

e. Implement site design and maintenance criteria for each site design and treatment control BMP required. (F.1.d.8.)

f. Implement the requirements of the approved HMP for all priority development projects, except those identified in section F.1.h.3. (i.e., where the project discharges stormwater runoff into underground storm drains discharging directly to bays or the ocean, or discharges into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to ocean waters, enclosed bays, estuaries, or water storage reservoirs and lakes). (F.1.h.4.)

3. Verify that proponents of the *new* categories of priority development projects (industrial, retail gasoline outlets, and one acre pollutant generating development projects) comply with all requirements of the SSMP and HMP. (F.1.d.2.; F.1.d.3.-8.; F.1.h.1., 2.)

4. Track and inspect completed retrofit BMPs in accordance with section F.1.f., of the test claim permit. (F.3.d.5.)

7. Section F.1.f., Addressing BMP Maintenance Tracking and Inspections, Imposes Some New State-Mandated New Programs or Higher Levels of Service.

The claimants have pled section F.1.f.,[880] which requires as part of the JRMP, that each copermittee develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance for existing municipal, industrial, commercial, and residential developments within its jurisdiction since July 2001; and verify that approved post-construction BMPs are operating effectively and have been adequately maintained as specified in the permit.[881]

The Commission finds that many activities required by section F.1.f. are not new, but were required by the prior permit. However, *except as applicable to a claimant's own municipal development* (which is not mandated by the state), the following requirements imposed by section F.1.f. are new and constitute a state-mandated new program or higher level of service:

- Develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance for existing municipal, industrial, commercial, and residential developments within its jurisdiction since July 2001. (Section F.1.f.1.)
- Establish a mechanism to ensure that appropriate easements and ownerships are properly recorded in public records and that the information is conveyed to all appropriate parties when there is a change in project or site ownership. (Section F.1.f.2.)
- The inspections of BMP implementation, operation, and maintenance must note observations of vector conditions, such as mosquitoes, and where conditions are contributing to mosquito production, the copermittee is required to notify the Orange County Vector Control District. (Section F.1.f.3.)

a. Background

i. Federal law requires a management program that includes a maintenance schedule for controls to reduce pollutants in discharges to the MEP from new development and significant redevelopment and controls after construction is complete.

Under federal law, NPDES permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as

[880] Exhibit A, Test Claim, filed June 30, 2011, pages 37, 101-104.

[881] Exhibit C, Water Boards' Comments on Test Claim, filed October 21, 2016, pages 2157-2158 (Order No. R9-2009-0002, section F.1.f.).

the Administrator or the State determines appropriate for the control of such pollutants."[882]

Federal regulations require applicants for an NPDES permit for large and medium MS4 discharges to describe a proposed management program that covers the duration of the permit to be considered by the Regional Board when developing permit conditions to reduce pollutants in discharges to the MEP. The management program is required to include a maintenance schedule for structural controls to reduce pollutants in discharges from the MS4.[883] The management program is also required to include a comprehensive master plan to develop, implement, and enforce controls to reduce the discharge of pollutants from the MS4s that receive discharges from areas of new development and significant redevelopment. Additionally, the plan shall "address controls to reduce pollutants in discharges from municipal separate storm sewers *after construction is completed*."[884] Federal regulations further state that NPDES permits must include "any requirements in addition to or more stringent than promulgated effluent limitations guidelines . . . necessary to . . . [a]chieve water quality standards established under section 303 of the CWA."[885]

ii. The prior permit required the permittees to develop and update a watershed-based inventory of existing development, prioritize the inventory by threat to water quality, designate BMPs for existing development based on threat to water quality, conduct inspections to ensure BMPs are adequate, and enforce stormwater ordinances for existing development.

Section F.3. of the prior permit required the copermittees, as part of their JURMP, to minimize the short and long-term impacts on receiving water quality from all types of existing development, including existing municipal, industrial, commercial, and residential developments. To comply, the prior permit required the copermittees to do the following activities:

- Develop, and annually update, a watershed-based inventory of municipal, industrial, and commercial sites and activities that generate pollutants.[886]

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

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

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

[885] Code of Federal Regulations, title 40, section 122.44(d)(1).

[886] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3455, 3458, and 3461 (Order No. R9-2002-0001, sections F.3.a.2., F.3.b.2., F.3.c.2.).

- Prioritize each watershed inventory by threat to water quality and update annually.[887]
- Designate a set of minimum BMPs for high, medium, and low threat to water quality for each type of existing development, and require implementation of the BMPs. Implementation of additional controls for 303(d) impaired water bodies may be necessary.[888]
- Conduct inspections of high priority municipal and industrial areas and activities annually. Inspect medium and low threat to water quality industrial sites "as needed." Conduct inspections of high priority commercial sites "as needed." Implement all follow-up actions necessary to comply with the Order.[889] The purpose of the inspections is to ensure that proper measures are being undertaken to reduce pollutant discharges to the MEP, to properly evaluate compliance with local ordinances, and to ensure that implemented BMPs are adequate.[890]
- Enforce the stormwater ordinance for existing development as necessary to maintain compliance with the Order.[891]

With respect to existing residential developments, the copermittees were required to identify high priority residential areas and activities, including those high threat areas and activities specified in the permit (i.e., automobile repair, washing, and parking; home and garden activities and product use like fertilizer; disposal of hazardous waste, pet waste, and green waste); designate a set of minimum BMPs for high threat to water quality areas and activities; and enforce the stormwater ordinance for all residential

[887] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3456, 3458, and 3461 (Order No. R9-2002-0001, sections F.3.a.3., F.3.b.3., F.3.c.2.).

[888] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3456, 3459, 3462 (Order No. R9-2002-0001, sections F.3.a.4., F.3.b.4., F.3.c.3.).

[889] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3457, 3459-3460, and 3462 (Order No. R9-2002-0001, sections F.3.a.7., F.3.b.6., F.3.c.4.).

[890] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3651, 3660, and 3668 (Order No. R9-2002-0001, Fact Sheet).

[891] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3457, 3460, and 3462 (Order No. R9-2002-0001, sections F.3.a.8., F.3.b.7., F.3.c.5.).

areas and activities necessary to maintain compliance with the Order.[892] The Fact Sheet for the 2002 permit explains that "[e]ffective inspection and enforcement requires penalties to deter infractions and intervention by the municipal authority to correct violations."[893]

In addition, Finding 35 of the prior permit recognized that certain BMPs for urban runoff management may create a habitat for vectors if not properly designed or maintained. The prior permit stated that "[c]lose collaboration and cooperative effort between municipalities and local vector control agencies and the State Department of Health Services during the development and implementation of the Urban Runoff Management Programs is necessary to minimize nuisances and public health impacts resulting from vector breeding."[894] The Fact Sheet for this finding explains that:

> The implementation of certain structural BMPs or other urban runoff treatment systems can result in significant vector problems in the form of increased breeding or harborage habitat for mosquitoes, rodents or other potentially disease transmitting organisms. The implementation of BMPs that retain water may provide breeding habitat for a variety of mosquito species, some of which have the potential to transmit diseases such as Western Equine Encephalitis, St. Louis Encephalomyelitis, and malaria. Recent BMP implementation studies by CALTRANS [citation omitted] in District 7 and District 11 have demonstrated mosquito breeding associated with some types of BMPs. The CALTRANS BMP Retrofit Pilot study cited lack of maintenance and improper design as factors contributing to mosquito production. However, a Watershed Protection Techniques article [citation omitted] describes management techniques to select, design and maintain structural treatment BMPs for urban runoff to minimize mosquito production. State and local urban runoff management programs that include structural BMPs with the potential to retain water have been implemented in Florida and the Chesapeake Bay region without resulting in significant public health threats from mosquitoes or other vectors. [Citation omitted.] The finding identifies the potential vector issues related to BMP implementation and the role of collaborative program development between municipalities and vector control agencies

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[892] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3462-3463 (Order No. R9-2002-0001, section F.3.d).

[893] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3674 (Order No. R9-2002-0001, Fact Sheet).

[894] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3437 (Order No. R9-2002-0001, Findings, paragraph 35).

in addressing and minimizing vector production in the implementation of the Jurisdiction Urban Runoff Management Program.[895]

Section D. of the prior permit required each copermittee to establish, maintain, and enforce adequate legal authority (through ordinances and permits) to control pollutant discharges into and from the MS4. Legal authority, at a minimum, had to:

- Control the contribution of pollutants in discharges of runoff associated with industrial and construction activity to the MS4 and from the industrial and construction sites.
- Prohibit all illicit discharges, including those from sewage; wash water from automotive service facilities; discharges from cleaning, repair, or maintenance of equipment, machinery, motor vehicles, cement-related equipment, and port-a-potty servicing; wash water from the cleaning or hosing of impervious surfaces in municipal, industrial, commercial, and residential areas including parking lots, streets, sidewalks, driveways, patios, etc.; runoff from material storage areas containing chemicals, fuels, grease, oil, or other hazardous materials; pool or fountain water containing chlorine, biocides, or other chemicals; sediment, pet waste, vegetation clippings, or other landscape or construction-related wastes; and food-related wastes. Eliminate all illicit connections.
- Control the discharge of spills, dumping, and disposal of materials other than stormwater to the MS4.
- Require compliance with conditions in the ordinances and permits.
- Utilize enforcement mechanisms to require compliance.
- Carry out all inspections, surveillance, and monitoring necessary to determine compliance and noncompliance with local ordinances and permits, including the prohibition on illicit discharges to the MS4. "This means the Copermittee must have authority to enter, sample, inspect, review and copy records, and require regular reports from industrial facilities discharging into MS4, including construction sites . . ."
- Require the use of BMPs to prevent or reduce the discharge of pollutants to the MS4.[896]

[895] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3581-3582 (Order No. R9-2002-0001, Fact Sheet, Discussion of Finding 35).

[896] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3440-3441 (Order No. R9-2002-0001, section D.).

b. Section F.1.f., of the test claim permit imposes some state-mandated new programs or higher levels of service.

i. Section F.1.f. imposes new requirements to develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance for existing development; establish a mechanism to ensure that appropriate easements and ownerships are properly recorded in public records and that the information is conveyed to all appropriate parties when there is a change in project or site ownership; and notify the Orange County Vector Control District when conditions of existing development are contributing to mosquito production.

According to the Fact Sheet, section F.1.f. was included in the test claim permit to improve the effectiveness of the BMP requirements for existing development. Audits conducted in 2005 by Tetra Tech, Inc., concluded that cities were not tracking post-construction BMPs. In addition, the U.S. EPA, when adopting the Phase II stormwater regulations, recommended "inspections during construction to verify BMPs are built as designed." The Fact Sheet also notes that the copermittees' 2007 DAMP proposed to verify 90 percent of the post-construction BMPs, including structural and non-structural, by inspections, self-certifications, surveys, or other means.[897]

Accordingly, section F.1.f.1. requires, as part of the JRMP, that each copermittee develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance for existing municipal, industrial, commercial, and residential developments within its jurisdiction since July 2001. At a minimum the database must include information on BMP type, location, watershed, date of construction, identification of the party responsible for maintenance, maintenance certifications or verifications, inspections, inspection findings, and corrective actions, including whether the site was referred to the Vector Control District. LID BMPs implemented on a lot-by-lot basis at a single family residential home, such as rain barrels, are not required to be tracked or inventoried.[898] This requirement is new. Under the prior permit, the claimants only had to develop a watershed-based inventory of municipal, industrial, and commercial sites and activities that generate pollutants, but

[897] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2440 (Order No. R9-2009-0002, Fact Sheet); see also, Exhibit K, 2007 DAMP, dated July 21, 2006, page 154.

[898] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2157 (Order No. R9-2009-0002, section F.1.f.).

were not required to track and inventory the approved BMPs and BMP maintenance for those existing developments.[899]

Section F.1.f.2. requires each copermittee to establish a mechanism to ensure that appropriate easements and ownerships are properly recorded in public records and the information is conveyed to all appropriate parties when there is a change in project or site ownership.[900] This activity is new, and was not required by the prior permit.

Section F.1.f.3. requires each copermittee to verify that approved post-construction BMPs are operating effectively and have been adequately maintained by implementing the following measures:

- An annual inventory of all approved BMPs within the copermittee's jurisdiction, including all BMPs approved for priority development projects since July 2001. This does not include LID BMPs implemented on a lot by lot basis at a single family residential home, such as rain barrels.
- The designation of high priority BMPs, which includes consideration of BMP size, recommended maintenance frequency, likelihood of operational and maintenance issues, location, receiving water quality, and other relevant factors.
- Verify implementation, operation, and maintenance of BMPs by inspection, self-certification, surveys, or other equally effective approaches, as specified below:
    1. The implementation, operation, and maintenance of at least 90 percent of approved and inventoried final project public and private SSMPs must be verified annually. All post-construction BMPs shall be verified every four years.
    2. Operation and maintenance verifications must be required before each rainy season.
    3. All projects with BMPs that are high priority shall be inspected annually before each rainy season.
    4. All public agency projects with BMPs must be inspected annually.
    5. At least half of projects with drainage insert treatment control BMPs must be inspected annually.
    6. Appropriate follow-up measures, including re-inspections, enforcement, and maintenance, must be conducted to ensure the

[899] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3455, 3458, and 3461 (Order No. R9-2002-0001, sections F.3.a.2., F.3.b.2., F.3.c.2.).

[900] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2157-2158 (Order No. R9-2009-0002, section F.1.f.2.).

treatment BMPs continue to reduce stormwater pollutants as originally designed.

7. All inspections must verify effective operation and maintenance of the treatment control BMPs, as well as compliance with all ordinances, permits, and the Order.
8. Inspections must note observations of vector conditions, such as mosquitoes, and where conditions are contributing to mosquito production, the copermittee is required to notify the Orange County Vector Control District.[901]

As explained below, the activities required by section F.1.f.3. to annually inspect existing development, verify effective operation and maintenance of the treatment control BMPs, as well as compliance with all ordinances, permits, and the Order; and conduct follow-up measures to ensure that treatment BMPs continue to reduce stormwater pollutants, are not new.

The prior permit, in section F.3., required the claimants to conduct annual inspections of high priority areas and activities of municipal and industrial developments; conduct inspections of high priority commercial sites "as needed;" and conduct inspections of medium and low threat industrial sites "as needed."[902] The prior permit also required the claimants to enforce the stormwater ordinance in order to achieve water quality standards for all areas and activities of municipal, industrial, commercial, and residential developments necessary to maintain compliance with the prior permit (including the requirements to use BMPs to prevent or reduce the discharge of pollutants to the MS4; control the contribution of pollutants in discharges of runoff associated with industrial and construction activity to the MS4 and from the industrial and construction sites; prohibit all illicit discharges; and carry out all inspections, surveillance, and monitoring necessary to determine compliance and noncompliance with local ordinances and permits).[903] Thus, the prior permit required the inspection of all post-construction BMPs for all types of development (including lower threat sites and residential developments) any time it was necessary to comply with local ordinances and the requirements of the permit to use BMPs to prevent or reduce the discharge of pollutants to the MS4 and not

[901] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2158 (Order No. R9-2009-0002, section F.1.f.3.).

[902] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3457, 3459-3460, and 3462 (Order No. R9-2002-0001, sections F.3.a.7., F.3.b.6., F.3.c.4.).

[903] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2440, 3457, 3459-3460, and 3462 (Order No. R9-2009-0002, Fact Sheet; Order No. R9-2002-0001, sections F.3.a.7., F.3.b.6., F.3.c.4.).

violate water quality standards. The prior permit also required the claimants to implement all follow-up actions necessary to comply with the Order.[904]

Thus, with respect to high priority municipal and industrial developments, the requirements of the test claim permit to annually inspect; verify effective operation and maintenance of the treatment control BMPs, as well as compliance with all ordinances, permits, and the Order; and conduct follow-up measures to ensure that treatment BMPs continue to reduce stormwater pollutants, are not new.

With respect to high priority commercial developments, all residential developments, and all other lower threat priority developments, the prior permit also required the inspection; verification of effective operation and maintenance of the treatment control BMPs, as well as compliance with all ordinances, permits, and the Order; and follow-up measures to ensure that treatment BMPs continue to reduce stormwater pollutants, but the activities could be performed "as needed."[905] The test claim permit, however, now imposes time requirements for these activities as follows:

- The inspection, verification, and follow-up activities for high priority commercial and residential sites are now required annually.
- The inspection, verification, and follow-up activities for lower threat public agency projects with BMPs are now required annually.
- The implementation, operation, and maintenance of at least 90 percent of approved and inventoried final project public and private SSMPs must be verified annually.
- The inspection, verification, and follow-up activities for all lower threat industrial, commercial, and residential developments are now required every four years.[906]

Although the time requirements are new, section F.1.f.3. does not impose any new activities on the claimants or increase the actual level or quality of governmental services required; it simply ensures that BMPs continue to be maintained and stormwater pollutants are reduced to the MEP as required under existing law. Any

[904] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2440, 3457, 3459-3460, and 3462 (Order No. R9-2009-0002, Fact Sheet; Order No. R9-2002-0001, sections F.3.a.7., F.3.b.6., F.3.c.4.).

[905] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2440, 3457, 3459-3460, and 3462 (Order No. R9-2009-002, Fact Sheet; Order No. R9-2002-0001, sections F.3.a.7., F.3.b.6., F.3.c.4.).

[906] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2158 (Order No. R9-2009-0002, section F.1.f.3.).

increased costs associated with the time requirements do not result in a reimbursable state-mandated program.[907]

Finally, the last requirement in section F.1.f.3., that inspections must note observations of vector conditions, such as mosquitoes, and where conditions are contributing to mosquito production, the copermittee is required to notify the Orange County Vector Control District, are new. The prior permit recognized that certain BMPs for urban runoff management may create a habitat for vectors if not properly designed or maintained, creating potential nuisance and public health issues. The prior permit further recognized that "[c]lose collaboration and cooperative effort between municipalities and local vector control agencies and the State Department of Health Services during the development and implementation of the Urban Runoff Management Programs is necessary to minimize nuisances and public health impacts resulting from vector breeding."[908] These findings are also contained in the test claim permit, in section D.2.f.[909] However, the prior permit did not impose any specific requirements with respect to vector control, and the inspections required by the prior permit of existing development were focused on water quality and not public health.

Accordingly, section F.1.f. imposes the following new requirements:

1. Develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance for existing municipal, industrial, commercial, and residential developments within its jurisdiction since July 2001. (F.1.f.1.)
2. Establish a mechanism to ensure that appropriate easements and ownerships are properly recorded in public records and that the information is conveyed to all appropriate parties when there is a change in project or site ownership. (F.1.f.2.)

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[907] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877 ("[S]imply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting 'service to the public' under article XIII B, section 6, and Government Code section 17514." Rather, the new program or higher level of service must "increase the actual level or quality of governmental services provided.").

[908] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3437 (Order No. R9-2002-0001, Findings, paragraph 35.).

[909] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2125, 2375, 2438 (Order No. R9-2009-0002, Findings D.2.f; Order No. R9-2009-0002, Fact Sheet, Discussions of Section D.2.f., and Section F.1.d.6., which states that "treatment control BMPs must be designed and implemented with measures to avoid the creation of nuisance or pollution associated with vectors, such as mosquitoes, rodents, and flies.").

3. The inspections of BMP implementation, operation, and maintenance must note observations of vector conditions, such as mosquitoes, and where conditions are contributing to mosquito production, the copermittee is required to notify the Orange County Vector Control District. (F.1.f.3.)

    ii. Except as applicable to a claimant's own municipal development, the new activities constitute state-mandated new programs or higher levels of service within the meaning of article XIII B.

The claimants contend that all activities required by section F.1.f. of the Test Claim permit are mandated by the state and impose a new program or higher level of service.[910] The claimants also contend that they are legally compelled, not practically compelled, to create the database.[911]

The Water Boards contend that the requirements in section F.1.f. are not mandated by the state since the requirements implement and are necessary to meet federal law. "The BMP maintenance tracking requirement is integral to the successful implementation of runoff management programs that must be continually assessed, modified and improved upon, in order to achieve the evolving federal MEP standard."[912] The requirements were imposed in response to 2005 audit findings that cities were not tracking post-construction BMPs. The audit report recommended that each city should develop a system to verify implementation and track post-construction BMPs to ensure adequate maintenance.[913] The Water Boards further contend that tracking inspections of BMPs is consistent with U.S. EPA guidance, which states the following:

> Creating an inventory of post-construction structural stormwater control measures, including tracking of specific information, will first enable Permittees to know what control measures they are responsible for. Without this information, the permittee will not be protecting water quality to their full potential since inspections, maintenance, and follow-up changes cannot be performed. Tracking information such as latitude/longitude, maintenance and inspection requirements and follow-up

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[910] Exhibit A, Test Claim, filed June 30, 2011, pages 101-104.

[911] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 29-30.

[912] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 44.

[913] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 45.

> will allow the permittee to be able to better allocate their resources for those activities that are immediately necessary. . . ."[914]

The Water Boards further rely on the following recommendation by U.S. EPA:

> Permit writers should clearly specify requirements for inspections. Inspecting and properly maintaining structural stormwater controls to ensure they are working as designed is just as important as installing them in the first place. By having specific requirements, Permittees will be reminded that they must allocate resources to ensure control measures are properly maintained and functioning.[915]

The Commission finds that the new activities required by section F.1.f. as they apply to a claimant's own *municipal* development are not mandated by the state, but the remaining new activities constitute a state-mandated new program or higher level of service.

The courts have explained that even though the test claim statute or executive order may contain new requirements, the determination of whether those requirements are mandated by the state depends on whether the claimant's participation in the underlying program is voluntary or compelled.[916] Activities undertaken at the option or discretion of local government, without legal or practical compulsion, do not trigger a state-mandated program within the meaning or article XIII B, section 6.[917] The California Supreme Court has described legal compulsion as follows:

> Legal compulsion occurs when a statute or executive action uses mandatory language that require[s] or command[s] a local entity to participate in a program or service… Stated differently, legal compulsion is present when the local entity has a mandatory, legally enforceable duty to

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[914] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 45; see also, Exhibit K (49), U.S. EPA MS4 Permit Improvement Guide (April 14, 2010), page 66.

[915] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 45; see also, Exhibit K (49), U.S. EPA MS4 Permit Improvement Guide (April 14, 2010), page 68.

[916] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 731; *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815-817.

[917] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 73-76; *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727; *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1366; *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815.

> obey. This standard is similar to the showing necessary to obtain a traditional writ of mandate, which requires the petitioning party to establish the respondent has a clear, present, and usually ministerial duty to act. ... Mandate will not issue if the duty is ... mixed with discretionary power.
>
> Thus, as a general matter, a local entity's voluntary or discretionary decision to undertake an activity cannot be said to be legally compelled, even if that decision results in certain mandatory actions.[918]

In the absence of legal compulsion, the courts have acknowledged the possibility that a state mandate can be found if local government can show that it faces "certain and severe penalties, such as double taxation or other draconian consequences," leaving local government no choice but to comply with the conditions established by the state.[919] Substantial evidence in the record is required to make a finding of practical compulsion.[920]

The claimants are not legally compelled by state law to develop municipal projects and facilities. Nothing in state statute or case law imposes a legal obligation on local agencies to construct, expand, or improve municipal projects.[921] Nor is there evidence

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

[919] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816-817.

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

[921] For example, see Government Code section 23004 (counties *may* purchase, receive by gift or bequest, and hold land within its limits, or elsewhere when permitted by law; and manage, sell, lease, or otherwise dispose of its property as the interests of its inhabitants require); Government Code sections 37350-37353 (cities *may* purchase, lease, receive, hold, and enjoy real and personal property, and control and dispose of it for the common benefit; may erect and maintain buildings for municipal purposes; and may acquire property for parking motor vehicles, and for opening and laying out any street; Government Code 37111 ("When the legislative body deems it necessary that land purchased for park or other purposes be used for construction of public buildings or creation of a civic center, it *may* adopt an ordinance by a four-fifths vote declaring the necessity and providing for such use"); Streets and Highways Code, sections 1800 ["The legislative body of any city *may* do any and all things necessary to lay out, acquire, and construct any section or portion of any street or highway within its jurisdiction as a freeway, and to make any existing street or highway a freeway."]; 1801 ["The legislative body of any city *may* close any street or highway within its jurisdiction at or near the point of its intersection with any freeway, or *ma*y make provision for

in the record that the claimants would suffer certain and severe penalties such as "double…taxation" or other "draconian" consequences" if they fail to comply with the permit's annual reporting requirements for municipal projects.[922]

The claimants nevertheless assert that they are legally compelled to create the database: "It was the *creation of the database and the other Section F.1.f. requirements* that constituted the legal compulsion on Claimants, not the allegedly discretionary decision to construct a municipal project in the first place."[923]

> Here, the BMP tracking database requirements were unconnected to the original decision to build a municipal project that required those BMPs. The projects were built and the BMPs were installed. Section F.l.f. made the tracking of those BMPs mandatory, not discretionary. Having exercised their alleged discretion to build the project, Claimants had no discretion as to whether to include their completed municipal projects in the database and otherwise follow the requirements of Section F.l.f. Extension of the *City of Merced* rule to such requirements is not appropriate.[924]

The claimants further assert that the downstream effect of any discretionary decision was limited by the California Supreme Court in *San Diego Unified School Dist. v. Commission on State Mandates,* which questioned an extension of the holding of *City of Merced* so as to preclude reimbursement under article Xlll B, section 6 whenever an entity makes an initial discretionary decision, such as the number of employees to hire, which in turn triggers mandated costs.[925]

As explained above, the courts have held that when local government elects to participate in the underlying program, then reimbursement under article XIII B, section 6 is not required, regardless of when the initial decision to participate in the program began.[926] This was true in *Kern High School Dist.*, where school districts made the

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carrying such street or highway over, under, or to a connection with the freeway, and *may* do any and all necessary work on such street or highway."].

[922] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816-817.

[923] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 29-30.

[924] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, page 30.

[925] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, page 30.

[926] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 731, 743.

discretionary decision to participate in the school site council programs, well before the state imposed additional notice and agenda requirements on those programs.[927] The claimants rely on dicta from *San Diego Unified School Dist.* where the court mused about the application of *City of Merced* to and the denial of reimbursement based simply on the decision by a local entity on how many employees to hire. The court, however, never addressed the state-mandate issue to resolve the case: "In any event, we have determined that we need not address in this case the problems posed by such an application of the rule articulated in *City of Merced,* because this aspect of the present case can be resolved on an alternative basis." The issue here is not how many employees to hire to comply with the permit, but the local discretionary decision to construct, expand, or improve municipal projects. The claimants cite no authority for any limitation on the application of *City of Merced* and *Kern High School Dist*. cases, nor on the downstream effects of a discretionary decision. Without such authority, the holdings of *City of Merced* and *Kern High School Dist*. cases must be applied as set forth in those decisions.

Accordingly, the new activities as they apply to municipal developments are not mandated by the state.

However, *except as applicable to a claimant's own municipal development*, the remaining requirements mandate a new program or higher level of service:

1. Develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance for existing municipal, industrial, commercial, and residential developments within its jurisdiction since July 2001. (F.1.f.1.)
2. Establish a mechanism to ensure that appropriate easements and ownerships are properly recorded in public records and that the information is conveyed to all appropriate parties when there is a change in project or site ownership. (F.1.f.2.)
3. The inspections of BMP implementation, operation, and maintenance must note observations of vector conditions, such as mosquitoes, and where conditions are contributing to mosquito production, the copermittee is required to notify the Orange County Vector Control District. (F.1.f.3.)

In the 2016 decision in *Department of Finance v. Commission on State Mandates*, the California Supreme Court identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or the federal government:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular

[927] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 732, 753.

> implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[928]

The courts have also explained that "except where a regional board finds the conditions are the *only means* by which the [federal] 'maximum extent practicable' standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard."[929] "That the San Diego Regional Board found the permit requirements were 'necessary' to meet the standard establishes only that the San Diego Regional Board exercised its discretion."[930]

In this case, federal law requires the claimants to propose a management program that includes a comprehensive master plan to develop, implement, and enforce controls to reduce the discharge of pollutants from the MS4s that receive discharges from areas of new development and significant redevelopment. The plan is required to "address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed."[931]

The State argues that the requirements in section F.1.f. are necessary to meet federal law, and that the U.S. EPA recommended that the copermittees create an inventory of post-construction structural stormwater control measures and specific inspection requirements to meet the MEP requirements. Federal law, however, gives the State discretion to determine what controls are necessary to meet the MEP standard, and does not require any specific activities. Moreover, there is no evidence in the record that the new required activities are the only means by which the federal MEP standard can be met.

Therefore, the Commission finds that the new activities required by section F.1.f. are mandated by the state.

Moreover, the new requirements are expressly directed toward the local agency permittees under their regulatory authority and are therefore unique to government. "The challenged requirements are not bans or limits on pollution levels, they are mandates to perform specific actions" designed to reduce the discharge of pollutants in

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[928] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

[929] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 (citing to *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.)

[930] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

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

stormwater runoff to the MEP, and prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.[932]

Accordingly, except as applicable to municipal development, the new activities required by sections F.1.f.1., 2., and, 3. of the test claim permit mandate a new program or higher level of service.

8. Jurisdictional Runoff Management Program Effectiveness Assessment and Reporting, and Work Plan to Address High Priority Water Quality Problems (Section J.).

The claimants plead section J.[933] Section J. requires each copermittee to annually assess and review the implementation and effectiveness of its JRMP; plan program modifications and improvements when monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges and when activities and BMPs are ineffective or less effective than other comparable BMPs; and include a description and summary of the long-term effectiveness assessments within each annual report. Section J. also requires each copermittee to develop and annually update a work plan to address high priority water quality problems in an iterative manner.[934]

The Commission finds that the following new requirements imposed by section J. of the test claim permit are mandated by the state, and impose a new program or higher level of service.

- Establish annual assessment measures for reducing discharges into each downstream 303(d) listed water body and downstream environmentally sensitive areas that conform to the six outcome levels developed by CASQA, and which target water quality outcomes and the results of municipal enforcement activities, and to annually assess those measures. (J.1.a.)
- Include the following effectiveness assessment information within each annual report, beginning with the 2011 annual report:
    1. A description and results of the annual assessment measures or methods for reducing discharges of stormwater pollutants from the MS4 into each 303(d) listed waterbody. (J.3.a.1.)

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[932] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560; Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2122-2123, 2144, 2440 (Order No. R9-2009-0002, Finding D, sections F.1.f.(1), (2), and (3); Order No. R9-2009-0002, Fact Sheet).

[933] Exhibit A, Test Claim, filed June 30, 2011, pages 36-37, 84-90.

[934] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2195-2198.

2. A description and results of the annual assessment measures or methods for managing discharges of pollutants from the MS4 into each downstream environmentally sensitive area. (J.3.a.2.)
3. A description of the steps that will be taken to improve the copermittees' ability to assess program effectiveness using measurable targeted outcomes, assessment measures, assessment methods, and outcome levels 1-6, and include a time schedule for when improvement will occur. (J.3.a.8.)

- Develop a work plan to address high priority water quality problems in an iterative manner over the life of the permit. The plan is required to be submitted to the Regional Board within 365 days of the adoption of the test claim permit, and shall be annually updated and included in the annual JRMP report. The work plan shall include the following information:
    1. The problems and priorities identified during the assessment.
    2. A list of priority pollutants and known or suspected sources.
    3. A brief description of the strategy employed to reduce, eliminate or mitigate the negative impacts.
    4. A description and schedule for new or modified BMPs. The schedule is to include dates for significant milestones.
    5. A description of how the selected activities will address an identified high priority problem, including a description of the expected effectiveness and benefits of the new or modified BMPs.
    6. A description of how efficacy results will be used to modify priorities and implementation.
    7. A review of past activities implemented, progress in meeting water quality standards, and planned program adjustments. (J.4.)

The remaining provisions of section J. do not impose any new required activities.

a. Background

i. Federal Law requires permittees to assess the effectiveness of their management programs and to identify any proposed revisions in the annual report to ensure that water quality standards and objectives are achieved.

The Clean Water Act requires an NPDES permittee to monitor discharges into the waters of the United States in a manner sufficient to determine whether it is in

compliance with the permit and whether it is meeting water quality standards.[935] An NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance.[936] Federal law also requires that NPDES permits include conditions to achieve water quality standards and objectives.[937]

Accordingly, federal NPDES regulations require each permittee to propose a management program to reduce the discharge of pollutants to the MEP using BMPs, control techniques, and other appropriate systems. The program is required to include structural and source control measures to reduce pollutants from runoff discharged from the MS4, and to detect and remove non-stormwater discharges and improper disposal into the storm sewer. The proposed program must be accompanied by an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls.[938] The federal regulations also require the permittees to assess the controls to estimate "reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water."[939]

In addition, federal regulations require each permittee to submit an annual report to the Regional Board, which shall include the following information:

- The status of implementing the components of the storm water management program that are established as permit conditions.
- Proposed changes to the storm water management programs that are established as permit condition. Such proposed changes shall be consistent with 40 Code of Federal Regulations 122.26(d)(2)(iii) [which requires a permittee to provide information, as specified, characterizing the quality and quantity of discharges covered in the permit application].
- Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit.

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[935] United States Code, title 33, section 1342(a)(2); Code of Federal Regulations, title 40, section 122.44(i)(1).

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

[937] Code of Federal Regulations, title 40, section 122.44(d)(1), which states that NPDES permits must include "any requirements in addition to or more stringent than promulgated effluent limitations guidelines . . . necessary to . . . [a]chieve water quality standards established under section 303 of the CWA."

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

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

- A summary of data, including monitoring data that is accumulated throughout the reporting year.
- Annual expenditures and budget for the year following each annual report.
- A summary describing the number and nature of enforcement actions, inspections, and public education programs.
- Identification of water quality improvements or degradation.[940]

ii. The prior permit required the annual assessment and reporting of the JRMP to assure that the program is effective in achieving compliance with water quality objectives.

Finding 14 of the prior permit states that assessment of the urban runoff management program is necessary to ensure that the program is effective to achieve compliance with receiving water quality objectives, as follows:

> Implementation of BMPs cannot ensure attainment of water quality objectives under all circumstances; some BMPs may not prove to be as effective as anticipated. An iterative process of BMP development, implementation, monitoring, and *assessment is necessary to assure that an Urban Runoff Management Program is sufficiently comprehensive and effective to achieve compliance with receiving water quality objectives*.[941]

The Fact Sheet to the prior permit explains Finding 14 as follows:

> As discussed above in the Finding 13 discussion, the US EPA and SWRCB have discretion to issue municipal storm water permits which require compliance with water quality standards. To ensure that MS4 discharges comply with water quality standards, the SWRCB has adopted US EPA language in SWRCB Order WQ 99-05 that dictates implementation of an iterative BMP process when water quality standards are not met. This language is included in Order No. R9-2002-0001 in Receiving Water Limitations item C. The iterative BMP process requires the implementation of increasingly stringent BMPs until receiving water standards are achieved. This is necessary because implementation of BMPs alone cannot ensure attainment of receiving water quality objectives. For example, a BMP that is effective in one situation may not be applicable in another. An iterative process of BMP development, implementation, and assessment is needed to promote consistent compliance with receiving water quality objectives. If assessment of a

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

[941] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3434 (Order No. R9-2002-0001, Finding, paragraph 14, emphasis added).

given BMP confirms that the BMP is ineffective, the iterative process should be restarted, with redevelopment of a new BMP which is anticipated to result in compliance with receiving water quality objectives. Regarding BMP assessment, the SWRCB Urban Runoff Technical Advisory Committee states "The [Storm Water Pollution Prevention Plan] SWPPP must be revised if an inspection indicates a need to alter the BMPs: drop ineffective BMPs, add new BMPs, or modify a BMP that is to remain in the SWPPP." It should be noted that while implementation of the iterative BMP process is a means to achieve compliance with water quality objectives, it does not shield the discharger from enforcement actions for continued non-compliance with water quality objectives.[942]

The receiving water limitations discussed in the Fact Sheet for Finding 14 are identified in sections A. and C. of the prior permit. These sections prohibit discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in waters of the state.[943] In addition, "[d]ischarges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses) are prohibited."[944] Discharges from MS4s containing pollutants that have not been reduced to the MEP are also prohibited.[945]

In order to comply with these prohibitions, section C.2. of the prior permit required the timely implementation of control measures and actions to reduce pollutants in urban runoff discharges in accordance with the JRMP, and other requirements of the permit, including any modifications. Section C.2., states that the JRMP shall be designed to achieve compliance with water quality standards, and if exceedances of water quality standards persist notwithstanding implementation of the JRMP, the copermittee "shall assure compliance" with the following procedure:

1. Upon determination by either the copermittee or the Regional Board that MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard, the copermittee shall promptly notify and thereafter submit a report to the Regional Board that describes BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce

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[942] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3568 (Order No. R9-2002-0001, Fact Sheet).

[943] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3438 (Order No. R9-2002-0001, section A.).

[944] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3438-3439 (Order No. R9-2002-0001, sections A., and C.).

[945] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3438 (Order No. R9-2002-0001, section A.).

any pollutants that are causing or contributing to the exceedance of water quality standards. The report shall include an implementation schedule.

2. Submit any modifications to the report required by the Regional Board within 30 days of notification.
3. Within 30 days following approval of the report by the Regional Board, the copermittee shall revise its JRMP and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule, and any additional monitoring required.
4. Implement the revised JRMP and monitoring program in accordance with the approved schedule.[946]

In addition, section F.8. of the prior permit required each copermittee to develop a long-term strategy for assessing the effectiveness of its JRMP. The long-term assessment strategy was required to identify specific direct and indirect measurements that each copermittee used to track the long-term progress towards achieving improvements in receiving water quality. Methods used for assessing effectiveness had to include the following or their equivalent: surveys, pollutant loading estimations, and receiving water quality monitoring. The long-term strategy was required to also discuss the role of monitoring data in substantiating or refining the assessment.[947] In addition, "[a]s part of its Individual Jurisdictional URMP Annual Report, each Copermittee shall include an assessment of the effectiveness of its Jurisdictional URMP using the direct and indirect assessment measurements and methods developed in its long-term assessment strategy."[948]

Section H.1.a.9., of the prior permit also required each copermittee to submit to the principal permittee an individual JRMP document that describes all activities it has undertaken or is undertaking to implement the requirements of each component of Section F. The document had to contain a "description of strategies to be used for assessing the long-term effectiveness of the individual Jurisdictional URMP." The principal permittee was then required by section H.2. to compile the individual reports and submit a unified report to the Regional Board, which was required to address the

[946] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3440 (Order No. R9-2002-0001, section C.2.).

[947] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3467 (Order No. R9-2002-0001, section F.8.).

[948] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3467 (Order No. R9-2002-0001, section F.8.).

entire JRMP including section F.8., within 365 days of the adoption of the prior permit.[949]

Section I. of the prior permit addresses the annual report, and requires each copermittee to submit to the principal copermittee, who then compiles and submits to the Regional Board, an annual JRMP report containing a comprehensive description of all activities conducted to meet the requirements of each component of the JRMP; an accounting of all reports of illicit discharges and how they were resolved, inspections, enforcement actions, and education efforts conducted; a summary of monitoring data; identification of management measures proven to be ineffective in reducing urban runoff pollutants and flow*;* identification of water quality improvements or degradation; and proposed revisions to the JRMP.[950]

iii. Section J., of the test claim permit imposes some new assessment and reporting activities when compared to the prior permit.

The receiving water limitations in the test claim permit are outlined in section A., and, like the prior permit, prohibit discharges into and from MS4s in a manner causing, or threatening to cause, a condition of pollution, contamination, or nuisance in waters of the state; prohibit "[d]ischarges from MS4s that cause or contribute to the violation of water quality standards (designated beneficial uses and water quality objectives developed to protect beneficial uses); and prohibit discharges from MS4s containing pollutants that have not been reduced to the MEP.[951]

The Findings in the test claim permit state that the copermittees have generally been implementing the JRMPs since 2003. However, runoff discharges continue to cause or contribute to violations of water quality standards as evidenced by the copermittees' monitoring results.[952] Thus, the test claim permit contains "new or modified requirements that are necessary to improve the Copermittees' efforts to reduce the discharge of pollutants in stormwater runoff to the MEP and achieve water quality standards."[953] The Findings further state that annual reporting requirements included in the permit are necessary to meet federal requirements and to evaluate the effectiveness

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[949] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3468-3471 (Order No. R9-2002-0001, section H.2.).

[950] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3472 (Order No. R9-2002-0001, section I.).

[951] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2134 (Order No. R9-2009-0002, section A.).

[952] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2122 (Order No. R9-2009-0002, Finding D.1.b.).

[953] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2123 (Order No. R9-2009-0002, Finding D.1.c.).

and compliance with the copermittees' programs.[954] The Fact Sheet for the test claim permit states that the new requirements "provide the Copermittees with the framework for improving their standard assessment metrics" and to "ensure Copermittees are allocating resources and effort to address priority problems and pollutants identified in the watershed analysis."[955]

As described below, the Commission finds that Section J imposes some new requirements when compared to the prior permit.

b. Section J.1.a. imposes new requirements to establish assessment measures based on six outcome levels developed by the California Storm Water Quality Association (CASQA) that target water quality outcomes and the results of municipal enforcement activities for the 303(d) impaired waterbodies and environmentally sensitive areas.

Section J.1.a. requires each copermittee to annually assess the implementation and effectiveness of its JRMP based on specific objectives for 303(d) impaired waterbodies, environmentally sensitive areas, major program component outcomes, and actions taken to protect receiving water limitations.[956] In order to conduct the assessments, claimants are required to: establish assessment measures and methods that conform to six outcome levels developed by the California Storm Water Quality Association (CASQA) for the 303(d) listed waterbodies and environmentally sensitive areas in order to meet water quality objectives; develop objectives for each program component in the JRMP; and, develop and implement an effectiveness assessment strategy for each measure conducted to prevent or reduce stormwater pollutants that are causing or contributing to the exceedance of water quality standards, as follows:

1. Objectives for 303(d) impaired waterbodies - reduce stormwater pollutant loadings in all 303(d) waterbodies as follows:

   - Establish annual assessment measures or methods specifically for reducing discharges of stormwater pollutants from the MS4 into each downstream 303(d) listed water body. Assessment measures must conform to each of the six outcome levels developed by the California Storm Water Quality Association (CASQA). Attachment C-4. to the test claim permit defines these outcome levels as follows:

[954] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2123 (Order No. R9-2009-0002, Finding D.1.g.).

[955] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2470-2471 (Order No. R9-2009-0002, Fact Sheet).

[956] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2195-2196 (Order No. R9-2009-0002, section J.1.a.).

Level 1 outcomes are those directly related to the implementation of specific activities prescribed by the test claim permit or established pursuant to it.

Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, businesses, and municipal employees.

Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation.

Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed.

Level 5 outcomes measures changes in one or more specific constituents or stressors in discharges into or from MS4s.

Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity, or beneficial use attainment.[957]

- Annually evaluate each outcome, and use the outcomes to assess the effectiveness of implemented management measures toward reducing MS4 discharges of the specific pollutants causing or contributing to conditions of impairment.
- The assessment measures must target both water quality outcomes and the results of municipal enforcement activities.

2. Objective for environmentally sensitive areas[958] - prevent stormwater MS4 discharges from causing or contributing to conditions of pollution, nuisance, or

[957] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2224 (Order No. R9-2009-0002, Attachment C-4.).

[958] "Environmentally Sensitive Areas (ESAs)" are defined as follows: "Areas that include but are not limited to all Clean Water Act 303(d) impaired water bodies; areas designated as Areas of Special Biological Significance by the State Water Resources Control Board (Water Quality Control Plan for the San Diego Basin (1994) and amendments); State Water Quality Protected Areas; water bodies designated with the RARE beneficial use by the State Water Resources Control Board (Water Quality Control Plan for the San Diego Basin (1994) and amendments); areas designated as preserves or their equivalent under the Natural Communities Conservation Program within the Cities and County of Orange; and any other equivalent environmentally sensitive areas which have been identified by the Copermittees." (Exhibit C, Water

contamination by: establishing annual measures or methods for each of the six outcome levels described above that specifically assesses the effectiveness of its management measures for protecting downstream environmentally sensitive areas from adverse effects caused by discharges from the MS4; and annually implement each assessment measure or method to reduce the MS4 discharges of the specific pollutants causing or contributing to conditions of impairment and evaluate the outcome. The assessment measures must target both water quality outcomes and the results of municipal enforcement activities.

3. Objectives for major program component outcomes. Develop objectives for each program component in Section F of the test claim permit governing the JRMP. The objectives must be established as appropriate to program implementation and evaluation of water quality and management practices. Assess approaches for program implementation. The assessment measures must target both water quality outcomes and the results of municipal enforcement activities.

4. Objectives for actions taken to protect receiving water limitations. Develop and implement an effectiveness assessment strategy for each measure conducted in response to a determination to implement the iterative approach to prevent or reduce stormwater pollutants that are causing or contributing to the exceedance of water quality standards.

The activities to develop objectives, strategies, and assessment measures, and to annually assess the effectiveness of the major program component outcomes of the JRMP (in number 3 above) and the actions taken to protect receiving water limitations (number 4 above) are not new. Section F.8. of the prior permit also required each copermittee to develop specific direct and indirect measurements to: track the long term progress of the JRMP towards achieving improvements in water quality; assess the effectiveness of its JRMP by using surveys, pollutant loading estimations, and receiving water quality monitoring; and, to report on the assessment in the annual report.[959] Sections H.1.a.9., and I. required each copermittee to submit an individual JRMP document that contains a description of the strategies used for assessing the long-term effectiveness of the JRMP, and to submit an annual report with a comprehensive description of all the activities conducted to meet the requirements of

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Boards' Comments on the Test Claim, filed October 21, 2016, page 2225 (Order No. R9-2009-0002, Attachment C-5.).

[959] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3467 (Order No. R9-2002-0001, section F.8.).

the JRMP, identification of management measures proven to be ineffective in reducing urban runoff pollutants and flow, and proposed revisions to the JRMP.[960]

In addition, the requirement to establish objectives, strategies, and assessment measures, and to annually assess the effectiveness of its JRMP for 303(d) impaired waterbodies and environmentally sensitive areas is not new. Section F.8. of the prior permit required the assessment of the progress of the JRMP "towards achieving improvements in water quality" in all receiving waters by surveys, pollutant loading estimations, and receiving water quality monitoring, but generally left the methods for assessment up to the copermittees.[961]

Section J.1.a., however, now requires claimants to establish annual assessment measures for reducing discharges into each downstream 303(d) listed water body and downstream environmentally sensitive areas that conform to the following six outcome levels developed by the California Storm Water Quality Association (CASQA), and which target water quality outcomes and the results of municipal enforcement activities, and to annually assess those measures:

> Level 1 outcomes are those directly related to the implementation of specific activities prescribed by the test claim permit or established pursuant to it.
>
> Level 2 outcomes are measured as increases in knowledge and awareness among target audiences such as residents, businesses, and municipal employees.
>
> Level 3 outcomes measure the effectiveness of activities in affecting behavioral change and BMP implementation.
>
> Level 4 outcomes measure load reductions which quantify changes in the amounts of pollutants associated with specific sources before and after a BMP or other control measure is employed.
>
> Level 5 outcomes measures changes in one or more specific constituents or stressors in discharges into or from MS4s.

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[960] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3468-3472 (Order No. R9-2002-0001, sections H.1.a.9. and I.).

[961] See also Finding 10 and 14 of the prior permit, which state that "urban runoff management programs designed to reduce discharges of pollutants and flow into and from MS4s to the MEP can protect receiving water quality by promoting attainment of water quality objectives necessary to support designated beneficial uses" and that "assessment is necessary to assure that an Urban Runoff Management Program is sufficiently comprehensive and effective to achieve compliance with receiving water quality objectives." (Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3433-3434.)

> Level 6 outcomes measure changes to receiving water quality resulting from discharges into and from MS4s, and may be expressed through a variety of means such as compliance with water quality objectives or other regulatory benchmarks, protection of biological integrity, or beneficial use attainment.[962]

Establishing these specific assessment measures and outcome levels to determine if the JRMP has been effective for 303(d) impaired waterbodies and environmentally sensitive areas and annually assessing those measures were not required by the prior permit.

i. Sections J.1.b. and J.2., addressing program modifications identified during annual effectiveness assessments, does not impose any new requirements.

Section J.1.b. requires each copermittee to identify modifications and improvements needed to maximize JRMP effectiveness, as necessary to achieve compliance with the test claim permit. Section J.2. then requires each copermittee to:

- Develop and implement a plan and a schedule to address these program modifications and improvements.
- Jurisdictional activities and BMPs that are ineffective or less effective than other comparable jurisdictional activities and BMPs "must be replaced or improved upon by implementation of more effective jurisdictional activities/BMPs." And where monitoring data exhibits persistent water quality problems that are caused or contributed to by MS4 discharges, jurisdictional activities or BMPs applicable to the water quality problems "must be modified and improved to correct the water quality problems."[963]

The first requirement, to identify modifications and improvements needed to maximize JRMP effectiveness as necessary to achieve compliance with the test claim permit, is not new. Section I. of the prior permit required each copermittee to submit an annual JRMP report that identified management measures proven to be ineffective in reducing urban runoff pollutants and flow, and proposed revisions to the JRMP to comply with the requirements of the permit and improve water quality standards.[964]

The requirement to modify, improve, and correct jurisdictional activities and BMPs for MS4 discharges that have been shown, based on monitoring data, to cause or contribute to persistent water quality problems, and to develop and implement a plan

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[962] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2195 (Order No. R9-2009-0002, section J.1.a.).

[963] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2196-2197 (Order No. R9-2009-0002, section J.2.).

[964] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3472 (Order No. R9-2002-0001, section I.).

and a schedule to address these program modifications and improvements are also not new. The prior permit, like the test claim permit, contained receiving water limitations that prohibit discharges from MS4s that cause or contribute to the violation of water quality standards.[965] Thus, section C.2. of the prior permit required the JRMP to be designed to achieve compliance with water quality standards, and if exceedances of water quality standards persisted notwithstanding implementation of the JRMP, the copermittee "shall assure compliance" with the following procedure to submit proposed BMP modifications and an implementation schedule to prevent or reduce pollutants that are causing or contributing to the exceedance of water quality standards to the Regional Board:

1. Upon determination by either the copermittee or the Regional Board that MS4 discharges are causing or contributing to an exceedance of an applicable water quality standard, the copermittee shall promptly notify and thereafter submit a report to the Regional Board that describes BMPs that are currently being implemented and *additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedance of water quality standards. The report shall include an implementation schedul*e.
2. Submit any modifications to the report required by the Regional Board within 30 days of notification.
3. Within 30 days following approval of the report by the Regional Board, the copermittee *shall revise its JRMP and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, the implementation schedule,* and any additional monitoring required.
4. Implement the revised JRMP and monitoring program in accordance with the approved schedule.[966]

Finally, the requirement to replace or improve jurisdictional activities and BMPs that are ineffective or less effective than other comparable jurisdictional activities and BMPs is not new. The prior permit expressly prohibited discharges from MS4s containing pollutants that have not been reduced to the MEP, and required that the "Jurisdictional URMP shall be designed to achieve compliance with" the receiving water limitations and Basin Plan prohibitions.[967] Section I of the prior permit also required each copermittee to submit an annual JRMP report that identified management measures proven to be ineffective in reducing urban runoff pollutants and flow, and proposed revisions to the

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[965] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3438-3439 (Order No. R9-2002-0001, sections C.1. and A.2.).

[966] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3440 (Order No. R9-2002-0001, section C.2, emphasis added).

[967] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3436, 3440 (Order No. R9-2002-0001, sections A., and C.).

JRMP to comply with the requirements of the permit and improve water quality standards.[968] The Fact Sheet for the prior permit also stated the following:

> If assessment of a given BMP confirms that the BMP is ineffective, the iterative process should be restarted, with redevelopment of a new BMP which is anticipated to result in compliance with receiving water quality objectives. Regarding BMP assessment, the SWRCB Urban Runoff Technical Advisory Committee states "The [Storm Water Pollution Prevention Plan] SWPPP must be revised if an inspection indicates a need to alter the BMPs: drop ineffective BMPs, add new BMPs, or modify a BMP that is to remain in the SWPPP."[969]

ii. Section J.3., which identifies the information required in the annual assessment reports, requires new information regarding the assessments based on the six outcome levels developed by the California Storm Water Quality Association (CASQA) for 303(d) water bodies and environmentally sensitive areas, and a description of the steps that will be taken to improve the ability to assess program effectiveness including the six outcome levels.

Section J.3.a. requires that each copermittee include a description and summary of its annual and long-term effectiveness assessments within each annual report, beginning with the 2011 annual report. The report must include the following information:

1. A description and results of the annual assessment measures or methods for reducing discharges of stormwater pollutants from the MS4 into each 303(d) listed waterbody.
2. A description and results of the annual assessment measures or methods for managing discharges of pollutants from the MS4 into each downstream environmentally sensitive area.
3. A description of the objectives and corresponding assessment measures and results used to evaluate the effectiveness of each general program component. The results must include findings from program implementation and water quality assessment.
4. A description and results of the annual assessment measures or methods employed specifically for actions taken to protect receiving water limitations in accordance with Section A.3. of the test claim permit [Prohibitions and Receiving Water Limitations].

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[968] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3472 (Order No. R9-2002-0001, section I.).

[969] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3568 (Order No. R9-2002-0001, Fact Sheet).

5. A description of the steps taken to use dry weather and wet weather monitoring data to assess the effectiveness of the programs for 303(d) impairments, environmentally sensitive areas, and the general program components.
6. A description of activities conducted in response to investigations of illicit discharge and illicit connection activities, including how each investigation was resolved and the pollution involved.
7. A description of each program modification in response to the results of effectiveness assessments, and the basis for determining that each modified activity and BMP represents an improvement with respect to reducing the discharge of stormwater pollutants from the MS4.
8. A description of the steps that will be taken to improve the copermittees' ability to assess program effectiveness using measurable targeted outcomes, assessment measures, assessment methods, and outcome levels 1-6, and include a time schedule for when improvement will occur.
9. A description of the steps that will be taken to identify aspects of the JRMP that will be changed based on the results of the effectiveness assessment.[970]

Under the prior permit, the claimants also had to submit to the Regional Board an annual assessment report which contained most of the same information required by section J.3. of the test claim permit. Section F.8. of the prior permit required each copermittee to develop specific direct and indirect measurements to track the long term progress of the JRMP towards achieving improvements in water quality; assess the effectiveness of its JRMP by using surveys, pollutant loading estimations, and receiving water quality monitoring; and, to report on the assessment in the annual report.[971] Sections H.1.a.9. and I. of the prior permit required each copermittee to submit: an individual JRMP document that contains a description of the strategies used for assessing the long-term effectiveness of the JRMP; an annual report with a "comprehensive description" of all the activities conducted to meet the requirements of the JRMP; a summary of monitoring data; and identification of management measures proven to be ineffective in reducing urban runoff pollutants and flow and water quality improvements or degradation, and proposed revisions to the JRMP.[972] In addition, section I. of the prior permit required the annual report to include "an accounting of all reports of illicit discharges and how they were resolved, inspections, enforcement

[970] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2197 (Order No. R9-2009-0002, section J.3.a.).

[971] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3467 (Order No. R9-2002-0001, section F.8.).

[972] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3468-3472 (Order No. R9-2002-0001, sections H.1.a.9., and I.).

actions . . . ."[973] This is the same information required by sections J.3.a.3. through 7. and 9. above.

However, as indicated in the sections above, establishing annual assessment measures for reducing discharges into each downstream 303(d) listed water body and downstream environmentally sensitive areas that conform to the six outcome levels developed by CASQA, and annually assessing those measures is new. Thus, the information required by sections J.3.a.1. and 2. to report that information is new.

In addition, section J.3.a.8. now requires the claimants to provide a description in the annual report of the steps that will be taken to improve their ability to assess program effectiveness for all measures and methods, including the six outcome levels developed by CASQA for 303(d) water bodies and environmentally sensitive areas, and a time schedule for when improvement will occur. This information was not required to be reported by the prior law and is therefore new.

Accordingly, the Commission finds that the following information required to be included in the annual assessment report by section J.3. of the test claim permit is new:

- A description and results of the annual assessment measures or methods for reducing discharges of stormwater pollutants from the MS4 into each 303(d) listed waterbody. (Section J.3.a.1. of the test claim permit.)
- A description and results of the annual assessment measures or methods for managing discharges of pollutants from the MS4 into each downstream environmentally sensitive area. (Section J.3.a.2. of the test claim permit.)
- A description of the steps that will be taken to improve the copermittees' ability to assess program effectiveness using measurable targeted outcomes, assessment measures, assessment methods, and outcome levels 1-6, and include a time schedule for when improvement will occur. (Section J.3.a.8. of the test claim permit.)

iii. Section J.4., which requires the development of a work plan to address high priority water quality problems, is new.

Section J.4. requires each copermittee to develop a work plan to address high priority water quality problems in an iterative manner over the life of the permit. The plan is required to be submitted to the Regional Board within 365 days of the adoption of the test claim permit, and shall be annually updated and included in the annual JRMP report. "The goal of the work plan is to demonstrate a responsive and adaptive approach for the judicious and effective use of available resources to attach the highest priority problems." The work plan shall include the following information:

[973] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3472 (Order No. R9-2002-0001, section I.).

1. The problems and priorities identified during the assessment.
2. A list of priority pollutants and known or suspected sources.
3. A brief description of the strategy employed to reduce, eliminate or mitigate the negative impacts.
4. A description and schedule for new or modified BMPs. The schedule is to include dates for significant milestones.
5. A description of how the selected activities will address an identified high priority problem, including a description of the expected effectiveness and benefits of the new or modified BMPs.
6. A description of how efficacy results will be used to modify priorities and implementation.
7. A review of past activities implemented, progress in meeting water quality standards, and planned program adjustments.[974]

The Fact Sheet states that the work plan was "added" to ensure the permittees are addressing priority problems and pollutants in the watershed as follows:

> This section includes a requirement for the Copermittees to develop and implement a workplan identifying and addressing the highest priority issues in the watershed. The workplan requirement in the JRMP section has been added to ensure Copermittees are allocating resources and effort to address priority problems and pollutants identified in the watershed analysis. This section has been added to ensure Copermittees use the annual watershed water quality assessment to asses, adjust and tailor their JRMP programs.[975]

The Commission finds that the submission of the initial and annual work plan that addresses high priority water quality problems, in addition to the existing requirements of submitting the proposed and updated JRMP and annual assessment reports, is a new requirement.

[974] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2198 (Order No. R9-2009-0002, section J.4.).

[975] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2471 (Order No. 2009-0002, Fact Sheet).

c. The new requirements imposed by section J. of the test claim permit are mandated by the state and constitute a new program or higher level of service.

The claimants contend the new requirements go beyond federal law requirements, are mandated by the state, and impose a new program or higher level of service. The claimants state the following:

> . . . under the 2002 Permit, Claimants were authorized to develop their own strategy for assessing the effectiveness of their programs and to report that method to the Regional Board. [Citation omitted.] As further discussed in the Narrative Statement, the 2009 Permit is much more extensive and prescriptive. In it, the Regional Board mandated the manner and elements of the assessment.
>
> Thus, whereas under the 2002 Permit the Claimants could develop their own annual assessment procedure, under the 2009 Permit Claimants are now required to assess (1) discharges to "303(d)" waterbodies; discharges to "Environmentally Sensitive Areas ("ESAs")," (3) the effectiveness of each general program component of the permit, and (4) measures employed to protect receiving water limitations. The assessment must further describe (1) the use of dry-weather and wet weather monitoring data for these purposes of making these assessments, (2) activities conducted in response to investigations of illicit discharges and illicit connections, (3) modifications of permit programs made in response to these assessments; (4) steps to be taken to improve Claimants' ability to assess program effectiveness; and (5) steps to be taken to identify changes to Claimants jurisdictional runoff management program in light of the assessments. [Citation omitted.] In addition, pursuant to Section J.4., Claimants are required to develop a work plan to address their high priority water quality issues in an iterative manner over the life of the permit.
>
> This section is therefore more than just a continuation of prior effectiveness assessments. These highly prescriptive terms and the new work plan represent a significant increase in the level and type of activities required of Claimants, and thus an increase in the actual level or quality of the governmental services being provided. As such, these requirements are a new program or higher level of service within the meaning of article XIII B, section 6. [Citation omitted.][976]

[976] Exhibit F, Claimants' Rebuttal Comments, filed January 6, 2017, pages 37-38

In comments on the Draft Proposed Decision, the claimants incorrectly assert that the Commission should disregard the prior 2002 permit and find that all of the program assessment and reporting obligations are new.[977]

The Water Boards contend that the requirements in section J. of the test claim permit are not mandated by the state, but are necessary to reduce the discharge of pollutants in stormwater runoff to the federal MEP standard. Reducing the discharge of stormwater pollutants to the MEP requires the copermittees to assess each program component and revise activities, control measures, BMPs, and measurable goals as necessary to meet MEP. Thus, the copermittees JRMPs must be continually assessed and modified to incorporate improved programs, control measures, and BMPs in order to achieve the evolving MEP standard. The Water Boards cite the following findings of the Regional Board to argue that the annual effectiveness assessment requirements are crucial to the achievement of the MEP standard:

> The Jurisdictional work plan closes the loop on implementation, monitoring, and effectiveness assessment. The work plan is the strategy by which the effectiveness assessment is used to prioritize the implementation of the Copermittee's storm water program. The work plan requirement in the JRMP section has been added to ensure Copermittees are allocating resources and efforts to address priority problems and pollutants identified in the watershed analysis. This section has been added to ensure Copermittees use the annual assessment to adjust and tailor their JRMP programs. The work plan is specifically designed for the Copermittees to prioritize their limited resources on water quality problems and on efforts that improve water quality. By planning and adapting, the Copermittees will be able to use their resources more effectively and not waste time and effort on actions that do not improve water quality.[978]

The Water Boards also rely on U.S. EPA guidance, which states that "the interim permitting approach uses best management practices (BMPs) in first-round storm water permits, and expanded better tailored BMPs in subsequent permits, where necessary, to provide for attainment of water quality standards."[979]

The Water Boards further contend that the 2002 permit contained annual assessment reporting requirements with implementation schedules when the copermittees

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[977] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, page 31.

[978] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 37.

[979] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 36 (citing to Exhibit K (21), Federal Interim Permitting Approach for WQBELs, 61 FR 43761, August 26, 1996.)

determined that MS4 discharges were causing or contributing to water quality exceedances. Incorporation of the 2009 permit's annual reporting requirements does not amount to a new program or higher level of service when reporting is already conducted and is essential to the implementation of successively improved BMPs to meet the MEP standard. The Water Boards also note that the copermittees' ROWD recognized the importance of assessment.[980]

And finally, the Water Boards contend that the claimants have fee authority sufficient to pay for the costs of any new requirements.[981]

The Commission finds that the new requirements are mandated by the state, and impose a new program or higher level of service.

i. The new activities required by section J. of the test claim permit are mandated by the state because the state exercised discretion when requiring these activities and there is no evidence that the new required activities are the only means by which the federal MEP standard can be met.

As indicated above, the following activities required by the test claim permit are new:

- Establish annual assessment measures for reducing discharges into each downstream 303(d) listed water body and downstream environmentally sensitive areas that conform to the six outcome levels developed by CASQA, and which target water quality outcomes and the results of municipal enforcement activities, and to annually assess those measures. (J.1.a.)
- Include the following effectiveness assessment information within each annual report, beginning with the 2011 annual report:
    1. A description and results of the annual assessment measures or methods for reducing discharges of stormwater pollutants from the MS4 into each 303(d) listed waterbody. (J.3.a.1.)
    2. A description and results of the annual assessment measures or methods for managing discharges of pollutants from the MS4 into each downstream environmentally sensitive area. (J.3.a.2.)
    3. A description of the steps that will be taken to improve the copermittees' ability to assess program effectiveness using measurable targeted outcomes, assessment measures, assessment methods, and outcome

[980] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 38.

[981] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 38.

levels 1-6, and include a time schedule for when improvement will occur. (J.3.a.8.)

- Develop a work plan to address high priority water quality problems in an iterative manner over the life of the permit. The plan is required to be submitted to the Regional Board within 365 days of the adoption of the test claim permit, and shall be annually updated and included in the annual JRMP report. The work plan shall include the following information:
    1. The problems and priorities identified during the assessment.
    2. A list of priority pollutants and known or suspected sources.
    3. A brief description of the strategy employed to reduce, eliminate or mitigate the negative impacts.
    4. A description and schedule for new or modified BMPs. The schedule is to include dates for significant milestones.
    5. A description of how the selected activities will address an identified high priority problem, including a description of the expected effectiveness and benefits of the new or modified BMPs.
    6. A description of how efficacy results will be used to modify priorities and implementation.
    7. A review of past activities implemented, progress in meeting water quality standards, and planned program adjustments. (J.4.)

In the 2016 decision in *Department of Finance v. Commission on State Mandates*, the California Supreme Court identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or the federal government:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[982]

The courts have also explained that "except where a regional board finds the conditions are the *only means* by which the [federal] 'maximum extent practicable' standard can be met, the State exercises a true choice by determining what controls are necessary to

[982] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

meet the standard."[983] "That the San Diego Regional Board found the permit requirements were 'necessary' to meet the standard establishes only that the San Diego Regional Board exercised its discretion."[984]

In this case, federal law requires the claimants to assess the controls to estimate "reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water quality management program. The assessment shall also identify known impacts of storm water controls on ground water."[985] In addition, federal regulations require each permittee to submit an annual report to the Regional Board, which shall include the status of implementing the components of the storm water management program that are established as permit conditions; proposed changes to the storm water management programs that are established as permit condition; and proposed revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit.[986]

The Water Boards argue that the requirements in section J. are necessary to comply with federal law since the copermittees JRMPs must be continually assessed and modified to incorporate improved programs, control measures, and BMPs in order to achieve the evolving federal MEP standard. Federal law, however, gives the State discretion to determine what controls are necessary to meet the MEP standard, and does not require any specific activities. Moreover, there is no evidence in the record that the new required activities are the only means by which the federal MEP standard can be met.

Accordingly, the Commission finds that the new activities required by section J. are mandated by the state.

ii. The new activities required by section J. impose a new program or higher level of service.

Article XIII B, section 6 requires reimbursement whenever the Legislature or any state agency mandates a new program or higher level of service that results in costs mandated by the state. To determine whether a program is new or provides a higher level of service in an existing program, the requirements in the test claim statute or executive order are compared with the legal requirements in effect before the test claim

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[983] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 (citing to *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.)

[984] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

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

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

statute or executive order.[987] If the requirements are new, the analysis continues to determine if the requirements constitute a "program" within the meaning of article XIII B, section 6, which is defined as one that carries out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[988] Only one of these alternatives is required to establish a new program or higher level of service.[989]

Here, the new requirements cited in section J. are expressly directed toward the local agency permittees and, thus, are unique to local government. "The challenged requirements are not bans or limits on pollution levels, they are mandates to perform specific actions" designed to reduce the discharge of pollutants in stormwater runoff to the MEP, and prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards.[990]Accordingly, the following activities mandate a new program or higher level of service:

- Establish annual assessment measures for reducing discharges into each downstream 303(d) listed water body and downstream environmentally sensitive areas that conform to the six outcome levels developed by CASQA, and which target water quality outcomes and the results of municipal enforcement activities, and to annually assess those measures. (J.1.a.)
- Include the following effectiveness assessment information within each annual report, beginning with the 2011 annual report:
    1. A description and results of the annual assessment measures or methods for reducing discharges of stormwater pollutants from the MS4 into each 303(d) listed waterbody. (J.3.a.1.)
    2. A description and results of the annual assessment measures or methods for managing discharges of pollutants from the MS4 into each downstream environmentally sensitive area. (J.3.a.2.)

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[987] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 75, 98; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

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

[989] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

[990] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560; Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2123 (Order No. R9-2009-0002, Finding D.1.c.).

3. A description of the steps that will be taken to improve the copermittees' ability to assess program effectiveness using measurable targeted outcomes, assessment measures, assessment methods, and outcome levels 1-6, and include a time schedule for when improvement will occur. (J.3.a.8.)

- Develop a work plan to address high priority water quality problems in an iterative manner over the life of the permit. The plan is required to be submitted to the Regional Board within 365 days of the adoption of the test claim permit, and shall be annually updated and included in the annual JRMP report. The work plan shall include the following information:
    1. The problems and priorities identified during the assessment.
    2. A list of priority pollutants and known or suspected sources.
    3. A brief description of the strategy employed to reduce, eliminate or mitigate the negative impacts.
    4. A description and schedule for new or modified BMPs. The schedule is to include dates for significant milestones.
    5. A description of how the selected activities will address an identified high priority problem, including a description of the expected effectiveness and benefits of the new or modified BMPs.
    6. A description of how efficacy results will be used to modify priorities and implementation.
    7. A review of past activities implemented, progress in meeting water quality standards, and planned program adjustments. (Section J.4.)

9. Sections F.1.d.7.i.; F.3.a.4.c.; and only as they relate to the Reporting Checklist K.3.a. and Attachment D., With Respect to the Annual Reports to the Regional Board, Impose a State-Mandated New Program or Higher Level of Service for Some Activities.

The claimants' Test Claim, on page 37, pleads sections K.1.a. and K.3., regarding the annual reporting requirements, as follows: "New reporting requirements, including describing all activities a Copermittee will undertake pursuant to the 2009 Permit and an individual Jurisdictional Runoff Management Report as set forth in Sections K.1.a. and K.3. of the 2009 Permit."[991]

However, page 93 of the Test Claim, specifically addressing the annual reporting requirements, omits any discussion of section K.1.a. and adds a discussion of sections F.1.d.7.i., F.3.a.4.c., and Attachment D., as follows: "2009 Permit sections F.1.d.(7).(i),

[991] Exhibit A, Test Claim, filed June 30, 2011, page 37.

F.3.a.(4).(c),; section K.3.a.(3), 1 [sic] and Attachment D of the 2009 Permit are unfunded mandates being challenged."[992]

And pages 93-95 of the Test Claim discuss the requirements in sections F.1.d.7.i., F.3.a.4.c., K.3.a.3., and Attachment D., and contend that the following activities are now required to be included in the annual report and are mandated by the state.[993]

- Priority development projects choosing to participate in the LID waiver program, including details of the feasibility analysis, BMPs implemented, and funding details, pursuant to section F.1.d.7.i., of the test claim permit.
- An evaluation of existing flood control devices that cause or contribute to a condition of pollution, measures to reduce or eliminate the structure's effect on pollution, and an inventory and evaluation of the feasibility of retrofitting the flood control device, pursuant to section F.3.a.4.c., of the test claim permit.
- A reporting checklist as required by section K.3.a.3. and Attachment D. of the test claim permit.[994]

Government Code section 17553(b)(1) requires test claims to identify the specific sections of the executive order alleged to contain a mandate and a detailed description of the new activities mandated by the state. Section K.1.a., as listed by the claimants on page 37 of the Test Claim, requires the submittal of an updated JRMP to the Regional Board, and does not address the annual reporting requirements.[995] Since the claimants have not specifically addressed or identified any activities allegedly mandated by section K.1.a., the Commission does not take jurisdiction of section K.1.a.

This Decision will address sections F.1.d.7.i.; F.3.a.4.c.; and, only as they relate to the reporting checklist, K.3.a. and Attachment D., which have been adequately identified pursuant to Government Code section 17553(b)(1) as allegedly imposing new state-mandated activities.[996] No other activities or costs have been alleged by the claimants with respect to the annual reporting requirements.

As described below, the Commission finds that the requirements in section F.3.a.4.c. are not new and are, therefore, denied. The Commission further finds that the new requirements in sections F.1.d.7.i., and, only as they relate to the reporting checklist

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[992] Exhibit A, Test Claim, filed June 30, 2011, page 93.

[993] Exhibit A, Test Claim, filed June 30, 2011, pages 93-95.

[994] Exhibit A, Test Claim, filed June 30, 2011, page 94.

[995] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2199 (Order No. R9-2009-0002, section K.1.a.).

[996] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2155, 2171, 2202, and 2235 (Order No. R9-2009-0002, sections F.1.d.7.i., K.3.a., and, Attachment D.).

K.3.a. and Attachment D. are not mandated by the state for the reporting of a permittee's own municipal development projects, construction, and facilities because the requirement is triggered by a local discretionary decision to build. However, the Commission finds that the following activities mandate a new program or higher level of service:

- Except for the permittee's own municipal priority development projects, notify the Regional Board in the annual report of all other priority development projects choosing to participate in the LID waiver program. The annual report must include the following information: name of the developer of the participating priority development project; site location; reason for LID waiver including technical feasibility analysis; description of BMPs implemented; total amount deposited, if any, into the stormwater mitigation fund; water quality improvement projects proposed to be funded; and timeframe for implementation of water quality improvement projects. (Section F.1.d.7.i.)[997]
- Gather and report the following new information in the annual report checklist:
    - Construction - Except for the permittee's own municipal construction, which is not reimbursable, gather and report number of active sites, number of inactive sites, and number of violations for all other construction.
    - New development - Except for the permittee's own municipal new development, which is not reimbursable, gather and report the number of development plan reviews, number of grading permits issued, and number of projects exempted from interim/final hydromodification requirements for all other new development.
    - Post construction development – Except for the permittee's own municipal priority development projects, which is not reimbursable, gather and report the number of priority development projects; and number of SUSMP [standard urban storm water mitigation plans] required post construction BMP violations.
    - MS4 maintenance –amount of waste removed, and total miles of MS4 inspected.
    - Municipal/Commercial/industrial – Except for the permittee's own municipal facilities, which is not reimbursable, gather and report the

[997] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2155 (Order No. R9-2009-0002, section F.1.d.7.i.).

number of facilities and number of violations. (Section K.3.a.3.c., and Attachment D., section D-2., of the test claim permit.)[998]

a. Background

i. Federal law requires that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible, and to file reports to ensure compliance with the permit and water quality standards.

Federal law requires each permittee to propose a management program to reduce the discharge of pollutants to the MEP using BMPs, control techniques, and other appropriate systems. "At a minimum," the program is required to describe specified information, including as relevant here, a "description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible."[999]

Federal law also requires that the permittee file reports to ensure compliance with the permit and water quality standards.[1000] Federal regulations require each permittee to submit an annual report to the Regional Board, which shall include the following information:

- The status of implementing the components of the storm water management program that are established as permit conditions.
- Proposed changes to the storm water management programs that are established as permit condition. Such proposed changes shall be consistent with 40 Code of Federal Regulations 122.26(d)(2)(iii) [which requires a permittee to provide information, as specified, characterizing the quality and quantity of discharges covered in the permit application].

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[998] Exhibit C, Water Boards' Comments on the Test Claim filed October 21, 2016, pages 2202, 2235 (Order No. R9-2009-0002, section K.3.a.3.c., and Attachment D., section D-2.).

[999] United States Code, title 33, section 1342(p)(3)(B); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(4).

[1000] United States Code, title 33, section 1342(a)(2) ("The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.").

- Revisions, if necessary, to the assessment of controls and the fiscal analysis reported in the permit.
- A summary of data, including monitoring data that is accumulated throughout the reporting year.
- Annual expenditures and budget for year following each annual report.
- A summary describing the number and nature of enforcement actions, inspections, and public education programs.
- Identification of water quality improvements or degradation.[1001]

Other reporting requirements are imposed by federal law when the permittee plans any changes that could significantly change the nature or increase the quantity of pollutants discharged, or that may result in noncompliance with the permit conditions.[1002] In addition, a discharger shall furnish, within a reasonable time, any information requested by the Regional Board to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit, or to determine compliance with the permit.[1003]

ii. The prior permit required permittees to evaluate the feasibility of retrofitting existing structural flood control devices and retrofit where needed and to submit an annual report to the Regional Board.

Under the prior permit, each copermittee, as part of the JRMP, was required to minimize the short and long-term impacts on receiving water quality from all types of existing development, including existing municipal development.[1004] To establish priorities for oversight of municipal areas and activities required by the permit, each copermittee had to prioritize all the municipal land use areas and activities that generate pollutants and are a threat to water quality, and update the inventory annually. "At a minimum," the high priority municipal areas and activities had to include "Flood Management Projects and Flood Control Devices."[1005] In addition, each copermittee was required to designate a set of minimum BMPs for high priority areas, and "evaluate the feasibility of retrofitting existing structural flood control devices and retrofit where needed."[1006] The

[1001] Code of Federal Regulations, title 40, section 122.42(c).

[1002] Code of Federal Regulations, title 40, section 122.41(l).

[1003] Code of Federal Regulations section, title 40, 122.41(h).

[1004] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3455-3457 (Order No. R9-2002-0001, section F.3.a.).

[1005] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3456 (Order No. R9-2002-0001, section F.3.a.3.b.ii.).

[1006] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3456 (Order No. R9-2002-0001, section F.3.a.4.b.i.).

prior permit further states that "[a]t a minimum, each Copermittee shall inspect high priority municipal areas and activities annually" and, based on the inspection findings, "shall implement all follow-up actions necessary to comply with this Order."[1007]

Within 365 days of the adoption of the prior permit, each copermittee was required to submit to the principal permittee, who was then required to submit a unified JRMP "document" to the Regional Board, with a signed certified statement from each copermittee under penalty of perjury, describing all activities undertaken to comply with each component of JRMP imposed by section F. of the permit (i.e., construction; existing municipal, industrial, commercial, and residential developments; education; illicit discharges detection and elimination; public participation; assessment of the JRMP effectiveness; fiscal analysis; land use planning for new development and redevelopment; firefighting; and common interest areas and homeowners associations).[1008] With respect to existing municipal developments, the document had to contain a description of the pollution prevention methods required, the inventory of land use areas and activities, the prioritization of areas based on the threat to water quality, the BMPs that will be implemented or are required to be implemented for each priority category, maintenance activities and schedules, and the planned inspection frequencies for the high priority category.[1009]

Annually, each copermittee was required to submit to the principal permittee, who was then required to submit a unified JRMP annual report to the Regional Board, with a signed certified statement from each copermittee under penalty of perjury, a report describing the jurisdictional activities conducted during the past annual reporting period. Each JRMP annual report was required to contain, "at a minimum," the following information:

- A comprehensive description of all activities conducted by the copermittee to meet all requirements of each component of the JRMP.
- An accounting of each copermittee's reports of illicit discharges and how they were involved, inspections conducted, enforcement actions taken, and education efforts conducted.
- Public participation mechanisms used during the JRMP implementation process.
- Proposed revisions to the JRMP.

[1007] Exhibit C, Water Boards' Comments on the Test Claim filed October 21, 2016, page 3457 (Order No. R9-2002-0001, section F.3.a.7.).

[1008] Exhibit C, Water Boards' Comments on the Test Claim filed October 21, 2016, page 3468-3471, 3497 (Order No. R9-2002-0001, section H.; Attachment C.7.).

[1009] Exhibit C, Water Boards' Comments on the Test Claim filed October 21, 2016, pages 3468, 3471 (Order No. R9-2002-0001, section H.2. and H.3.).

- A summary of all urban runoff related data not included in the annual monitoring report.
- Budget for the upcoming year.
- Identification of management measures proven to be ineffective in reducing urban runoff pollutants and flow.
- Identification of water quality improvements or degradation.[1010]

iii. Some of the annual reporting requirements imposed by the test claim permit are not new, and others are new when compared to prior law.

The claimants acknowledge existing federal law and the requirements of the prior permit, and seek reimbursement for only the requirements in sections F.1.d.7.i.; F.3.a.4.c.; and, only as they relate to the reporting checklist, section K.3.a. and Attachment D. of the test claim permit.[1011]

Section F.1.d.7.i. requires each copermittee to notify the Regional Board in its annual report of each priority development project choosing to participate in the LID waiver program. The annual report must include the following information:

- Name of the developer of the participating priority development project.
- Site location.
- Reason for LID waiver including technical feasibility analysis.
- Description of BMPs implemented.
- Total amount deposited, if any, into the stormwater mitigation fund.
- Water quality improvement projects proposed to be funded.
- Timeframe for implementation of water quality improvement projects.[1012]

As indicated in Section IV.C.6. of this Decision, the LID waiver program, including the annual report on the program, was not specifically required by prior law and is, therefore, new.

Section F.3.a.4.c. of the test claim permit, addressing municipal flood control structures, states the following:

[1010] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3471-3472, 3497 (Order No. R9-2002-0001, section I.; Attachment C.7.).

[1011] Exhibit A, Test Claim, filed June 30, 2011, pages 93-95.

[1012] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2155 (Order No. R9-2009-0002, section F.1.d.7.i.).

> Each Copermittee must evaluate its existing flood control devices, identify devices causing or contributing to a condition of pollution, identify measures to reduce or eliminate the structure's effect on pollution, and evaluate the feasibility of retrofitting the structural flood control device. The inventory and evaluation must be completed by and submitted to the Regional Board in the 2nd year JRMP Annual Report.[1013]

The claimants contend that this provision imposes new requirements to prepare a full inventory and evaluation of existing flood control devices and include the evaluation in the second year JRMP annual report.[1014] The claimants further contend that prior law does not require the claimants to identify measures to reduce or eliminate the structure's general effect on pollution.[1015]

The activities required by section F.3.a.4.c. of the test claim permit, however, are *not* new. As indicated above, federal law requires stormwater programs to include procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been *evaluated* to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible.[1016] Federal law also requires each permittee to submit an annual report to the Regional Board, which shall include the information on the "status of implementing the components of the storm water management program that are established as permit conditions."[1017]

In addition, the prior permit required the claimants to "*evaluate* the feasibility of retrofitting existing structural flood control devices and retrofit where needed."[1018] The prior permit further states that "[a]t a minimum, each Copermittee shall inspect high priority municipal areas and activities annually" and, based on the inspection findings, "shall implement all follow-up actions necessary to comply with this Order."[1019] "High

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[1013] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2171 (R9-2009-0002, section F.3.a.4.c.).

[1014] Exhibit A, Test Claim, filed June 30, 2011, page 95; Exhibit F, Claimants' Rebuttal Comments, filed January 6, 2017, page 39.

[1015] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, page 31.

[1016] United States Code, title 33, section 1342(p)(3)(B); Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(4).

[1017] Code of Federal Regulations, title 40, section 122.42(c).

[1018] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3456 (Order No. R9-2002-0001, section F.3.a.4.b.i.).

[1019] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3457 (Order No. R9-2002-0001, section F.3.a.7.).

priority municipal areas and activities" expressly includes flood management projects and flood control devices.[1020] Thus, the claimants were required to identify measures to reduce or eliminate the structure's general effect on pollution under the prior permit.

The prior permit also required an inventory of flood control projects and flood control devices, which had to be updated annually. Section F.3.a.2., of the prior permit states that "Each Copermittee shall develop, and update annually, a watershed-based *inventory* of the name, address (if applicable), and description of all municipal land use areas and activities which generate pollutants."[1021] Section F.3.a.3., states that in order to "establish priorities for oversight of municipal areas and activities required under this Order, each Copermittee shall prioritize each watershed inventory in F.3.a.2., above by threat to water quality and update annually."[1022] As indicated above, "High priority municipal areas and activities" expressly includes flood management projects and flood control devices.[1023] And each JRMP annual report was required to contain, "at a minimum," a "[c]omprehensive description of all activities conducted by the Copermittee to meet all requirements of each component of the Jurisdictional URMP section of this Order."[1024] Thus, the activities required by section F.3.a.4.c. of the test claim permit are not new.

The claimants also plead section K.3.a. and Attachment D. of the test claim permit, seeking reimbursement to include in the JRMP annual report, "[t]he completed Reporting Checklist in Attachment D."[1025] Section K.3.a.3.c. requires "Each JRMP Annual Report must contain, at a minimum, the following information: …(c) The completed Reporting Checklist found in Attachment D. . . ."[1026]

Attachment D., section D-2., of the test claim permit states that the copermittees shall provide an annual report checklist in the JRMP annual report. The checklist "must be no longer than 2 pages, be current as of the 1st day of the rainy season of that year, and

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[1020] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3456 (Order No. R9-2002-0001, section F.3.a.3.b.ii.).

[1021] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3455 (Order No. R9-2002-0001, section F.3.a.2.).

[1022] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3456 (Order No. R9-2002-0001, section F.3.a.3).

[1023] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3456 (Order No. R9-2002-0001, section F.3.a.3.b.ii.).

[1024] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3471-3472, 3497 (Order No. R9-2002-0001, section I.; Attachment C.7.).

[1025] Exhibit A, Test Claim, filed June 30, 2011, page 94.

[1026] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2202 (Order No. R9-2009-0002, section K.3.a.3.c.).

include a signed certification statement."[1027] The annual report checklist "must provide the following information:"

- Order requirements – "Were all Requirements of this Order Met?"
- Construction – number of active sites, number of inactive sites, number of sites inspected, number of inspections, number of violations, number of construction enforcement actions taken.
- New development – number of development plan reviews, number of grading permits issued, and number of projects exempted from interim/final hydromodification requirements.
- Post construction development – number of priority development projects; and number of SUSMP [standard urban storm water mitigation plans] required post construction BMP inspections, violations, and enforcement actions taken.
- Illicit discharges and connections – number of inspections, number of detections by staff, number of detections from the public, number of eliminations, number of violations, and number of enforcement actions taken.
- MS4 maintenance – number of inspections conducted, amount of waste removed, and total miles of MS4 inspected.
- Municipal/commercial/industrial – number of facilities, number of inspections conducted, number of facilities inspected, number of violations, and number of enforcement actions taken.[1028]

Providing the checklist is new. As indicated earlier, the purpose of the JRMP is to reduce development project discharges of stormwater pollutants; prevent development project discharges from the MS4 from causing or contributing to a violation of water quality standards; prevent illicit discharges into the MS4; and to manage increases in runoff discharge rates and duration from development projects that are likely to cause increased erosion.[1029] This is achieved through ordinances, a development project approval program to ensure that appropriate source control and treatment control BMPs are implemented, including compliance with LID and hydromodification plans, and post-

[1027] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2235 (Order No. R9-2009-0002, Attachment D., section D-2.).

[1028] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2235 (Order No. R9-2009-0002, Attachment D, section D-2.).

[1029] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2144 (Order No. R9-2009-0002, section F.1.).

construction BMP maintenance tracking.[1030] Inspection and enforcement requirements to ensure BMP compliance are also required for all construction, existing development, and commercial and industrial facilities in the permittees' jurisdiction.[1031] The Fact Sheet explains that the reporting checklist that covers this information required by the JRMP was added to "determine and ensure that all requirements of the permit are being met."[1032]

However, some of the information in the checklist was required to be provided annually to the Regional Board under prior law and, thus, gathering and reporting that information is *not* new.

For example, the requirement to report "Order requirements – Were all Requirements of this Order Met?" is *not* new. Federal law requires that the permittee file reports to ensure compliance with the permit and water quality standards, including the "status of implementing components of the storm water management program established as permit conditions.[1033] The prior permit also required the claimants to provide a certified statement signed under penalty of perjury describing all activities undertaken to comply with each component of JRMP.[1034]

In addition, the requirement to gather and report the numbers requested for illicit discharges and connections is *not* new. The prior permit required "an accounting" of all reports of illicit discharges and how they were resolved, inspections conducted, and enforcement actions taken.[1035]

In addition, gathering and reporting the number of enforcement actions and inspections requested on the checklist for construction, post construction development, MS4 maintenance, and municipal/commercial/industrial projects is *not* new. Federal law has

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[1030] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2144-2163 (Order No. R9-2009-0002, section F.1.).

[1031] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2164-2181 (Order No. R9-2009-0002, sections F.2., F.3.).

[1032] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2482 (Order No. R9-2009-0002, Fact Sheet).

[1033] United States Code, title 33, section 1342(a)(2) ("The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate."); Code of Federal Regulations, title 40, section 122.42(c).

[1034] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3468-3471, 3497 (Order No. R9-2002-0001, section H.; Attachment C.7.).

[1035] Exhibit C, Water Boards' Comments on the Test Claim filed October 21, 2016, page 3472 (Order No. R9-2002-0001, section I.1.b.).

long required that the annual report from municipalities include "a summary describing *the number* and nature of enforcement actions and inspections . . . ."[1036]

However, the checklist required by the test claim permit now specifically requires the following information that was not expressly identified in prior law:

- Construction – number of active sites, number of inactive sites, and number of violations.
- New development – number of development plan reviews, number of grading permits issued, and number of projects exempted from interim/final hydromodification requirements.
- Post construction development – number of priority development projects; and number of SUSMP [standard urban storm water mitigation plans] required post construction BMP violations.
- MS4 maintenance –amount of waste removed, and total miles of MS4 inspected.
- Municipal/commercial/industrial – number of facilities and number of violations.

b. The new annual reporting requirements imposed by sections F.1.d.7.i., K.3.a.3.c., and Attachment D., section D-2. of the test claim permit are not mandated by the state for a permittee's own municipal projects, developments, and facilities. However, the requirements are mandated by the state and impose a new program or higher level of service for projects, developments, and facilities of other developers and entities.

As indicated above, the Commission finds that the following information must now be provided in the annual report to the Regional Board:

- Notify the Regional Board in the annual report of each priority development project choosing to participate in the LID waiver program. The annual report must include the following information: name of the developer of the participating priority development project; site location; reason for LID waiver including technical feasibility analysis; description of BMPs implemented; total amount deposited, if any, into the stormwater mitigation fund; water quality improvement projects proposed to be funded; and timeframe for implementation of water quality improvement projects. (Section F.1.d.7.i.)
- Gather and report the following new information in the annual report checklist:
    - Construction – number of active sites, number of inactive sites, and number of violations.

[1036] Code of Federal Regulations, title 40, section 122.42(c).

- New development – number of development plan reviews, number of grading permits issued, and number of projects exempted from interim/final hydromodification requirements.
- Post construction development – number of priority development projects; and number of SUSMP [standard urban storm water mitigation plans] required post construction BMP violations.
- MS4 maintenance –number of amount of waste removed, and total miles of MS4 inspected.
- Municipal/commercial/industrial – number of facilities and number of violations. (Section K.3.a.3.c., and Attachment D., section D-2., of the test claim permit.)

i. The annual reporting activities required by sections F.1.d.7.i., K.3.a.3.c., and Attachment D., section D-2., of the test claim permit with respect to a permittee's own municipal projects, developments, and facilities are not mandated by the state.

The claimants contend that the new activities are mandated by the state with respect to their own municipal projects. They state that to hold otherwise would be to find that local government, "in providing for the health, safety and welfare of their citizens will never be required to build any building, a priority development project or not, or that the flood control district will never be required to build any flood control structure or device, that all such decisions are discretionary."[1037] The claimants continue their argument as follows:

> There is no evidence to support such a finding. The Commission is requested to and can take administrative notice that municipalities must have facilities to house their employees; they must have police and fire stations. As for flood control, a flood control district is charged with protecting property from flooding and must build flood control devices for that purpose. If a flood control district did not, it could be held liable under inverse condemnation principles. See Arreola v. (J)nty.of Monterey (2002) 99 Cal.App.4th 722, 730, 737-739, 744-746 (intentional failure to maintain flood control infrastructure rendered counties liable for inverse condemnation). A flood control district is thus "practically compelled" to maintain and where necessary upgrade its facilities. [Citing to *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.].
>
> Municipalities must maintain their facilities and given growth in communities expand or replace those facilities. To say that constructing

[1037] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 31-32.

> and maintaining municipal facilities is always just discretionary is not based on fact. The assertion that all such projects are discretionary is erroneous.[1038]

The courts have explained that even though the test claim statute or executive order may contain new requirements, the determination of whether those requirements are mandated by the state depends on whether the claimant's participation in the underlying program is voluntary or compelled.[1039] Activities undertaken at the option or discretion of local government, without legal or practical compulsion, do not trigger a state-mandated program within the meaning or article XIII B, section 6.[1040] The California Supreme Court has described legal compulsion as follows:

> Legal compulsion occurs when a statute or executive action uses mandatory language that require[s] or command[s] a local entity to participate in a program or service… Stated differently, legal compulsion is present when the local entity has a mandatory, legally enforceable duty to obey. This standard is similar to the showing necessary to obtain a traditional writ of mandate, which requires the petitioning party to establish the respondent has a clear, present, and usually ministerial duty to act. ... Mandate will not issue if the duty is ... mixed with discretionary power.
>
> Thus, as a general matter, a local entity's voluntary or discretionary decision to undertake an activity cannot be said to be legally compelled, even if that decision results in certain mandatory actions.[1041]

In the absence of legal compulsion, the courts have acknowledged the possibility that a state mandate can be found if local government can show that it faces "certain and severe penalties, such as double taxation or other draconian consequences," leaving local government no choice but to comply with the conditions established by the

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[1038] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, page 32.

[1039] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 731.

[1040] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 73-76; *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727; *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1366; *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815.

[1041] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815 (internal quotation marks and citations omitted).

state.[1042] Substantial evidence in the record is required to make a finding of practical compulsion, and the burden to provide that evidence lies with the claimants.[1043]

As indicated above, the permittees are now required by section F.1.d.7.i. to notify the Regional Board in the annual report of each priority development project choosing to participate in the LID waiver program. The LID waiver program allows a priority development project, including those developed by the permittees, to substitute implementation of all or some of the required LID BMPs with implementation of treatment control BMPs and a mitigation project, payment into an in-lieu funding program, or watershed equivalent BMPs consistent with section F.1.d.(11).[1044]

The permittees are also required to gather and report the following information pertaining to their own municipal projects in the annual checklist required by section K.3.a.3.c., and Attachment D., section D-2., of the test claim permit:

- Construction – number of active sites, number of inactive sites, and number of violations.
- New development – number of development plan reviews, number of grading permits issued, and number of projects exempted from interim/final hydromodification requirements.
- Post construction development – number of priority development projects; and number of SUSMP [standard urban storm water mitigation plans] required post construction BMP violations.
- Municipal – number of facilities and number of violations.

The claimant is not legally compelled by state law to develop priority development projects or other municipal projects, developments, and facilities, or to participate in the LID waiver program for priority development projects. Nothing in state statute or case law imposes a legal obligation on local agencies to construct, expand, or improve municipal projects.[1045] Nor is there evidence in the record that the claimants would

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[1042] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816-817.

[1043] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368-1369 (*POBRA*); Government Code section 17559; California Code of Regulations, title 2, section 1187.5; Evidence Code section 500 (a party has the burden of proof as to each fact, the existence of which is essential to the claim for relief that he is asserting).

[1044] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2153 (Order No. R9-2009-0002, section F.1.d.7.).

[1045] For example, see Government Code section 23004 (counties *may* purchase, receive by gift or bequest, and hold land within its limits, or elsewhere when permitted

suffer certain and severe penalties such as "double…taxation" or other "draconian" consequences" if they fail to comply with the permit's annual reporting requirements for municipal projects.[1046]

Accordingly, the annual reporting activities required by sections F.1.d.7.i., K.3.a.3.c., and Attachment D., section D-2., of the test claim permit are not mandated by the state with respect to a permittee's own municipal projects, developments, and facilities.

ii. The remaining annual reporting activities required by sections F.1.d.7.i., K.3.a.3.c., and Attachment D., section D-2., of the test claim permit are mandated by the state and impose a new program or higher level of service for the reporting of projects, developments, and facilities of developers and entities other than the permittee.

Except for reporting on a permittee's own municipal projects, developments, and facilities (which are not eligible for reimbursement), the following annual reporting activities required by sections F.1.d.7.i., K.3.a.3.c., and Attachment D., section D-2., of the test claim permit are mandated by the state and impose a new program or higher level of service.

- Except for the permittee's own municipal priority development projects, notify the Regional Board in the annual report of all other priority development projects choosing to participate in the LID waiver program. The annual report must include the following information: name of the developer of the participating priority development project; site location; reason for LID waiver including

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by law; and manage, sell, lease, or otherwise dispose of its property as the interests of its inhabitants require); Government Code sections 37350-37353 (cities *may* purchase, lease, receive, hold, and enjoy real and personal property, and control and dispose of it for the common benefit; may erect and maintain buildings for municipal purposes; and may acquire property for parking motor vehicles, and for opening and laying out any street; Government Code 37111 ("When the legislative body deems it necessary that land purchased for park or other purposes be used for construction of public buildings or creation of a civic center, it *may* adopt an ordinance by a four-fifths vote declaring the necessity and providing for such use"); Streets and Highways Code, sections 1800 ["The legislative body of any city *may* do any and all things necessary to lay out, acquire, and construct any section or portion of any street or highway within its jurisdiction as a freeway, and to make any existing street or highway a freeway."]; 1801 ["The legislative body of any city *may* close any street or highway within its jurisdiction at or near the point of its intersection with any freeway, or *ma*y make provision for carrying such street or highway over, under, or to a connection with the freeway, and *may* do any and all necessary work on such street or highway."].

[1046] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816-817.

technical feasibility analysis; description of BMPs implemented; total amount deposited, if any, into the stormwater mitigation fund; water quality improvement projects proposed to be funded; and timeframe for implementation of water quality improvement projects. (Section F.1.d.7.i.)

- Gather and report the following new information in the annual report checklist:
    - Construction - Except for the permittee's own municipal construction, which is not reimbursable, gather and report number of active sites, number of inactive sites, and number of violations for all other construction.
    - New development - Except for the permittee's own municipal new development, which is not reimbursable, gather and report the number of development plan reviews, number of grading permits issued, and number of projects exempted from interim/final hydromodification requirements for all other new development.
    - Post construction development – Except for the permittee's own municipal priority development projects, which is not reimbursable, gather and report the number of priority development projects; and number of SUSMP [standard urban storm water mitigation plans] required post construction BMP violations.
    - MS4 maintenance –number of amount of waste removed, and total miles of MS4 inspected.
    - Municipal/Commercial/industrial – Except for the permittee's own municipal facilities, which is not reimbursable, gather and report the number of facilities and number of violations. (Section K.3.a.3.c., and Attachment D., section D-2., of the test claim permit.)

In the 2016 decision in *Department of Finance v. Commission on State Mandates*, the California Supreme Court identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or the federal government:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[1047]

[1047] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

The courts have also explained that "except where a regional board finds the conditions are the *only means* by which the [federal] 'maximum extent practicable' standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard."[1048] "That the San Diego Regional Board found the permit requirements were 'necessary' to meet the standard establishes only that the San Diego Regional Board exercised its discretion."[1049]

In this case, federal law requires permittees to file reports to ensure compliance with the permit and water quality standards, and to submit annual reports that include the "status of implementing the components of the storm water management program that are established as permit conditions"; "a summary of data, including monitoring data that is accumulated throughout the reporting year; and other specified information."[1050]

Federal law, however, does not require permittees to notify the Regional Board in their annual report of each priority development project choosing to participate in the LID waiver program, and does not require an annual report checklist with the new information identified above.

The Water Boards argue that the annual report requirements in Sections F.1.d.7.i., K.3.a.3.c., and Attachment D. of the test claim permit are "essential for the Board to determine whether, and how effectively, municipalities adopt and improve their programs based on report findings," and, thus, necessary to meet federal requirements and achieve compliance with the MEP standard.[1051] Federal law, however, does not specifically require the information described above, and there is no evidence in the record that providing the new required information is the only means by which the federal MEP standard can be met.

Accordingly, the Commission finds that except for reporting on a permittee's own municipal projects, developments, and facilities, providing the new information required by sections F.1.d.7.i., K.3.a.3.c., and Attachment D., section D-2., of the test claim permit is mandated by the state.

[1048] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 (citing to *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.)

[1049] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

[1050] United States Code, title 33, section 1342(a)(2); Code of Federal Regulations, title 40, section 122.42(c).

[1051] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 40.

Moreover, these requirements constitute a new program or higher level of service.[1052] The requirements cited above are expressly directed toward the local agency permittees and, thus, are unique to government, and detail their responsibilities to provide additional information in the JRMP annual report to the Regional Board to ensure compliance with the JRMP components of the test claim permit and water quality standards. "The challenged requirements are not bans or limits on pollution levels, they are mandates to perform specific actions" designed to reduce pollution entering stormwater drainage systems and receiving waters.[1053]

Accordingly, sections F.1.d.7.i., K.3.a.3.c., and Attachment D., section D-2., of the test claim permit mandate a new program or higher level of service as specified above.

10. Public Notice and Meeting Requirements to Review and Update the Watershed Workplan Imposes a State-Mandated New Program or Higher Level of Service. (Sections G.6., K.1.b.4.n.)

The Test Claim, on page 37, pleads the "New reporting requirements related to the Watershed Workplan report as set forth in Section K.1.b of the 2009 Permit."[1054] However, page 90 of the Test Claim states the following: "The Public Meeting requirements found in sections G.6, and K.1.b.(4).(n) of the 2009 Permit are being challenged as unfunded state mandates."[1055] The claimants then contend that the public notice and meeting requirements for their annual review and update of the watershed workplan, as described in sections G.6., and K.1.b.4.n. of the test claim permit, constitute a reimbursable state-mandated program.[1056] There is no discussion of any other activities or costs associated with any other "reporting requirements related to the Watershed Workplan report" as initially stated in the Test Claim. Thus, this Decision will address the public notice and meeting provisions described in sections G.6., and K.1.b.4.n., of the test claim permit.

The watershed workplan is a collective watershed strategy and requires copermittees in a watershed management area to develop a workplan to assess and prioritize the water quality problems within the watershed's receiving waters, identify and model sources of the highest priority water quality problems, develop a watershed-wide BMP implementation strategy to abate the highest priority water quality problems, and a

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[1052] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557..

[1053] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560.

[1054] Exhibit A, Test Claim, filed June 30, 2011, page 37.

[1055] Exhibit A, Test Claim, filed June 30, 2011, page 90.

[1056] Exhibit A, Test Claim, filed June 30, 2011, pages 90-92.

monitoring strategy to evaluate BMP effectiveness and changing water quality prioritization in the watershed management area.[1057] The copermittees are required by sections G.6., and K.1.b.4.n., to annually review and update the watershed workplan during a meeting that is open to the public and adequately noticed, in order to identify needed changes to the prioritized water quality problems identified in the plan.[1058]

The Commission finds that the requirements to annually notice and conduct a public meeting to review and update the watershed workplan are new, mandated by the state, and impose a new program or higher level of service.

a. Federal law requires local stormwater management plans to include a comprehensive planning process which involves public participation, which at a minimum includes notice and an opportunity to comment.

Federal law declares the goals and policies of Congress with respect to water pollution prevention and control, and states that "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States."[1059]

Accordingly, federal law requires that the proposed runoff management programs developed by permittees must also involve public participation. Federal regulations require proposed management programs, which "shall include a comprehensive planning process *which involves public participation* and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable . . . ."[1060] "Public participation" is not defined in the federal statutes or regulations. However, EPA's MS4 Program Evaluation Guidance describes the public participation activities as requiring, at a minimum, notice and an opportunity to comment, as follows:

> Public Participation Activities
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> Ideally, permittees give the public the opportunity to participate in the development, implementation, evaluation, and improvement of the stormwater program. At the very least, permittees need to notify the public about the availability of the SWMP [stormwater management plan] and notice of intent and solicit comments. Some permittees have stakeholder workgroups that are involved in developing policy and programs. Many

[1057] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2189 (Order No. R9-2009-0002, section G.2.).

[1058] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2190, 2200 (Order No. R9-2009-0002, sections G.6. and K.1.b.4.n.).

[1059] United States Code, title 33, section 1251(e).

[1060] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv).

permittees encourage and facilitate involvement by coordinating or promoting community events and promoting volunteerism in the community through activities such as storm drain stenciling, stream cleanups, riparian tree plantings, and other programs.[1061]

b. The prior permit required an annual watershed report documenting the activities conducted by the watershed copermittees during the previous year, the assessment of the effectiveness of the plan, proposed revisions to the watershed program, and "public participation mechanisms utilized during the Watershed URMP implementation process."

The prior permit recognized that "[p]ublic participation during the URMP [Urban Runoff Management Program] development process is necessary to ensure that all stakeholder interests and a variety of creative solutions are considered."[1062]

Thus, the prior permit required a watershed management program to be developed and implemented, and the program had to identify a "*mechanism for public participation throughout the entire watershed URMP process*."[1063] Each copermittee was required to collaborate with other copermittees to develop and implement the watershed urban runoff management program for the six watersheds in the San Juan Creek Watershed Management Area.[1064] The watershed management program had to contain an assessment of the water quality of all receiving waters in the watershed, an identification and prioritization of major water quality problems, a time schedule and recommended activities to address the highest priority water quality problems, a watershed-based education program, and short-term and long-term strategies to assess the effectiveness of the activities and programs implemented. And, as stated above, the program had to identify a mechanism for public participation throughout the entire

[1061] Exhibit K (50), U.S. EPA MS4 Program Evaluation Guidance, January 2007, page 38.

[1062] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3435 (Order No. R9-2002-0001, Finding 25).

[1063] Exhibit C, Water Boards' Comments on the Test Claim filed October 21, 2016, pages 3472-3473 (Order No. R9-2002-0001, section J.2.e.).

[1064] The six watersheds include Orange County Coastal Streams-Laguna, Aliso Creek, Dana Point Coastal Streams, San Juan Creek, Orange County Coastal Streams-San Clemente, and San Mateo Creek. (Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3698-3699 (Order No. R9-2002-0001, Fact Sheet)).

watershed process.[1065] The principal permittee was required to submit the watershed URMP document to the Regional Board by August 13, 2003.[1066]

In addition, an annual watershed report had to be submitted to the Regional Board documenting the activities conducted by the watershed copermittees during the previous year, the assessment of the effectiveness of the plan, proposed revisions to the watershed program, and "public participation mechanisms utilized during the Watershed URMP implementation process."[1067] The 2007-2008 annual report from the Aliso Creek watershed described their public participation mechanisms as follows:

> **Public Participation:** Due to the delay release of the Prop 84 guidelines no IRWMP [Integrated Regional Watershed Management Plan] Public Meetings were held in the 2007-08 reporting period. However, an IRWMP Status Report Presentation was made to the OC Board of Supervisors on July 2, 2008, a meeting that is attended by the public and broadcast on the internet.
>
> All program documentation, including the WAP, is available for review and comment on the widely publicized www.ocwatersheds.com website with contact information encouraging submittal of questions and comments to Principal Permittee staff. The number of "hits" on the Aliso Creek Watershed page was 1,391 in the reporting period, a 55% decrease in hits over the previous year. Fecal indicator bacteria data for coastal waters is now directly available to the public at www.ocbeachinfo.com.[1068]

[1065] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3472-3473, 3475 (Order No. R9-2002-0001, sections J. and L.).

[1066] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 3475 (Order No. R9-2002-0001, section L.).

[1067] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 3476, 3703 (Order No. R9-2002-0001, section M.; Fact Sheet).

[1068] Exhibit K (57), Watershed Action Plan, 2007-08 Annual Report, Aliso Creek Watershed (Exhibit 13), page 6.

c. The requirements imposed by sections G.6. and K.1.b.4.n. of the test claim permit to annually notice and conduct a public meeting to review and update the watershed workplan are mandated by the state, and impose a new program or higher level of service.

i. Sections G.6. and K.1.b.4.n. of the test claim permit require an annual notice and public meeting to review and update the watershed workplan.

Section G.2. of the test claim permit continues to require a watershed runoff management program, which includes a watershed workplan. The watershed workplan is required to:

- Characterize the receiving water quality in the watershed management area through data, reports, monitoring, and analysis.
- Identify the highest priority water quality problems, in terms of constituents by location and in terms of TMDLs, 303(d) listed waterbodies, persistent violations of water quality standards, and impacts to beneficial uses, in the watershed management area's receiving waters.
- Identify sources of the highest water quality problems within the watershed management area. Efforts to determine such sources shall include, but not be limited to information from the construction, industrial, commercial, municipal, and residential source identification programs required within the JRMP; specific actions to model pollutant transport to receiving waters to identify the point of origin; and water quality monitoring data.
- Develop a watershed BMP implementation strategy and schedule to attain receiving water quality objectives in the highest priority water quality problem areas.
- Develop a strategy to model and monitor improvements in receiving water quality directly resulting from implementation of the BMPs described in the workplan. The strategy shall generate the necessary data to report on the measured pollutant reduction that results from proper BMP implementation.
- Establish a schedule for development and implementation of the watershed strategy outlined in the workplan.[1069]

In addition, section G.5. continues to require that the watershed copermittees implement a public participation mechanism, but the test claim permit now states how public participation must be accomplished. Section G.5. requires, at a minimum, a 30-day public review of the watershed workplan before submittal to the Regional Board.

[1069] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2189-2190 (Order No. R9-2009-0002, section G.2.).

Opportunity for the public to review and comment on the watershed workplan is required before the workplan can be implemented.[1070] The claimants did not plead section G.5.

The claimants, however, have pled sections G.6. and K.1.b.4.n. of the test claim permit, which requires an annual meeting that shall be open to the public and adequately noticed, to review and update the watershed workplan. Section G.6. states the following:

> **Watershed Workplan Review and Updates**. Watershed Copermittees shall review and update the Watershed Workplan annually to identify needed changes to the prioritized water quality problem(s) listed in the workplan. All updates to the Watershed Workplan shall be presented during an Annual Watershed Review Meeting. Annual Watershed Review Meetings shall occur once every calendar year and be conducted by the Watershed Copermittees. *Annual Watershed Review Meetings shall be open to the public and adequately noticed.* Individual Watershed Copermittees shall also review and modify their jurisdictional programs and JRMP Annual Reports, as necessary, so that they are consistent with the updated Watershed Workplan.[1071]

Section K.1.b.4.n. states that each watershed workplan shall, at a minimum, include a "scheduled annual Watershed Workplan Review Meeting once every calendar year. This meeting shall be open to the public."[1072]

As explained in section G.2.f., "[a]nnual watershed workplan review meetings must be open to the public and appropriately publically [sic] noticed such that interested parties may come and provide comments on the watershed program."[1073]

The Fact Sheet states that the requirement to review and update the workplan each year at an annual public meeting is "meant to take the place of Order No. 2002-01 requirement to submit Watershed Annual Reports."[1074] If, on review of the watershed

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[1070] Exhibit C, Water Boards' Comments on the Test Claim filed October 21, 2016, pages 2190 (Test claim permit, section G.5.).

[1071] Exhibit C, Water Boards' Comments on the Test Claim filed October 21, 2016, pages 2190-2191(Order No. R9-2009-0002, section G.6., emphasis added).

[1072] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2200 (Order No. R9-2009-0002, section K.1.b.4.n.).

[1073] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2190 (Order No. R9-2009-0002, section G.2.f.).

[1074] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2465 (Order No. R9-2009-0002, Fact Sheet).

workplan, the copermittees request modifications to the watershed URMP, then those requests "should be incorporated, as appropriate, into the Annual Reports . . ."[1075]

ii. The requirements to conduct an annual meeting that is open to the public and adequately noticed to review and update the watershed workplan are new requirements that are mandated by the state.

The claimants contend that the annual public meeting requirements in sections G.6. and K.1.b.4.n. are reimbursable state-mandated requirements. The claimants contend that federal law does not require a permittee to conduct a public meeting before adopting any aspect of the management program and, thus, the requirement is mandated by the state. The claimants further contend that the prior permit did not require the copermittees to conduct an annual watershed workplan review at a public meeting and, thus, assert that the requirement is new. The claimants also contend that the new requirement represents a significant increase in the actual level of service provided to the public and, thus, imposes a new program or higher level of service.[1076]

The Water Boards disagree. The Water Boards contend that the challenged provisions are federal mandates:

> Runoff management programs are at the heart of the federal MS4 program and the 2009 Permit's implementation of such provisions is an integral component. By assuring public participation in the development of runoff management programs, the requirements to ensure consideration of "all stakeholder interests and a variety of creative solutions are considered." [Citation omitted.] The provisions are entirely consistent with the applicable federal regulations that require Copermittees to develop and implement a proposed management program that 'shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable . . . ." [Citation omitted.]
>
> . . . . The requirements to incorporate public participation do not transform the permit provisions into state mandates when . . . the San Diego Water Board has found they are exclusively based on federal law and are necessary to further the likelihood that Copermittees will achieve

[1075] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2206 (Order No. R9-2009-0002, section L.).

[1076] Exhibit A, Test Claim, filed June 30, 2011, pages 90-92; Exhibit F, Claimants' Rebuttal Comments, filed January 6, 2017, page 39.

compliance with the federal MEP standard in implementing their MS4 programs.[1077]

The Water Boards further contend that the public meeting requirements do not impose a new program or higher level of service since the 2002 permit also required a public participation component.[1078]

The Commission finds that sections G.6. and K.1.b.4.n. of the test claim permit, which now requires an annual meeting that is open to the public and adequately noticed to review and update the watershed workplan are new requirements that are mandated by the state.

The California Supreme Court, in *Department of Finance v. Commission on State Mandates*, identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or the federal government:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[1079]

The courts have also explained that "except where a regional board finds the conditions are the *only means* by which the [federal] 'maximum extent practicable' standard can be met, the State exercises a true choice by determining what controls are necessary to

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[1077] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 38-39.

[1078] The Water Boards, citing to "Order No. R9-2002-0002, Dir. G.5, Fact Sheet Discussion," also contend that the prior 2002 permit stated that a "required component of the watershed-specific public participation shall be a minimum 30-day public review of the Watershed Workplan," and that "the opportunity for the public to review and comment on the Watershed workplan must occur before the workplan is implemented." (Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, p. 39.) Although section G.5., of the *test claim permit* contains the quoted language, that language is not in the prior permit. In addition, the claimants have not requested reimbursement to comply with section G.5., of the test claim permit.

[1079] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

meet the standard."[1080] "That the San Diego Regional Board found the permit requirements were 'necessary' to meet the standard establishes only that the San Diego Regional Board exercised its discretion."[1081]

Here, federal law requires that stormwater management programs "shall include a comprehensive planning process *which involves public participation*" to reduce the discharge of pollutants to the maximum extent practicable . . . ."[1082] "Public participation" is not defined in the federal statutes or regulations. However, EPA's MS4 Program Evaluation Guidance describes the public participation activities as giving the public the opportunity to participate in the development, implementation, evaluation, and improvement of the stormwater management plan and, at the very least, notifying the public about the availability of the plan and the opportunity to submit comments.[1083]

Federal law, however, does not require a public meeting to review and update these local plans. In addition, there is no evidence in the record that a public meeting is the *only means* by which the federal MEP standard can be met. The prior permit did not require a public meeting to review and update the workplan. The prior permit instead required annual reports that were made available to the public. The Regional Board, therefore, exercised true discretion when requiring the permittees to notice and conduct a public meeting to review and update the watershed workplan.

Accordingly, the public meeting requirements are mandated by the state.

iii. The new annual notice and public meeting requirements to review and update the watershed workplan pursuant to sections G.6. and K.1.b.4.n. of the test claim permit impose a new program or higher level of service.

Article XIII B, section 6 requires reimbursement whenever the Legislature or any state agency mandates a new program or higher level of service that results in costs mandated by the state. To determine whether a program is new or provides a higher level of service in an existing program, the requirements in the test claim statute or executive order are compared with the legal requirements in effect before the test claim

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[1080] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 (citing to *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.)

[1081] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

[1082] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv).

[1083] Exhibit K (50), U.S. EPA MS4 Program Evaluation Guidance, January 2007, page 38.

statute or executive order.[1084] If the requirements are new, the analysis continues to determine if the requirements constitute a "program" within the meaning of article XIII B, section 6, which is defined as one that carries out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[1085] Only one of these alternatives is required to establish a new program or higher level of service.[1086]

Here, the new requirements cited above are expressly directed toward the local agency permittees and are therefore uniquely imposed on local government. In addition, the annual notice and public meeting requirements provide a governmental service to the public by ensuring notice and public participation when assessing the water quality problems within the watershed's receiving waters and developing a watershed-wide BMP implementation strategy to abate the highest priority water quality problems.

Accordingly, the requirements in sections G.6. and K.1.b.4.n. of the test claim permit to annually notice and conduct public meetings to review and update the watershed workplan mandates a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

C. <u>There Are Costs Mandated by the State for Those New State-Mandated Activities Not Subject to the Claimants' Regulatory Fee Authority Pursuant to Government Code Section 17556(d) From December 16, 2009, Through December 31, 2017.</u>

As indicated above, the following activities constitute state-mandated new programs or higher levels of service:

- **Develop a monitoring plan** to sample a representative percent of the major outfalls within each hydrologic subarea to determine **SAL compliance (one-time activity as required by section D.2.)**.[1087]
- **Update the map** of the entire MS4 and the corresponding drainage areas within each copermittees' jurisdiction ***in GIS format*** and submit GIS layers within 365

[1084] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 75, 98; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

[1085] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[1086] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

[1087] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2141 (Order No. R9-2009-0002, section D.2.).

days of adoption of the permit to the Regional Board **(*one-time only*, as required by section F.4.b.)**[1088]

- **LID, Hydromodification Plans, LID Waiver Program, BMPs for Priority Development Projects, and a Retrofitting Program (Sections F.1.d., F.1.h., and F.3.d.)[1089]**

  1. The mandated LID activities include the following administrative and planning activities:

     a. Submit an updated model Standard Stormwater Mitigation Plan (SSMP) for review by the Regional Board within two years of adoption of the permit, that meets the requirements of section F.1.d of the permit to reduce priority development project discharges of stormwater pollutants from the MS4 to the MEP and to prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. (Section F.1.d.)

     b. Update local SSMPs and amended ordinances consistent with the updated model SSMP. (Section F.1.d.)

     c. As part of the SSMP, implement an updated procedure for identifying pollutants of concern for each priority development project, which must include receiving water quality, land use type, and pollutants expected to be present on site. (Section F.1.d.3.)

     d. Within two years after adoption of the permit, review local codes, policies, and ordinances and identify barriers to the implementation of LID BMPs, and take appropriate actions to remove the barriers. (Section F.1.d.4.)

     e. Develop a LID BMP waiver program to incorporate into the SSMP. (Section F.1.d.7.)

     f. Develop site design and maintenance criteria for each site design and treatment control BMP listed in the SSMP. (Section F.1.d.8.)

     g. During the third year of implementation of the permit, review and update the BMPs that are listed in the local SSMPs for treatment control. The update must include the removal of obsolete or ineffective BMPs and the addition of LID BMPs that can be used for treatment. The update must also add appropriate LID BMPs to any discussion addressing pollutant

[1088] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2186 (Order No. R9-2009-0002, section F.4.b.).

[1089] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2147-2157, 2159-2163, 2183-2185 (Order No. R9-2009-0002, sections F.1.d., F.1.h., and F.3.d.).

removal inefficiencies of treatment control BMPs. In addition, the update must incorporate findings from BMP effectiveness studies conducted by the copermittees for projects funded wholly or in part by the State or Regional Board, and implement a mechanism for annually incorporating those findings into SSMP project reviews and permitting. (Section F.1.d.10.)

h. Collaborate with other copermittees to develop a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects, *except* those identified in section F.1.h.3.). Submit a draft HMP that has been available to public review and comment, to the Regional Board within two years of adoption of the permit. Within 180 days of receiving the Regional Board's comments on the draft HMP, submit a final HMP to the Regional Board that addresses the comments. Within 90 days of receiving a finding of adequacy from the executive officer, incorporate the HMP into the local SSMPs so that estimated post-project runoff discharge rates and durations do not exceed pre-development discharge rates and durations. (Section F.1.h.1., 2., and, 4.)

i. Before the final HMP is approved and within one year of adoption of the permit, submit a signed certification statement to the Regional Board verifying that all priority development projects are implementing interim hydromodification criteria "by comparing the pre-development (naturally occurring) and post-project flow rates and durations using a continuous simulation hydrologic model." (Section F.1.h.5.)

j. Develop a retrofitting program for existing developments (municipal, industrial, commercial, and residential) by identifying and creating an inventory of existing developments for retrofit, evaluating and ranking those projects for retrofit, and encouraging retrofit projects to be designed in accordance with SSMP LID and hydromodification requirements. (Section F.3.d.1.- 4.)

2. In accordance with section F.1.d.(9) of the test claim permit, verify that the proponents of existing categories of new development or significant redevelopment for residential, commercial, and mixed-use projects, comply with the following activities:

   a. When a new development project feature, such as a parking lot, falls into a priority development category, the entire project footprint must comply with the requirements of the SSMP. (Section F.1.d.2.)

   b. Project proponents must employ the following *specified* classes of site design BMPs in accordance with section F.1.d.4.b.ii.-iv.:

- Projects with landscaped or other pervious areas must, where feasible, drain runoff from impervious areas (rooftops, parking lots, sidewalks, walkways, patios) into pervious areas prior to discharge to the MS4. The amount of runoff from impervious areas that is to drain to pervious areas shall not exceed the total capacity of the project's pervious areas to infiltrate or treat runoff, taking into consideration the pervious areas' geologic and soil conditions, slope, and other relevant factors.
- Projects with landscaped or other pervious areas must, where feasible, properly design and construct the pervious areas to effectively receive and infiltrate or treat runoff from impervious areas prior to discharge to the MS4. Soil compaction for these areas shall be minimized. The amount of the impervious areas that are to drain to pervious areas must be based on the total size, soil condition, slope, and other relevant factors.
- Projects with low traffic areas and appropriate soil conditions must construct walkways, trails, overflow parking lots, alleys, or other low traffic areas with permeable surfaces, such as pervious concrete, porous asphalt, unit pavers, and granular materials.

c. LID BMPS shall be sized and designed to ensure onsite retention without runoff, of the volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the County of Orange's 85th Percentile Precipitation Map, unless technically infeasible. (Section F.1.d.4.d.)

d. The treatment control BMPs for each priority development project "not implementing LID capable of meeting the design stormwater criteria for the entire site and meeting technical infeasibility eligibility," shall be ranked with high or medium pollutant removal efficiency for the project's most significant pollutants of concern. (Section F.1.d.6.d.i.)

e. Implement site design and maintenance criteria for each site design and treatment control BMP required. (Section F.1.d.8.)

f. Implement the requirements of the approved HMP for all priority development projects, except those identified in section F.1.h.3. (i.e., where the project discharges stormwater runoff into underground storm drains discharging directly to bays or the ocean, or discharges into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to ocean waters, enclosed bays, estuaries, or water storage reservoirs and lakes). (Section F.1.h.4.)

3. Verify that proponents of the *new* categories of priority development projects (industrial, retail gasoline outlets, and one acre pollutant generating development projects) comply with all requirements of the SSMP and HMP. (Sections F.1.d.(2); F.1.d.3.-8.; F.1.h.1., 2.)

4. Track and inspect completed retrofit BMPs in accordance with section F.1.f. of the test claim permit. (Section F.3.d.5.)

- **BMP Maintenance Tracking and Inspections (Section F.1.f)**[1090]

  Except as applicable to a claimant's own municipal development (which is not mandated by the state), the following activities mandate a new program or higher level of service:

  1. Develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance for existing industrial, commercial, and residential developments within its jurisdiction since July 2001. (Section F.1.f.1.)
  2. Establish a mechanism to ensure that appropriate easements and ownerships are properly recorded in public records and that the information is conveyed to all appropriate parties when there is a change in project or site ownership. (Section F.1.f.2.)
  3. The inspections of BMP implementation, operation, and maintenance must note observations of vector conditions, such as mosquitoes, and where conditions are contributing to mosquito production, the copermittee is required to notify the Orange County Vector Control District. (Section F.1.f.3.)

- **JRMP Effectiveness Assessment and Reporting, and Work Plan to Address High Priority Water Quality Problems (Sections J.1., J.3., and J.4.)**[1091]

  1. Establish annual assessment measures for reducing discharges into each downstream 303(d) listed water body and downstream environmentally sensitive areas that conform to the six outcome levels developed by CASQA, and which target water quality outcomes and the results of municipal enforcement activities, and to annually assess those measures. (Section J.1.a.)
  2. Include the following effectiveness assessment information within each annual report, beginning with the 2011 annual report:

     - A description and results of the annual assessment measures or methods for reducing discharges of stormwater pollutants from the MS4 into each 303(d) listed waterbody. (Section J.3.a.1.)

[1090] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2157-2158 (Order No. R9-2009-0002, section F.1.f.).

[1091] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2195-2198 (Order No. R9-2009-0002, sections J.1., J.3., and J.4.).

- A description and results of the annual assessment measures or methods for managing discharges of pollutants from the MS4 into each downstream environmentally sensitive area. (Section J.3.a.2.)
- A description of the steps that will be taken to improve the copermittees' ability to assess program effectiveness using measurable targeted outcomes, assessment measures, assessment methods, and outcome levels 1-6, and include a time schedule for when improvement will occur. (Section J.3.a.8.)

3. Develop a work plan to address high priority water quality problems in an iterative manner over the life of the permit. The plan is required to be submitted to the Regional Board within 365 days of the adoption of the test claim permit, and shall be annually updated and included in the annual JRMP report. The work plan shall include the following information:
   - The problems and priorities identified during the assessment.
   - A list of priority pollutants and known or suspected sources.
   - A brief description of the strategy employed to reduce, eliminate or mitigate the negative impacts.
   - A description and schedule for new or modified BMPs. The schedule is to include dates for significant milestones.
   - A description of how the selected activities will address an identified high priority problem, including a description of the expected effectiveness and benefits of the new or modified BMPs.
   - A description of how efficacy results will be used to modify priorities and implementation.
   - A review of past activities implemented, progress in meeting water quality standards, and planned program adjustments. (Section J.4.)

- **Annual JRMP Reports (Section F.1.d.7.i.; K.3.a.3.c., and Attachment D., section D-2., of the test claim permit)**[1092]

1. Except for the permittee's own municipal priority development projects, notify the Regional Board in the annual report of all other priority development projects choosing to participate in the LID waiver program. The annual report must include the following information: name of the developer of the participating priority development project; site location; reason for LID waiver

[1092] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2155, 2202, 2235 (Order No. R9-2009-0002, section F.1.d.7.i., section K.3.a.3.c., and Attachment D., section D-2.).

including technical feasibility analysis; description of BMPs implemented; total amount deposited, if any, into the stormwater mitigation fund; water quality improvement projects proposed to be funded; and timeframe for implementation of water quality improvement projects. (Section F.1.d.7.i.)

2. Gather and report the following new information in the annual report checklist:
    - Construction - Except for the permittee's own municipal construction, gather and report number of active sites, number of inactive sites, and number of violations for all other construction.
    - New development - Except for the permittee's own municipal new development, gather and report the number of development plan reviews, number of grading permits issued, and number of projects exempted from interim/final hydromodification requirements for all other new development.
    - Post construction development – Except for the permittee's own municipal priority development projects, gather and report the number of priority development projects; and number of SUSMP [standard urban storm water mitigation plans] required post construction BMP violations.
    - MS4 maintenance –amount of waste removed, and total miles of MS4 inspected.
    - Municipal/commercial/industrial – Except for the permittee's own municipal facilities, gather and report the number of facilities and number of violations. (Section K.3.a.3.c., and Attachment D., section D-2., of the test claim permit.)

- **Annually notice and conduct public meetings to review and update the watershed workplan. (Sections G.6. and K.1.b.4.n.)**[1093]

The last issue is whether these activities result in increased costs mandated by the state. Government Code section 17514 defines "costs mandated by the state" as any increased costs that a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) further requires that no claim shall be made nor shall any payment be made unless the claim exceeds $1,000. Increased costs mandated by the

[1093] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2190, 2200 (Order No. R9-2009-0002, sections G.6. and K.1.b.4.n.).

state requires a showing of "increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit."[1094]

In addition, a finding of costs mandated by the state means that none of the exceptions in Government Code section 17556 apply to deny the claim. As relevant here, Government Code section 17556(d) states that the Commission shall not find costs mandated by the state when

> The local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service. This subdivision applies regardless of whether the authority to levy charges, fees, or assessments was enacted or adopted prior to or after the date on which the statute or executive order was enacted or issued.

The claimants contend that the mandated activities result in increased costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514, and that none of the exceptions to reimbursement apply to deny this claim.[1095]

Finance and the Water Boards contend that the claimants possess fee authority within the meaning of section 17556(d), and therefore reimbursement is not required.[1096]

As explained in the analysis below, there are costs mandated by the state for those new state-mandated activities not subject to the claimants' regulatory fee authority pursuant to Government Code section 17556(d) from December 16, 2009, through December 31, 2017:

- There is substantial evidence in the record, as required by Government Code section 17559, that the claimants incurred increased costs exceeding $1,000 and used their local "proceeds of taxes" to comply with the new state-mandated activities.[1097]
- Based on article XIII C, section 1(e)(3) of the California Constitution, *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th

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[1094] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1185 (emphasis added).

[1095] Exhibit A, Test Claim, filed June 30, 2011, pages 104-110; Exhibit F, Claimants' Rebuttal Comments, filed January 6, 2017, pages 45-46.

[1096] Exhibit B, Finance's Comments on the Test Claim, filed October 10, 2016, page 1; Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 20.

[1097] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 144-193.

535, 590, and other cases, there are no costs mandated by the state for the new activities relating to LID, Hydromodification Plans, LID Waiver Program, BMPs for Priority Development Projects, and a Retrofitting Program required by sections F.1.d., F.1.h., and F.3.d. of the test claim permit; and the new BMP maintenance tracking and inspection activities required by section F.1.f. The claimants have regulatory fee authority through their police powers sufficient to cover the costs these state-mandated activities pursuant to Government Code section 17556(d) and, thus, reimbursement is not required.

- The claimants have constitutional and statutory authority to charge property-related fees for the remaining new requirements to develop a monitoring plan to sample a representative percent of the major outfalls within each hydrologic subarea to determine SAL compliance (one-time activity as required by section D.2.); update the map of the entire MS4 and the corresponding drainage areas within each copermittees' jurisdiction *in GIS format* and submit GIS layers within 365 days of adoption of the permit to the Regional Board (one-time only, as required by section F.4.b.); the new requirements relating to JRMP Effectiveness Assessment and Reporting, and the work plan to address high priority water quality problems (sections J.1., J.3., and J.4.); the new requirements relating to the annual JRMP report (sections F.1.d.7.i., K.3.a.3.c., and Attachment D., section D-2.); and the new requirement to annually notice and conduct public meetings to review and update the watershed workplan (sections G.6. and K.1.b.4.n.). However, from December 16, 2009 through December 31, 2017 only, and based on the court's holding in *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351 (*City of Salinas),* which interpreted article XIII D of the California Constitution as requiring the voter's approval before any stormwater fees can be imposed, Government Code section 17556(d) does not apply. When voter approval is required by article XIII D, the claimants do *not* have the authority to levy fees sufficient as a matter of law to cover the costs of these activities within the meaning of Government Code section 17556(d).[1098]
- Beginning January 1, 2018, and based on *Paradise Irrigation District* case and Government Code sections 57350 and 57351 (which overturned *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351), there are no costs mandated by the state to comply with the new requirements because claimants have constitutional and statutory authority to charge property-related fees for these costs subject only to the voter protest provisions of article XIII D, which is sufficient as a matter of law to cover the costs of the mandated activities within the meaning of Government Code section 17556(d).

[1098] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581.

1. **There Is Substantial Evidence, As Required by Government Code Section 17559, that the Claimants Incurred Increased Costs Exceeding $1,000 and Used Their Local "Proceeds of Taxes" to Comply with the New State-Mandated Activities.**

    a. The reimbursement requirement in article XIII B, section 6 was included because of the tax and spend limitations in articles XIII A and XIII B, and is triggered only when the state forces the expenditure of local proceeds of taxes; section 6 was not intended to reach beyond taxation or to protect nontax sources.

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution. Article XIII A reduced the authority of local government to impose property taxes by providing that "the maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property," and that the one percent (1%) tax was to be collected by counties and "apportioned according to law to the districts within the counties…"[1099] In addition to limiting the property tax, section 4 also restricts a local government's ability to impose special taxes by requiring a two-thirds approval by voters.[1100]

Article XIII B was adopted by the voters as Proposition 4, less than 18 months after the addition of article XIII A to the state Constitution, and was billed as "the next logical step to Proposition 13."[1101] While article XIII A is aimed at controlling ad valorem property taxes and the imposition of new special taxes, "the thrust of article XIII B is toward placing certain limitations on the growth of appropriations at both the state and local government level; in particular, article XIII B places limits on the authorization to expend the 'proceeds of taxes.'"[1102] "Proceeds of taxes," in turn, includes "all tax revenues," as well as proceeds from "regulatory licenses, user charges, and user fees to the extent those proceeds *exceed* the costs reasonably borne by that entity in providing the regulation, product, or service," and proceeds from the investment of tax revenues.[1103] And, with respect to local governments, the section reiterates that "proceeds of taxes" includes state subventions other than mandate reimbursement, and, with respect to the

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[1099] California Constitution, article XIII A, section 1 (effective June 7, 1978).

[1100] California Constitution, article XIII A, section 4 (effective June 7, 1978).

[1101] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446.

[1102] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 762; *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446.

[1103] California Constitution, article XIII B, section 8(c) (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990) (emphasis added).

State's spending limit, excludes such state subventions.[1104] Article XIII B does *not* restrict the growth in appropriations financed from nontax sources, such as "user fees based on reasonable costs."[1105] And appropriations subject to limitation do not include "[a]ppropriations for debt service."[1106]

Proposition 4 also added article XIII B, section 6, which was specifically "designed to protect the tax revenues of local governments from state mandates that would require the expenditure of such revenues."[1107] The California Supreme Court, in *County of Fresno v. State of California*,[1108] explained:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra,* 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6.) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.[1109]

Most recently, the California Supreme Court concluded that articles XIII A and XIII B work "in tandem," for the purpose of precluding "the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities *because of the taxing and*

[1104] California Constitution, article XIII B, section 8(c) (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[1105] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; see also, *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 451 (finding that revenues from a local special assessment for the construction of public improvements are not "proceeds of taxes" subject to the appropriations limit).

[1106] California Constitution, article XIII B, section 9 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[1107] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

[1108] *County of Fresno v. State of California* (1991) 53 Cal.3d 482.

[1109] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487, emphasis in original.

spending limitations that articles XIII A and XIII B impose."[1110] Accordingly, reimbursement under article XIII B, section 6 is only required when a mandated new program or higher level of service forces local government to incur "increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit."[1111]

b. There is substantial evidence in the record that the claimants incurred increased costs exceeding $1,000 and used their local "proceeds of taxes" to comply with the new state-mandated activities.

Consistent with these constitutional principles, reimbursement under article XIII B, section 6 is only required if the claimants show, with substantial evidence in the record,[1112] that they have incurred increased costs mandated by the state within the meaning of Government Code section 17514. When alleged mandated activities do not compel the increased expenditure of local "proceeds of taxes," then reimbursement under section 6 is not required.[1113] Government Code section 17514 defines "costs mandated by the state" as any increased costs that a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) further requires that no claim shall be made nor shall any payment be made unless the claim exceeds $1,000.

All of the claimants have identified costs exceeding $1,000.[1114] The County of Orange also submitted a declaration stating the following:

> [T]here are no dedicated state, federal or regional funds that are available to pay for any of these new programs/activities. The County, in addition to its General Fund, had sources of other county funding, including from

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[1110] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763, emphasis added.

[1111] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1185 (emphasis added).

[1112] Government Code section 17559.

[1113] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 [Reimbursement is required only when "the costs in question can be recovered solely from tax revenues."]. See also, *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189; *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 32; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986-987; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281.

[1114] Exhibit A, Test Claim filed June 30, 2011, pages 114-217 (Declarations.)

> roads, parks and Flood District funding, for certain Permit obligations. To the extent such fees were employed and/or such funds appropriated for such obligations, they would not be available for other County obligations. I am informed and believe and therefore state that I am not aware of any other fee or tax which the County would have the discretion to impose under California law to cover any portion of the cost of these new programs/activities.[1115]

The declarations from the cities further state "I am further informed and believe that the only available sources to pay for these new programs or activities are and will be the City's General Fund."[1116]

The record shows, however, that the claimants have a number of different revenue streams with which to fund stormwater pollution control activities, and the record indicates a mix of different revenues being applied throughout the County to pay for the activities required by the Third Term Permit and the test claim permit.

The permittees filed a ROWD to apply for the test claim permit, which is dated July 21, 2006.[1117] A more recent ROWD, dated May 20, 2014, (submitted for a Fifth Term Permit renewal) is now available.[1118] Both the 2006 ROWD, which reflects the activities and costs under the Third Term Permit, and the 2014 ROWD, which discusses the activities and costs under the test claim permit, include a graphic representation of countywide costs for compliance with the NPDES stormwater MS4 permits.[1119] The 2006 ROWD states that "[t]he purpose of this document is to comply with the requirement of the Third Term Permits, Regional Water Quality Control Board Orders R8-2002-0010 (Santa Ana Regional Board) and R9-2002-0001 (San Diego Regional Board) to submit a Report of Waste Discharge 180 days prior to permit expiration."[1120] During the period of the test claim permit the County appears to have discontinued the

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[1115] Exhibit A, Test Claim filed June 30, 2011, page 121 (Orange County Declaration).

[1116] Exhibit A, Test Claim filed June 30, 2011, pages 133 (City of Dana Point Declaration); 142 (City of Laguna Hills Declaration); 151 (City of Laguna Niguel Declaration); 160 (City of Lake Forest Declaration); 169 (City of Mission Viejo Declaration); 179-180 (City of San Juan Capistrano Declaration).

[1117] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2889 (Orange County ROWD, July 21, 2006).

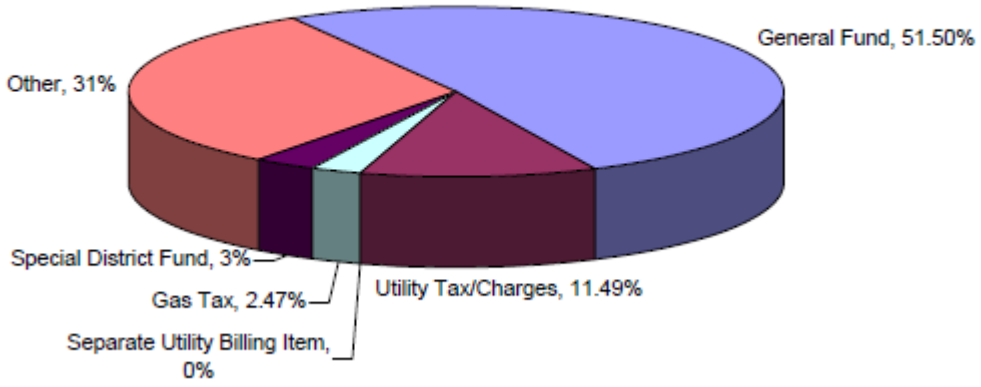
[1118] Exhibit K (30), Orange County, San Diego Region ROWD, May 20, 2014.

[1119] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2914 (Orange County ROWD, July 21, 2006, Fig. 2.2); Exhibit K, Orange County, San Diego Region ROWD, May 20, 2014, page 180.

[1120] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2889 (Orange County ROWD, July 21, 2006.

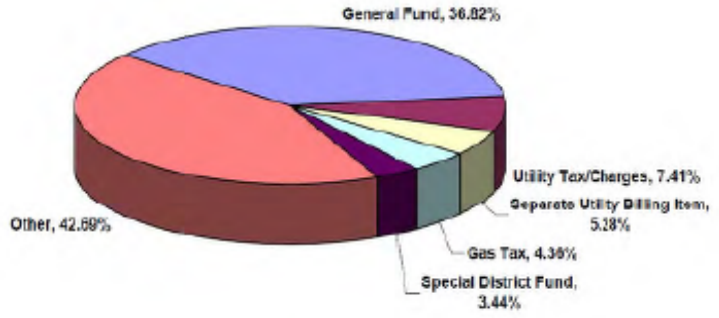
practice of submitting a ROWD to both regional boards simultaneously. The 2014 ROWD states that it is intended to comply only with Order No. R9-2009-0002 (the test claim permit).[1121] The relevant graphics are shown here:

Figure 2.2: 2004-05 Funding Sources



[1122]

Figure 6.2: FY2011-12 Funding Sources



[1123]

A few notable pieces of information about the claimants' costs and funding sources applied to their stormwater programs (which include, but are not limited to, the test claim permit activities) can be gleaned from these two ROWDs. First, the 2006 ROWD shows that countywide costs in the fiscal year prior to filing (fiscal year 2004-2005) were

[1121] Exhibit K (30), Orange County, San Diego Region ROWD, May 20, 2014, page 19.

[1122] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2914 (Orange County ROWD, July 21, 2006, Fig. 2.2).

[1123] Exhibit K (30), Orange County, San Diego Region ROWD, May 20, 2014, page 180.

approximately $73 million.[1124] This amount is not broken down by individual city permittees, or by program area, or by watershed, and therefore includes permittees under the Santa Ana Third Term Permit, Order No. R8-2002-0010. And, because the 2006 ROWD predates the test claim permit that is the subject of this Test Claim, the $73 million constitutes the cost of the program prior to any of the alleged test claim activities. Projected costs for 2005-2006 are stated to be $91.8 million for all city permittees across the county (and for both the Santa Ana and San Diego permit requirements).[1125] The ROWD also generally describes some of the funding sources available:

> The funding sources used by the Permittees include: General Fund, Utility Tax, Separate Utility, Gas Tax, and Special District Fund, Others (Sanitation Fee, Fleet Maintenance, Community Services District, Water Fund, Sewer and Storm Drain Fee, Grants, and Used Oil Recycling Grants).[1126]

The graph above indicates that 51.5 percent of funds used for NPDES activities under the prior permit (fiscal year 2004-2005 figures) are from "General Fund" revenues.[1127] A full 31 percent of funding sources for NPDES activities is identified as "Other," while the remaining funds are identified as "Special District Fund" (3%), "Utility Tax/Charges (11.49%), and "Gas Tax" (2.47%).[1128] It is unclear what revenues are included in the designation "Other," or whether "Utility Tax/Charges" would fall within a locality's "proceeds of taxes" subject to the protection of article XIII B, section 6. Neither is it clear in this record the origin of "Special District Fund[s]." However, the local entities' "General Fund" revenues should typically include local tax revenues and state subventions that fall within the conventional definition of "proceeds of taxes."[1129] In

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[1124] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2915 (Orange County ROWD, July 21, 2006, Fig. 2.3).

[1125] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2909 (Orange County ROWD, July 21, 2006, Section 2.2.5).

[1126] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2909 (Orange County ROWD, July 21, 2006, Section 2.2.5).

[1127] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016 (Orange County ROWD, July 21, 2006).

[1128] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016 (Orange County ROWD, July 21, 2006, Fig. 2.2).

[1129] California Constitution, article XIII C ["All taxes imposed by any local government shall be deemed to be either general taxes or special taxes. Special purpose districts or agencies, including school districts, shall have no power to levy general taxes."]; *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 57 [Defining special taxes to mean "taxes which are levied for a specific purpose rather than, as in the present

addition, the "Gas Tax" revenues, though collected by the state and allocated to the counties by statute, fall within the definition of "proceeds of taxes," being a state subvention other than a subvention under section 6.[1130] Thus the 2006 ROWD provides a snapshot of funding sources prior to the test claim permit, showing that a substantial portion, but not all, of the funds used to pay for stormwater activities countywide (including, but not necessarily limited to, activities required under the Third Term Permit) are from permittees' general fund revenues and from the state-allocated gas tax. These are, facially, appropriations subject to limitation, eligible for protection under article XIII B, section 6. The nature of the remaining revenues and their eligibility for reimbursement is unknown.

The May 20, 2014 ROWD, indicates a similar breakdown in funding sources, and a significant increase in the overall cost of the program.[1131] The 2014 ROWD states that countywide costs for Orange County's stormwater programs reached $95 million in fiscal year 2011-2012 (again, that includes all 36 separate municipal entities, and all stormwater activities - not just those newly required by the test claim permit and mandated by the state). And similarly to the 2006 ROWD, the 2014 ROWD states:

> In FY 2011-12, the funding sources used by the Permittees to meet these costs included: General Fund, Utility Tax, Separate Utility, Gas Tax, and Special District Fund, Others (Sanitation Fee, Fleet Maintenance, Community Services District, Water Fund, Sewer & Storm Drain Fee, Grants, and Used Oil Recycling Grants) (See Figure 6.2). While increasingly more stringent regulatory obligations prompt consideration being given to creation of dedicated stormwater funding, there are significant obstacles to overcome.[1132]

The 2014 ROWD shows a significantly smaller share of program activities funded from "General Fund" (36.82%) and a significantly larger share of activities funded from "Other" (42.69%).[1133] It is still unclear what revenues are encompassed within "Other," but the only inference that can be fairly drawn from this shift is that in the intervening years (2005-2012) the claimants have found some means, aside from relying more heavily on tax revenues, to fund the activities of the test claim permit. Indeed,

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case, a levy placed in the general fund to be utilized for general governmental purposes."]

[1130] Streets and Highways Code, section 2101 et seq.; California Constitution, article XIII B, section 8 ["With respect to any local government, 'proceeds of taxes' shall include subventions received from the State, other than pursuant to Section 6…"].

[1131] See Exhibit K (30), Orange County San Diego Region ROWD, May 20, 2014, pages 179-180.

[1132] Exhibit K (30), Orange County San Diego Region ROWD, May 20, 2014, page 179.

[1133] Exhibit K (30), Orange County San Diego Region ROWD, May 20, 2014, page 180.

comparing the 2006 ROWD with the 2014 ROWD, the difference in *total spending* and the portion of that spending that derives from the "General Fund" demonstrates that the importance of "Other" funds has only increased. The Commission cannot say, on the basis of these documents and the record filed what funds are included in the designation "Other," or whether "Utility Tax/Charges" might fall within proceeds of taxes; the description is imprecise. However, the two funding sources that can be identified with relative certainty as comprising mainly proceeds of taxes, "General Fund," and "Gas Tax" are relied on to a lesser degree after the test claim permit than before: in fiscal year 2004-2005 General Fund and Gas Tax spending totaled approximately 54 percent of the total $73 million, or $39.4 million, according to the 2006 ROWD.[1134] In 2011-2012 General Fund plus Gas Tax spending countywide totaled 41.2 percent of $95 million, or $39.1 million, according to the 2014 ROWD.[1135] Thus, not only has the *share* of revenues attributable to "proceeds of taxes" decreased, but also the actual *dollar amount* applied to this program has decreased. And, the Commission notes, between $50 and $75 million was already being spent annually for all requirements under the Third Term Permit,[1136] and only the *new and increased* costs mandated by the state under the test claim permit are of concern in a test claim analysis.

Moreover, one of the copermittees required to comply with the test claim permit is the City of San Clemente,[1137] and the City of San Clemente adopted a stormwater fee to cover the costs of the activities required by the permit, effective February 7, 2014, through June 30, 2020,[1138] and, thus, the City of San Clemente has no costs mandated by the state pursuant to Government Code section 17556(d) during that time period.

Thus, the Draft Proposed Decision found that the claimants had not established they were compelled to rely on proceeds of taxes to pay for the new state-mandated activities, as is required under *County of Fresno*, and, thus, there were no increased costs mandated by the state within the meaning of Government Code section 17514.[1139]

In response to the Draft Proposed Decision, the claimants contend that annual reports, required by the test claim permit to include a financial analysis and description of

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[1134] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2914-2915 (Orange County ROWD, July 21, 2006, Figs. 2.2, 2.3).

[1135] Exhibit K (30), Orange County San Diego Region ROWD, May 20, 2014, page 180.

[1136] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2915 (Orange County ROWD, July 21, 2006, Fig. 2.3).

[1137] Exhibit A, Test Claim, filed June 30, 2011, page 744 (Order No. R9-2009-0002).

[1138] Exhibit K (12), City of San Clemente Municipal Code, title 13, chapter 13.34, sections 13.34.010-13.34.030, page 3. Section 1187.5(c) of the Commission's regulations allows the Commission to take official notice of this document.

[1139] Exhibit G, Draft Proposed Decision, issued June 30, 2023, pages 337-343.

funding sources used, show that the Cities of Dana Point, Laguna Hills, and Laguna Niguel have used "entirely or almost entirely general fund revenues" during the permit term and, thus, have used their "proceeds of taxes" to pay for the new state-mandated activities.[1140] In support of this contention, the claimants submitted declarations from employees of Orange County, and the Cities of Dana Point, Laguna Hills, and Laguna Niguel.[1141] Each declare that the cities delivered their stormwater annual report to Orange County Public Works, as the principal permittee, which then consolidated and delivered the reports to the Regional Board, or delivered the annual report directly to the Regional Board with a copy to Orange County.[1142] In addition, each declares that the annual reports were certified under penalty of perjury,[1143] and the County provides three such certifications from the Cities of Dana Point and Laguna Hills dated in 2013 and 2014, which state the following:

> I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.[1144]

In addition, attached to the County's declaration are "true and correct" copies of excerpts from annual stormwater reports for fiscal years 2009-2010 through 2014-2015,

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[1140] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 35-36.

[1141] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 144-193 (Declaration of Cindy Rivers, Senior Environmental Resources Specialist with the Orange County Environmental Resources Service Area of the Orange County Public Works Department), 195-197 (Declaration of Lisa G. Zawaski, Senior Water Quality Engineer for the City of Dana Point), 199-201 (Declaration of Joseph Ames, Public Works Director/City Engineer for the City of Laguna Hills), 203-205 (Declaration of Trevor Agrelius, Finance Director for the City of Laguna Niguel).

[1142] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 145, 195, 200, 203.

[1143] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 145, 195-196, 200, 203.

[1144] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 148-150.

which are “kept in the regular course of business” by Orange County Public Works, identifying the costs and sources of funding used by these cities.[1145] These documents show that the Cities of Dana Point, Laguna Hills, and Laguna Niguel mostly used general fund revenues and used 100 percent general fund revenues in several fiscal years, on costs exceeding $1,000 for the stormwater program, which would include the new state-mandated activities identified above.[1146] The full annual reports have not been provided and, except for the three examples of certifications above, the reports do not show that they have been certified by the permittee. On this point, the declarations state the following or language very similar to the following:

> I am aware that each annual report was accompanied by a signed, certified statement, in which the signer certified under penalty of law that the annual report was prepared under the signatories' direction or supervision and further that, based upon the signatories' inquiry of responsible persons, "the information submitted, is, to the best of [the signatories'] knowledge and belief, true, accurate, and complete."[1147]

Following a review “of the annual report excerpts,” the Cities’ declarations identify the percentage of general fund revenues used in fiscal years 2009-2010 through 2014-2015, which corresponds to the pages attached to the County’s declaration.[1148]

Thus, the claimants are relying on excerpts from annual stormwater reports, which are filed by the permittees with the principal permittee and the Regional Board, and declarations from employees of Orange County, as the principal permittee, and employees of the Cities of Cities of Dana Point, Laguna Hills, and Laguna Niguel declaring that the copies of the records are true and correct copies, to prove that these

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[1145] Exhibit J, Claimants’ Comments on the Draft Proposed Decision, filed August 25, 2023, pages 145-146, 155-193.

[1146] Exhibit J, Claimants’ Comments on the Draft Proposed Decision, filed August 25, 2023, pages 155-193.

[1147] Exhibit J, Claimants’ Comments on the Draft Proposed Decision, filed August 25, 2023, pages 195-196, 200, 203.

[1148] Exhibit J, Claimants’ Comments on the Draft Proposed Decision, filed August 25, 2023, pages 196-197 (declaring that the City of Dana Point used 80% general fund revenues in fiscal year 2009-2010; 100% general fund revenues in fiscal years 2010-2011, 2011-2012, 2013-2014, and 2014-2015; and 95.5% in fiscal year 2012-2013); 200-201 (declaring that the City of Laguna Hills used 100% general fund revenues in fiscal years 2009-2010, 2010-2011, 2012-2013, 2013-2014, and 2014-2015; and 76% in fiscal year 2011-2012); 204 (declaring that the City of Laguna Niguel used 100% general fund revenues in fiscal years 2009-2010 and 2010-2011; 95% general fund revenues in 2011-2012; 91% general fund revenues in 2012-2013; 70% general fund revenues in 2013-2014; and 81% general fund revenues in 2014-2015).

cities used proceeds of taxes on the state-mandated activities. Except for copies of certified signature pages from each of the three cities for the 2013 and 2014 reports, the signature pages to the remaining reports are not provided.

Although the declarations are direct evidence and may properly be used to support a fact under the Commission's regulations,[1149] the portion of the annual reports identifying the sources of funds used are considered hearsay evidence. Hearsay evidence is defined as an out-of-court statement (either oral or written) that is offered to prove the truth of the matter stated.[1150] Unless an exception to the hearsay rule applies, hearsay evidence alone cannot be used to support a finding because out-of-court statements are generally considered unreliable. The person who prepared the annual report is not under oath, there is no opportunity to cross-examine the witness, and the witness cannot be observed at the hearing. Both the Commission's regulations, and provisions of the Administrative Procedures Act (APA), provide that hearsay evidence is admissible if it is inherently reliable, but will not be sufficient in itself to support a finding unless the evidence would be admissible over objection in a civil case with a hearsay exception.[1151] In such cases, hearsay evidence may be used only for the purpose of supplementing or explaining other evidence.[1152]

One of the exceptions to the hearsay rule is in Evidence Code section 1280, the public records exception, which the courts have found reliable if the records are properly authenticated.[1153] Section 1280 states the following:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:
>
> (a) The writing was made by and within the scope of duty of a public employee.
>
> (b) The writing was made at or near the time of the act, condition, or event.
>
> (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

[1149] California Code of Regulations, title 2, section 1187.5; *Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, 597.

[1150] Evidence Code section 1200.

[1151] California Code of Regulations, title 2, section 1187.5; Government Code section 11513.

[1152] California Code of Regulations, title 2, section 1187.5.

[1153] *People v. Orey* (2021) 63 Cal.App.5th 529, 551-552.

It is not required that a report from a public employee be sworn to be admissible under Evidence Code section 1280.[1154]

The Commission finds that the excerpts from the annual reports are properly authenticated by the declarations and, therefore, the reports fall within the public records exception to the hearsay rule.

Section H. of the test claim permit requires the permittees to conduct an annual fiscal analysis of the necessary capital and expenditures necessary to comply with the test claim permit, identify the source of funds used, and include that information in the annual Jurisdictional Runoff Management Program report.[1155] Section K.5. states that all annual reports are required to contain a "signed certified statement."[1156] In addition, the Water Code imposes civil penalties for the failure to comply with the reporting requirements or for false statements made in these documents.[1157]

The evidence shows that the annual reports were prepared annually as required by the test claim permit and, thus, were made by and within the scope of duty of a public employee. The excerpted annual reports were prepared in the same year as the expenditure of funds and, thus, the reports are considered reliable. The declarations also show that the excerpted reports were kept in the regular course of business and, thus, the excerpted reports have been properly authenticated pursuant to Evidence Code section 1280.[1158] There is no evidence rebutting these reports in the record.

Therefore, there is substantial evidence in the record that some of the claimants (the Cities of Dana Point, Laguna Hills, and Laguna Niguel) used their proceeds of taxes on the test claim permit in amounts exceeding $1,000.

However, to the extent the claimants receive funds from sources other than their own tax revenues, including from fees, grant funding, and from the other copermittees based

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[1154] For example, a hospital report, if properly authenticated, may qualify as a public record under Evidence Code section 1280. (*Bhatt v. State Dept. of Health Services* (2005) 133 Cal.App.4th 923, 929-930.)

[1155] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2193, 2201 (Order No. R9-2009-0002, Sections H and K.3.).

[1156] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2205 (Order No. R9-2009-0002, Section K.5.).

[1157] Water Code sections 13268, 13385, 13399.31.

[1158] In addition, the Commission may take official notice of the claimants' annual reports pursuant to section 1187.5(c) of the Commission's regulations, which states that "Official notice may be taken in the manner and of the information described in Government Code Section 11515."

on a cost sharing agreement,[1159] those funds are *not* the claimants' proceeds of taxes and reimbursement is not required if those funds are used to pay for the new state-mandated activities. These other sources of funds are not taxes levied by or for a claimant and are not counted against the recipient claimant's appropriations limit.[1160]

For example, the excerpted reports show that the Cities of Laguna Hills and Laguna Niguel used Orange County Local Transportation Authority Measure M2 funding in fiscal years 2012-2013, 2013-2014, and 2014-2015 to pay for a portion of their stormwater costs.[1161] Measure M2 is the second ordinance extending and increasing by ½ percent a retail transactions and use tax for eligible transportation projects beginning in 2011, which was originally levied by the Orange County Local Transportation Authority in 2006.[1162] The Measure M2 tax revenues are received by eligible local jurisdictions within the County under the Measure's local fair share return program.[1163] However, the revenues are not the claimants' proceeds of taxes because Orange County Local Transportation Authority has the sole legal authority to levy these taxes for eligible transportation projects and the tax proceeds are subject only to the Authority's appropriations limits, and not the appropriations limits of the claimants.[1164]

[1159] See, Exhibit A, Test Claim filed June 30, 2011, pages 122-124 (County of Orange Declaration, dated January 6, 2017), which explains that the County of Orange was designated the principal permittee and the County and the City permittees have a cost-sharing agreement for compliance with the test claim permit.

[1160] California Constitution, article XIII B, section 8; *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 32; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 [Reimbursement is required only when "the costs in question can be recovered solely from tax revenues."].

[1161] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 174, 191-192.

[1162] Exhibit K (59), Orange County Local Transportation Authority, Ordinance No. 3., page 4, https://octa.net/pdf/m2ordinance3-3.pdf?n=2021 (accessed on September 7, 2023).

[1163] Exhibit K (59), Orange County Local Transportation Authority, Ordinance No. 3., pages 36, 55-58.

[1164] Public Utilities Code section 130401 et seq. and 180200 et seq. provide the Transportation Authority with the authority to levy retail transaction and use taxes for transportation purposes in Orange County. Public Utilities Code section 18020 requires that transaction and use tax ordinances "shall include an appropriations limit for that entity pursuant to Section 4 of Article XIII B of the California Constitution." In this respect, Public Utilities Code section 130413 authorizes the Orange County Local Transportation Authority, upon approval of the voters, to increase the appropriations limit by the amount of the proceeds of the sales tax not entitled to an exemption. See

Based on the foregoing, there is substantial evidence in the record that the claimants incurred increased costs exceeding $1,000 and used their local "proceeds of taxes" to comply with the new state-mandated activities. Additional analysis is required to determine if any exception to the definition of "costs mandated by the state" in Government Code section 17556 apply.

2. Government Code Section 17556(d) Does Not Apply When Proposition 218 Requires Voter Approval to Impose Property-Related Stormwater Fees. However, the Courts Have Held There Are *No* Costs Mandated by the State Pursuant to Government Code Section 17556(d) When Local Government Has the Authority to Charge Regulatory Fees Pursuant to Article XIII C or Property-Related Fees that Are Subject Only to the Voter Protest Provisions of Article XIII D, Section 6 of the California Constitution.

Government Code section 17556(d) provides that the Commission "shall not find costs mandated by the state, as defined in Section 17514" if the Commission finds that "the local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

The claimants argue that due to the limitations of articles XIII A, XIII C, and XIII D they do not have the ability to fund any of these programs by a fee that could be imposed without a vote of the electorate, and, thus, the fee authority they have is not sufficient to cover the costs of the mandated activities within the meaning of Government Code section 17556(d).[1165] The claimants argue, in essence, that by preventing local government from recouping the costs of the mandate through non-tax revenue sources, Propositions 218 and 26 result in limiting the scope of the fee authority exception of Government Code section 17556(d) and that mandate reimbursement is an appropriate remedy in circumstances in which it would not have been previously.

As described below, the claimants' arguments are too broad. Cities and counties have authority under the California Constitution to make and enforce ordinances and resolutions to protect and ensure the general welfare within their jurisdiction, which is commonly referred to as the "police power."[1166] That authority includes the power to

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also, Exhibit K (59), Orange County Local Transportation Authority, Ordinance No. 3, page 9, which establishes the appropriations limit "of the Authority" for Measure M. Government Code section 7904 further provides that "[i]n no event shall the appropriation of the same proceeds of taxes be subject to the appropriations limit of more than one local jurisdiction or the state."

[1165] Exhibit A, Test Claim, filed June 30, 2011, pages 104-110; Exhibit F, Claimants' Rebuttal Comments, filed January 6, 2017, pages 45-46.

[1166] California Constitution, article XI, section 7. See also, *Marblehead Land Co. v. City of Los Angeles* (1931) 47 F.2d 528, 532.

impose fees or charges that are directed toward a particular activity or industrial or commercial sector, which this analysis will discuss in terms of a "regulatory fee;" fees or charges based on services or benefits received from government, which can be characterized as a "user fee;" fees or charges imposed as a condition of development of real property, often termed "development fees;" and fees or charges (or assessments) levied on all property owners within the jurisdiction, which after Proposition 218 are commonly described as "property-related fees or assessments."

In addition, a number of provisions of the Government Code provide express authority (and in some cases certain restrictions) to impose or increase regulatory fees,[1167] fees for development of real property,[1168] and property-based assessments, fees and charges.[1169]

Each of these fees or charges is subject to differing limitations pursuant to Propositions 26 and 218 (Cal. Const., arts. XIII C & XIII D).

The analysis below will address those limitations separately, because only property-related fees and assessments are subject to the notice, hearing, and majority approval or protest provisions of article XIII D, sections 4 and 6.

"Regulatory," "development," and "user" fees or charges are not subject to voter approval or majority protest. Broadly, these categories of fees are those that are targeted toward certain activities or sectors of industrial or commercial activity, or certain benefits received from the government or burdens created by the activity or the entity, rather than imposed on all property owners as an incident of property ownership.[1170] Such fees may be adopted as an ordinance or resolution in the context of the legislative body's normal business,[1171] subject only to the limitations of article XIII

[1167] See, e.g., Government Code section 37101 ("The legislative body may license, for revenue and regulation, and fix the license tax upon, every kind of lawful business transacted in the city.").

[1168] Government Code section 66001 (providing for development fees under the "Mitigation Fee Act," requiring local entity to identify the purpose of the fee and the uses to which revenues will be put, to determine a reasonable relationship between the fee's use and the type of project or projects on which the fee is imposed).

[1169] See, e.g., Health and Safety Code section 5471 (fees for storm drainage maintenance and operation); Government Code sections 38902 (providing for sewer standby charges); 53750 et seq. (Proposition 218 Omnibus Implementation Act, describing procedures for adoption of assessments, fees and charges); 53751 (as amended in 2017, providing that fees for sewer services includes storm sewers).

[1170] See *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842.

[1171] See, e.g., *City and County of San Francisco v. Boss* (1948) 83 Cal.App.2d 445, 450 ("If revenue is the primary purpose and regulation is merely incidental the imposition is a

C, section 1(e), which, largely turn on establishing the relationship between the revenues raised and the uses to which they are put, and the amount charged and the benefits received or burdens created by the payor.[1172]

a. Case law establishes that the exception to the subvention requirement found in Government Code section 17556(d) is a legal inquiry, not a practical one.

The California Supreme Court upheld the constitutionality of Government Code section 17556(d) in *County of Fresno.* [1173] The court, in holding that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes, stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra,* 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*[1174]

Following the logic of *County of Fresno*, the Third District Court of Appeal held in *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, that the Santa Margarita Water District, and other similarly situated districts, had statutory authority to raise rates on water, notwithstanding argument and evidence that the amount by which the district would be forced to raise its rates would render the water unmarketable.[1175] The district acknowledged the existence of fee authority, but argued it was not "sufficient," within the meaning of section 17556(d).[1176] The court held that "[t]he Districts in effect ask us to

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tax; while if regulation is the primary purpose the mere fact that incidentally a revenue is also obtained does not make the imposition a tax.").

[1172] California Constitution, article XIII C, section 1(e).

[1173] *County of Fresno v. State of California* (1990) 53 Cal.3d. 482.

[1174] *County of Fresno v. State of California* (1990) 53 Cal.3d. 482, 487.

[1175] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 402.

[1176] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 398.

construe 'authority,' as used in the statute, as a practical ability in light of surrounding economic circumstances. However, this construction cannot be reconciled with the plain language of [section 17556(d)] and would create a vague standard not capable of reasonable adjudication."[1177] The court concluded: "Thus, the economic evidence presented by SMWD to the Board was irrelevant and injected improper factual questions into the inquiry."[1178]

More recently, the Third District Court of Appeal endorsed and followed *Connell* in *Paradise Irrigation District*: "[w]e also reject the Water and Irrigation Districts' claim that, as a matter of practical reality, the majority protest procedure allows water customers to defeat the Districts' authority to levy fees."[1179] Instead, the court held, "[w]e adhere to our holding in *Connell* that the inquiry into fee authority constitutes an issue of law rather than a question of fact."[1180]

And the 2021 decision of the Second District Court of Appeal in *Department of Finance v. Commission on State Mandates* found that "[e]ven if we assume that drafting or enforcing a law that imposes fees to pay for inspections would be difficult, the issue is whether the local governments have the authority to impose such a fee, not how easy it would be to do so."[1181]

Accordingly, the background rule from these cases is that where the claimant has "authority, i.e., the right or power, to levy fees sufficient to cover the costs" of a state mandated program, reimbursement is not required, notwithstanding other factors that may make the exercise of that authority impractical or undesirable.[1182]

[1177] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

[1178] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

[1179] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

[1180] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

[1181] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 564, citing to *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

[1182] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Connell v. Superior Court* (1997) 59 Cal.App.4th 382.

b. The claimants have authority to charge regulatory fees sufficient to pay for the new requirements in sections F.1.d., F.1.f., F.1.h., and F.3.d., relating to LID, Hydromodification Plans, LID Waiver Program, BMPs for Priority Development Projects, a Retrofitting Program, and BMP Maintenance Tracking and Inspection program, which are sufficient as a matter of law to cover the costs of the mandated activities within the meaning of Government Code section 17556(d) and, thus, there are no costs mandated by the state for these activities.

i. The claimants have constitutional and statutory authority to impose regulatory fees, which are exempt from the definition of "tax" under article XIII C of the California Constitution as long as the fees meet a threshold of reasonableness and proportionality.

Article XI, section 7 of the California Constitution provides: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[1183] Interpreting this provision, and its predecessor, the courts have held that a local legislative body with police power "has a wide discretion" and its laws or ordinances "are invested with a strong presumption of validity."[1184] The courts have held that "the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution."[1185] Accordingly, ordinances or laws regulating legitimate businesses or other activities within a city or county, as well as regulating the development and use of real property, have generally been upheld.[1186] In addition, "[t]he services for which a regulatory fee may be charged include those that are "'incident to the issuance of [a] license or permit, investigation, inspection, administration, maintenance of a system of supervision and

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[1183] California Constitution, article XI, section 7.

[1184] *Marblehead Land Co. v. City of Los Angeles* (1931) 47 F.2d 528, 532.

[1185] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 662 (in which a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without a two-thirds affirmative vote of the county electors).

[1186] See *Ex parte Junqua* (1909) 10 Cal.App. 602 (police power "embraces the right to regulate any class of business, the operation of which, unless regulated, may, in the judgment of the appropriate local authority, interfere with the rights of others…"); *Sullivan v. City of Los Angeles Dept. of Building & Safety* (1953) 116 Cal.App.2d 807 (recognizing broad power to regulate not only nuisances but things or activities that may become nuisances or injurious to public health); *California Building Industry Ass'n v. City of San Jose* (2015) 61 Cal.4th 435 (recognizing broad authority of municipality to regulate land use).

enforcement.'"[1187] The courts also hold that water pollution prevention is a valid exercise of government police power.[1188]

Moreover, a number of provisions of the Government Code provide express authority to impose or increase regulatory fees,[1189] and fees for development of real property.[1190]

Thus, there is no dispute that the copermittees have authority, both statutory and constitutional (recognized in case law), to impose fees, including regulatory and development fees.[1191] The issue in dispute is only whether Propositions 26 and 218 imposes procedural and substantive restrictions that so weaken that authority as to render it insufficient, within the meaning of Government Code section 17556(d).

As discussed, Proposition 13 (1978) added article XIII A to the California Constitution, with the intent to limit local governments' power to impose or increase *taxes*.[1192] Proposition 13 generally limited the rate of any ad valorem tax on real property to one percent; limited increases in the assessed value of real property to two percent annually absent a change in ownership; and required that any changes in state taxes enacted to increase revenues and special taxes imposed by local government must be approved by a two-thirds vote of the electors.[1193] Proposition 13, however, did not define "special taxes," and a series of judicial decisions tried to define the difference between fees and

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[1187] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 562, citing to *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[1188] *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.

[1189] See, e.g., Government Code section 37101 ("The legislative body may license, for revenue and regulation, and fix the license tax upon, every kind of lawful business transacted in the city.").

[1190] Government Code section 66001 (providing for development fees under the "Mitigation Fee Act," requiring local entity to identify the purpose of the fee and the uses to which revenues will be put, to determine a reasonable relationship between the fee's use and the type of project or projects on which the fee is imposed).

[1191] See also, *Ayers v. City Council of City of Los Angeles* (1949) 34 Cal.2d 31 (Upholding conditions imposed by the City on subdivision development, in the absence of any clear restriction or limitation on the City's police power); *Associated Home Builders etc. Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633 (Upholding state statute and local ordinance requiring dedication or in-lieu fees for parks and recreation as a condition of subdividing for residential building).

[1192] See, e.g., *County of Fresno v. State of California* (1991) 53 Cal.3d 482.

[1193] *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1317.

taxes, and diminished Proposition 13's import by allowing local governments to generate revenue without a two-thirds vote.[1194]

In 1996, Proposition 218 added article XIII C to ensure and reiterate voter approval requirements for general and special taxes, because it was not clear whether Proposition 62, which enacted statutory provisions to ensure that all new local taxes be approved by a vote of the local electorate, bound charter jurisdictions.[1195] As added by Proposition 218, article XIII C defined all taxes as general or special, and provided that special districts have no power to impose general taxes; and for any other local government, general taxes require approval by a majority of local voters, and special taxes require a two-thirds majority voter approval.[1196]

Interpreting the newly-reiterated limitation on local taxes, the Court in *Sinclair Paint* held that a statute permitting the Department of Health Services to levy fees on manufacturers and other persons contributing to environmental lead contamination, in order to support a program of evaluation and screening of children, imposed bona fide *regulatory fees*, and not, as alleged by plaintiffs, a special tax that would require voter approval under articles XIII A and XIII C.[1197] The Court noted with approval *San Diego Gas & Electric*, in which the air district was permitted to recover costs of its operations, which are not reasonably identifiable with specific industrial polluters, against all monitored polluters according to an emissions-based formula, and those fees were not held to constitute a special tax.[1198] The *Sinclair Paint* Court cited with approval the court of appeal's finding that "A reasonable way to achieve Proposition 13's goal of tax relief is to shift the costs of controlling stationary sources of pollution from the tax-paying public to the pollution-causing industries themselves…"[1199] The *Sinclair Paint* Court thus held: "In our view, the shifting of costs of providing evaluation, screening, and medically necessary follow-up services for potential child victims of lead poisoning from the public to those persons deemed responsible for that poisoning is likewise a reasonable police power decision."[1200]

[1194] *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1317–1319.

[1195] *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 258-259.

[1196] See Exhibit K (17), Excerpts from Voter Information Guide, November 1996 General Election.

[1197] *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 870; 877.

[1198] *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1148.

[1199] *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 879 (quoting *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1148).

[1200] *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 879.

In 2010, the voters adopted Proposition 26, partly in response to *Sinclair Paint*.[1201] Proposition 26 sought to broaden the definition of "tax," (and accordingly narrow the courts' construction of permissible non-tax fees). However, Proposition 26 largely *codifies* the analysis of *Sinclair Paint*, in its articulation of the various types of fees and charges that are *not* deemed "taxes."[1202] Thus, while Proposition 13 led a series of increasing restrictions on the imposition of new taxes, after *Sinclair Paint*, and Propositions 218 and 26, local governments have the power, subject to varying limitations, to impose or increase (1) general taxes [with voter approval];[1203] (2) special taxes [with *two-thirds* voter approval];[1204] and (3) levies, charges, or exactions that are not "taxes," pursuant to the exceptions stated in article XIII C, section 1(e), which include:

> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
>
> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
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> (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
>
> (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
>
> (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
>
> (6) A charge imposed as a condition of property development.

[1201] See Exhibit K (18), Excerpts from Voter Information Guide, November 2010 General Election, page 3.

[1202] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210, Fn. 7 (citing *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 262 and Fn 5).

[1203] California Constitution, article XIII C, section 2.

[1204] California Constitution, article XIII C, section 2.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.[1205]

The plain language of article XIII C, section 1(e) thus describes certain categories of fees or exactions that are not taxes, including fees or charges for a benefit conferred or privilege granted,[1206] and fees or charges for a government service or product provided to the payor and not others.[1207] Both of these could be described as "user" fees, or otherwise described as fees for a government service or benefit. In addition, section 1(e) provides for regulatory fees (including those for inspections),[1208] development fees,[1209] and assessments or property-related fees or charges adopted in accordance with article XIII D.[1210] In each case, the local government bears the burden to establish that the fee or charge is not a tax, including that "the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."[1211]

The claimants argue that it would be impossible for local government to develop a fee that allocates to the individual fee payor the portion of the program costs attributable to the burdens that the payor places on the MS4.[1212]

However, while the limitations of article XIII C, section 1(e) may be newly expressed in the Constitution (i.e., added in 2010 by Proposition 26), the concepts that regulatory fees must be reasonably related to a legitimate public purpose, and in some way proportional to the activity being regulated, are not at all new. The California Supreme Court described the history of such fees in *United Water Conservation Dist.*, saying, "the language of Proposition 26 is drawn in large part from pre-Proposition 26 case law

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[1205] California Constitution, article XIII C, section 1(e).

[1206] California Constitution, article XIII C, section 1(e)(1).

[1207] California Constitution, article XIII C, section 1(e)(2).

[1208] California Constitution, article XIII C, section 1(e)(3).

[1209] California Constitution, article XIII C, section 1(e)(6).

[1210] California Constitution, article XIII C, section 1(e)(7).

[1211] California Constitution, article XIII C, section 1(e).

[1212] Exhibit A, Test Claim, filed June 30, 2011, page 105.

distinguishing between taxes subject to the requirements of article XIII A, on the one hand, and regulatory and other fees, on the other."[1213] The Court also noted: "*Sinclair Paint*, from which the relevant article XIII C requirements are derived, made clear that the aggregate cost inquiry and the allocation inquiry are two separate steps in the analysis."[1214] Accordingly, the Court upheld the court of appeal's finding that the conservation charges did not exceed the reasonable cost of the regulatory activity in the aggregate,[1215] but presumed "each requirement to have independent effect,"[1216] and remanded the matter for consideration of the latter issue.

Similarly, in *San Diego County Water Authority*, the First District Court of Appeal upheld non-property-related rates charged for conveying water from the Colorado River based on a two-part test.[1217] The rates were held to satisfy both the express requirements of article XIII C, section 1(e)(2): "a specific service (use of the conveyance system) directly to the payor (a member agency) that is not provided to those not charged and which does not exceed the reasonable costs…of providing the service"; and the more general test of *Sinclair Paint*: "[the volumetric rates] bear a fair and reasonable relationship to the benefits it receives from its use of the conveyance system."[1218]

Moreover, the courts have found that regulatory fees are flexible, and the Third District Court of Appeal in *California Assn. of Prof. Scientists v. Department of Fish & Game (Professional Scientists)* has identified the following general rules:

> General principles have emerged. Fees charged for the associated costs of regulatory activities are not special taxes under an article XIII A, section 4 analysis if the " ' "fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and [they] are not levied for unrelated revenue purposes." ' " (Citation omitted.) "A regulatory fee may be imposed under the police power when the fee

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[1213] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210, Fn. 7 (citing *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 262 and Fn 5).

[1214] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210.

[1215] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1212.

[1216] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1214 (citing *Dix v. Superior Court* (1991) 53 Cal.3d 442, 459).

[1217] *San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1153.

[1218] *San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1153.

> constitutes an amount necessary to carry out the purposes and provisions of the regulation." (Citation omitted.) "Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement." (Citation omitted.) Regulatory fees are valid despite the absence of any perceived "benefit" accruing to the fee payers. (Citation omitted.) Legislators "need only apply sound judgment and consider 'probabilities according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee." (Citation omitted).[1219]

As indicated by the court in *Professional Scientists,* regulatory fees can include all those costs "incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement."[1220] In *United Business Commission v. City of San Diego*, the court explained that regulatory fees include "all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed" and that the following incidental costs are properly included in a regulatory fee: "inspection of hazards, travel time, office supplies, telephone expenses, overhead, and clerk's time"[1221]

The 2021 *Department of Finance* decision of the Second District Court of Appeal found that the local agencies subject to an NPDES permit issued by the Los Angeles Regional Water Quality Control Board had the authority under their police powers to charge regulatory fees to periodically inspect commercial and industrial facilities to ensure compliance with various environmental regulatory requirements:

> We agree with the Commission that, based upon the local governments' constitutional police power and their ability to impose a regulatory fee that (1) does not exceed the reasonable cost of the inspections, (2) is not levied for unrelated revenue purposes, and (3) is fairly allocated among the fee payers, the local governments have such authority.[1222]

Even though the imposition of the fee may be difficult, the court held that local governments have the authority to impose the fee and, thus, reimbursement under article XIII B, section 6 was not required:

[1219] *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[1220] *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[1221] *United Business Commission v. City of San Diego* (1979) 91 Cal.App.3d 156, 166, fn. 2.

[1222] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 552, 546, 562-563.

> The local governments also argue that a fee that must be no more than necessary to cover the reasonable costs of the inspections "would be difficult to accomplish." They refer to problems that would arise from a general business license fee on all businesses, including those not subject to inspection, and to charging fees for inspections in years in which no inspection would take place. Even if we assume that drafting or enforcing a law that imposes fees to pay for inspections would be difficult, the issue is whether the local governments have the authority to impose such a fee, not how easy it would be to do so. (*Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401, 69 Cal.Rptr.2d 231.) As explained above, the police powers provision of the constitution and the judicial authorities we have cited provide that authority.[1223]

And the Third District Court of Appeal recently held in *Department of Finance v. Commission on State Mandates* that regulatory fees properly included the costs of creating LID and hydromodification plans, which were "incident to the development permit which permittees will issue to priority development projects and the administration of permittees' pollution abatement program."[1224] The court rejected arguments from the County and cities that the costs of creating the plans could not be recovered through regulatory fees, and thus voter approval would be required, since the amount of the fee would exceed the reasonable costs of providing the services for which it is charged, and the amount of the fee would not bear a reasonable relationship to the burdens created by the feepayers' activities or operations, primarily because the costs were incurred before any priority development project was proposed.[1225] The court also rejected arguments that the County and cities could not legally levy a fee to recover the cost of preparing the plans because those planning actions benefit the public at large and, thus, would constitute a tax.[1226] The court found that local government has fee authority sufficient as a matter of law to cover the costs of the hydromodification management plan and LID requirements within the meaning of Government Code section 17556(d) and, thus, there were no costs mandated by the state for these activities based on the following findings:

- Creating the hydromodification management plans and the LID requirements

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[1223] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 564-565.

[1224] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590 (review denied March 1, 2023).

[1225] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 587-590.

[1226] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 592-593.

constitute costs incident to the development permit which permittees will issue to priority development projects and the administration of permittees' pollution abatement program. "Setting the fee will not require mathematical precision. Permittees' legislative bodies need only "consider 'probabilities according to the best honest viewpoint of [their] informed officials' " to set the amount of the fee."[1227]

- There was no evidence that the permittees could not levy a fee that would bear a reasonable relationship to the burdens created by future priority development. "A regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors . . . The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors." The fee just has to be related to the overall cost of the governmental regulation.[1228]
- The court rejected the claimants' argument that they could not legally levy a fee to recover the cost of preparing the plans because those planning actions benefit the public at large, relying *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1451. Proposition 26 states a levy is not a tax where, among other uses, it is imposed "for a specific government service provided directly to the payor *that is not provided to those not charged* ...."[1229] However, the court found that the service provided directly to developers of priority development projects was the preparation, implementation, and approval of water pollution mitigations applicable only to their projects. Unlike in *Newhall*, that service was not provided to anyone else, and only affected priority project developers charged for the service. The service would not be provided to those not charged.[1230]

Accordingly, there is no reason to believe that article XIII C imposes any greater limitation on local governments' authority under their police power to impose reasonable regulatory fees and other fees than existed under prior law. Article XIII C makes clear

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[1227] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[1228] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[1229] See, for example, *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 569, where the court held that article XIII D prohibits MS4 permittees from charging property owners for the cost of providing trash receptacles at public transit locations in part because service was made available to the public at large.

[1230] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 592-593.

that the burden is on the local government to establish that the levy is not a tax, that the fee is reasonably related to the costs to government in the aggregate, and that the fee charged to the payors is reasonably related to the benefits received or burdens created by such payors as a part of the rate setting process.[1231] It is not the burden of the state to make this showing on behalf of local government.

Here, the claimants have imposed on themselves the opposite incentive: they do not wish to impose new fees, nor establish that such fees do not constitute a tax; instead they seek mandate reimbursement. They argue the impossibility of imposing or increasing fees, even as *Sinclair Paint* and *616 Croft Ave.* show that the reasonableness and proportionality tests to which courts have subjected other proposed fees do not present such a hurdle as to effectively divest them of the authority to impose fees. In addition, there is ample evidence that the claimants do in fact impose development fees, regulatory fees, and other fees that they have successfully established as fees, rather than taxes, even after the adoption of Propositions 218 and 26. For example, the County of Orange updated its fee schedule for development and building permits on March 10, 2015, and made the following findings:

> NOW, THEREFORE, be it resolved that this Board does hereby:
>
> 1. Find that the adoption of the Resolution approving the proposed fee schedule is Statutorily Exempt from the provisions of CEQA pursuant to Section 15273(a)(1) and (a)(2) of the CEQA Guidelines as the establishment or modification of rates, fees, and charges which are for the purpose of meeting operating expenses, including employee wage rates and fringe benefits and purchasing or leasing supplies, equipment, or materials.
> 2. Find that these fees meet the requirements set forth in subdivision (e)(2), (e)(3), or (e)(5), as applicable, of Section 1 Article XIII C of the California Constitution, and are therefore exempt from the definition of a tax as used therein.
> 3. Find that the revenue resulting from the fees established pursuant to this resolution will not exceed the estimated reasonable costs to provide the services and that the costs of providing these services are reasonably allocated among the fees established hereby.[1232]

Based on the foregoing, the Commission finds that article XIII C of the California Constitution does not render local government's authority to impose fees insufficient as a matter of law within the meaning of Government Code section 17556.

[1231] California Constitution, article XIII C, section 1(e).

[1232] Exhibit K (28), Orange County Development Fee Ordinance, March 10, 2015, page 1.

ii. There are no costs mandated by the state for the LID, Hydromodification Plans, LID Waiver Program, BMPs for Priority Development Projects, and a Retrofitting Program required by sections F.1.d., F.1.h., and F.3.d., of the test claim permit; and the new BMP maintenance tracking and inspection activities required by section F.1.f. of the test claim permit.

As indicated above, the following LID and hydromodification activities for development projects mandate a new program or higher level of service:

- LID, Hydromodification Plans, LID Waiver Program, BMPs for Priority Development Projects, and a Retrofitting Program (sections F.1.d., F.1.h., and F.3.d.)

  a. The following administrative and planning activities:

     1) Submit an updated model Standard Stormwater Mitigation Plan (SSMP) for review by the Regional Board within two years of adoption of the permit, that meets the requirements of section F.1.d., of the permit to reduce priority development project discharges of stormwater pollutants from the MS4 to the MEP and to prevent runoff discharges from the MS4 from causing or contributing to a violation of water quality standards. (F.1.d.)

     2) Update local SSMPs and amended ordinances consistent with the updated model SSMP. (F.1.d.)

     3) As part of the SSMP, implement an updated procedure for identifying pollutants of concern for each priority development project, which must include receiving water quality, land use type, and pollutants expected to be present on site. (F.1.d.3.)

     4) Within two years after adoption of the permit, review local codes, policies, and ordinances and identify barriers to the implementation of LID BMPs, and take appropriate actions to remove the barriers. (F.1.d.4.)

     5) Develop a LID BMP waiver program to incorporate into the SSMP. (F.1.d.7.)

     6) Develop site design and maintenance criteria for each site design and treatment control BMP listed in the SSMP. (F.1.d.8.)

     7) During the third year of implementation of the permit, review and update the BMPs that are listed in the local SSMPs for treatment control. The update must include the removal of obsolete or ineffective BMPs and the addition of LID BMPs that can be used for treatment. The update must also add appropriate LID BMPs to any discussion addressing pollutant removal inefficiencies of treatment control BMPs. In addition, the update must incorporate findings from BMP effectiveness studies conducted by

the copermittees for projects funded wholly or in part by the State or Regional Board, and implement a mechanism for annually incorporating those findings into SSMP project reviews and permitting. (F.1.d.10.)

8) Collaborate with other copermittees to develop a Hydromodification Management Plan (HMP) to manage increases in runoff discharge rates and durations from all priority development projects, *except* those identified in section F.1.h.(3). Submit a draft HMP that has been available to public review and comment, to the Regional Board within two years of adoption of the permit. Within 180 days of receiving the Regional Board's comments on the draft HMP, submit a final HMP to the Regional Board that addresses the comments. Within 90 days of receiving a finding of adequacy from the executive officer, incorporate the HMP into the local SSMPs so that estimated post-project runoff discharge rates and durations do not exceed pre-development discharge rates and durations. (F.1.h.1., 2., 4.)

9) Before the final HMP is approved and within one year of adoption of the permit, submit a signed certification statement to the Regional Board verifying that all priority development projects are implementing interim hydromodification criteria "by comparing the pre-development (naturally occurring) and post-project flow rates and durations using a continuous simulation hydrologic model." (F.1.h.5.)

10) Develop a retrofitting program for existing developments (municipal, industrial, commercial, and residential) by identifying and creating an inventory of existing developments for retrofit, evaluating and ranking those projects for retrofit, and encouraging retrofit projects to be designed in accordance with SSMP LID and hydromodification requirements. (F.3.d.1.-4.)

b. In accordance with section F.1.d.9., of the test claim permit, verify that the proponents of existing categories of new development or significant redevelopment for residential, commercial, and mixed-use projects, comply with the following activities:

1) When a new development project feature, such as a parking lot, falls into a priority development category, the entire project footprint must comply with the requirements of the SSMP. (F.1.d.2.)

2) Project proponents must employ the following *specified* classes of site design BMPs in accordance with section F.1.d.4.b.ii.-iv.:

- Projects with landscaped or other pervious areas must, where feasible, drain runoff from impervious areas (rooftops, parking lots, sidewalks, walkways, patios) into pervious areas prior to discharge to the MS4. The amount of runoff from impervious areas that is to

drain to pervious areas shall not exceed the total capacity of the project's pervious areas to infiltrate or treat runoff, taking into consideration the pervious areas' geologic and soil conditions, slope, and other relevant factors.

- Projects with landscaped or other pervious areas must, where feasible, properly design and construct the pervious areas to effectively receive and infiltrate or treat runoff from impervious areas prior to discharge to the MS4. Soil compaction for these areas shall be minimized. The amount of the impervious areas that are to drain to pervious areas must be based on the total size, soil condition, slope, and other relevant factors.
- Projects with low traffic areas and appropriate soil conditions must construct walkways, trails, overflow parking lots, alleys, or other low traffic areas with permeable surfaces, such as pervious concrete, porous asphalt, unit pavers, and granular materials.

3) LID BMPS shall be sized and designed to ensure onsite retention without runoff, of the volume of runoff produced from a 24-hour 85th percentile storm event, as determined from the County of Orange's 85th Percentile Precipitation Map, unless technically infeasible. (F.1.d.4.d.)

4) The treatment control BMPs for each priority development project "not implementing LID capable of meeting the design stormwater criteria for the entire site and meeting technical infeasibility eligibility," shall be ranked with high or medium pollutant removal efficiency for the project's most significant pollutants of concern. (F.1.d.6.d.i.)

5) Implement site design and maintenance criteria for each site design and treatment control BMP required. (F.1.d.8.)

6) Implement the requirements of the approved HMP for all priority development projects, except those identified in section F.1.h.3., (i.e., where the project discharges stormwater runoff into underground storm drains discharging directly to bays or the ocean, or discharges into conveyance channels whose bed and bank are concrete lined all the way from the point of discharge to ocean waters, enclosed bays, estuaries, or water storage reservoirs and lakes). (F.1.h.4.)

c. Verify that proponents of the *new* categories of priority development projects (industrial, retail gasoline outlets, and one acre pollutant generating development projects) comply with all requirements of the SSMP and HMP. (F.1.d.2.; F.1.d.3.-8.; F.1.h.1., 2.)

d. Track and inspect completed retrofit BMPs in accordance with section F.1.f., of the test claim permit. (F.3.d.5.)

- BMP Maintenance Tracking and Inspections (F.1.f.) In addition, except as applicable to a claimant's own municipal development (which is not mandated by the state), the following BMP maintenance tracking and inspection activities required by section F.1.f. constitute a state-mandated new program or higher level of service:
    a. Develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance for existing municipal, industrial, commercial, and residential developments within its jurisdiction since July 2001. (F.1.f.1.)
    b. Establish a mechanism to ensure that appropriate easements and ownerships are properly recorded in public records and that the information is conveyed to all appropriate parties when there is a change in project or site ownership. (F.1.f.2.)
    c. The inspections of BMP implementation, operation, and maintenance must note observations of vector conditions, such as mosquitoes, and where conditions are contributing to mosquito production, the copermittee is required to notify the Orange County Vector Control District. (F.1.f.3.)

All of these activities fall within the permittees' regulatory authority and are denied pursuant to Government Code section 17556(d), and the *Department of Finance* cases discussed above.[1233]

As indicated above, the plain language of Proposition 26, or article XIII C, section 1(e), describes certain categories of fees or exactions that are not taxes, including fees or charges for a benefit conferred or privilege granted,[1234] fees or charges for a government service or product provided to the payor and not others,[1235] reasonable regulatory fees for permits,[1236] and charges imposed as a condition of property development.[1237]

As the court in *Professional Scientists* made clear, regulatory fees may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation and includes all costs incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a

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[1233] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 552, 546, 562-563; *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 587-590.

[1234] California Constitution, article XIII C, section 1(e)(1).

[1235] California Constitution, article XIII C, section 1(e)(2).

[1236] California Constitution, article XIII C, section 1(e)(3).

[1237] California Constitution, article XIII C, section 1(e)(6).

system of supervision and enforcement. Regulatory fees are valid despite the absence of any perceived "benefit" accruing to the fee payers. The claimants "need only apply sound judgment and consider 'probabilities according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee."[1238]

Here, these activities, including the planning, inspection, and enforcement activities are "incident to the development permit[s] which permittees will issue to priority development projects and the administration of permittees' pollution abatement program."[1239] The proposed fee would be imposed as a condition for approving new real property development and based on the developer's application for government approval to proceed with the development. The fees would be not levied for unrelated revenue purpose, can be fairly allocated among the fee payers, and the service is not provided to those not charged.[1240] Such fees are not taxes under Proposition 26 when they are charges imposed as a condition of property development.[1241]

In addition, there is no evidence in the record indicating that the claimants cannot levy a fee that will bear a reasonable relationship to the burdens created by future priority development. "A regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors.[1242] The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors.[1243] Thus, permissible fees must be related to the overall cost of the governmental regulation. They need not be finely calibrated to the precise benefit each individual fee payor might derive, or the precise burden each payer may create. What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used for general revenue collection. "An excessive fee that is

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[1238] *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[1239] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[1240] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 562-563, citing *California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1046, which cited *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 881; see also *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 588.

[1241] California Constitution, article XIII C, section 1(e)(6).

[1242] *Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 194.

[1243] *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 948.

used to generate general revenue becomes a tax."[1244] And "No one is suggesting [that the claimants] levy fees that exceed their costs."[1245]

In comments on the Draft Proposed Decision, however, the claimants assert that the costs required by Sections F.3.d.1.-4. (i.e., the activities to develop and implement a retrofitting program for existing developments by identifying and creating an inventory of existing developments for retrofit, evaluating and ranking those projects for retrofit and then prioritizing work plans, and encouraging retrofit projects to be designed to use LID and hydromodification requirements), are not recoverable through regulatory fees as follows:

> The DPD concludes, without discussion, that Claimants can assess regulatory fees to pay costs relating to the retrofitting of existing development (DPD at 356-358). But in such a situation, there is no property owner or developer upon which fees can be assessed to pay costs such as identifying and inventorying existing areas of development (Section F.3.d. 1.); costs to "evaluate and rank" the inventoried areas to prioritize retrofitting (Section F.3.d.2.); or, costs to consider the results of the evaluation in prioritizing Claimant work plans for the following year. (Section F.3.d.3.).
>
> None of these requirements is related to potential 'future private development (for which development fees can be obtained), but rather to how Claimants must evaluate existing developments. [Fn. omitted.] And, as the Test Claim Permit expressly provided, the work required of Claimants was not intended to benefit or burden any particular parcel but to improve water quality generally by addressing "the impacts of existing development through retrofit projects that reduce impacts from hydromodification, promote LID, support riparian and aquatic habitat restoration, reduce the discharge of storm water pollutants from the MS4 to the MEP, and prevent discharges from the MS4 from causing or contributing to a violation of water quality standards." Test Claim Permit, Section F.3.d.
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> Fees for requirements which "redound to the benefit of all" are not recoverable as regulatory fees. *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1451. *Newhall County* held that a charge imposed by a water agency for creating "groundwater management plans" as part of the agency's groundwater management program could not be imposed as a fee. The court reasoned that the

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[1244] *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 438.

[1245] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 402.

> charge was"not [forl specific services the Agency provides directly to the [payors], and not to other [non-payors] in the Basin. On the contrary, groundwater management services redound to the benefit of all groundwater extractors in the Basin - not just the [payors]." [Fn. omitted.] *See also Dept. of Finance (LA County Permit Appeal II), supra*, holding that placing trash receptacles at transit stops benefitted the "public at large" [fn. omitted] and that associated costs could not be passed on to any particular person or group. [Fn. omitted.][1246]

The Commission disagrees with the claimant's argument. The fact that the claimants already issued the original permits on these projects does not defeat their authority to impose a fee to cover the costs of these activities. This issue is no different than the 2022 *Department of Finance* case, which found that the permittees had regulatory fee authority sufficient to pay the costs of hydromodification and LID planning at a time when there were no developers or property owners to charge.[1247] In addition, a regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors. "The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors." [1248] The fee just has to be related to the overall cost of the governmental regulation.

Moreover, the claimants' reliance on *Newhall* and the 2021 *Department of Finance* case (*Municipal Stormwater and Urban Runoff Discharges*) is misplaced. In *Newhall*, the issue was whether rates that a public water wholesaler of imported water charged to four public retail water purveyors violated Proposition 26.[1249] Part of the wholesaler's rates consisted of a fixed charge based on each retailer's rolling average of demand for the wholesaler's imported water and for groundwater which was not supplied by the wholesaler. Although the wholesaler was required to manage groundwater supplies in the basin, it did not sell groundwater to the retailers.[1250] The court determined the rates did not qualify as fees under Proposition 26. As indicated above, Proposition 26 states a levy is not a tax where it is imposed "for a specific government service provided

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[1246] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 38-39.

[1247] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[1248] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[1249] *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430.

[1250] *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1434-1440.

directly to the payor that is not provided to those not charged . . . .” The only specific government service the wholesaler provided to the retailers was imported water. It did not provide groundwater, and the groundwater management activities it provided were not services provided just to the retailers. Instead, those activities “redound[ed] to the benefit of all groundwater extractors in the Basin[.]”[1251] The wholesaler could not base its fee and allocate its costs based on groundwater use because the wholesaler’s groundwater management activities were provided to those who were not charged with the fee.[1252]

Similarly, the 2021 *Department of Finance* case (*Municipal Stormwater and Urban Runoff Discharges*) addressed property-related fees under Proposition 218 as they relate to the transit trash requirements. Under Proposition 218, or article XIII D, section 6, the proponent of a property-related fee has to also establish that the fee is not for general governmental services; where the service is available to the public at large in substantially the same manner as it is to property owners. The court found that Proposition 218 prohibits MS4 permittees from charging property owners for the cost of providing trash receptacles at public transit locations in part because the service was made available to the public at large.

> . . . common sense dictates that the vast majority of persons who would use and benefit from trash receptacles at transit stops are not the owners of adjacent properties but rather pedestrians, transit riders, and other members of the general public; any benefit to property owners in the vicinity of bus stops would be incidental. Even if the state agencies could establish that the need for the trash receptacles is in part attributable to adjacent property owners and that the property owners would use the trash receptacles (see Cal. Const., art. XIII D, § 6, subd. (b)(3)-(4)), the placement of the receptacles at public transit stops makes the “service available to the public at large in substantially the same manner as it is to property owners” (id., art. XIII D, § 6, subd. (b)(3)). The state agencies, therefore, failed to establish that the local governments could impose on property owners adjacent to transit stops a fee that could satisfy these constitutional requirements.[1253]

The retrofitting program in this case is different. The service provided directly to developers and property owners are the LID and hydromodification plans to assist in the preparation, implementation, and approval of water pollution mitigations to retrofit those

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[1251] *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1451.

[1252] *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1451.

[1253] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 568-569.

projects. Unlike in *Newhall* and *Department of Finance*, that service is not provided to anyone else, and only affected developers and property owners will be charged for the service. The service will not be provided to those not charged. Even if the citizens of Riverside County receive some indirect benefit from this service, as suggested by the claimants, that does not make the fee a tax under the plain language of Proposition 26. Fees are not taxes under Proposition 26 when they are charges for a benefit conferred or privilege granted,[1254] for a government service or product provided to the payor and not others,[1255] reasonable regulatory fees for permits,[1256] and charges imposed as a condition of property development.[1257]

The claimants also allege they do not have the authority to impose fees to develop and maintain a database of the priority development projects implemented since July 2001, including the requirement to establish a mechanism to ensure that appropriate easements and ownerships are properly recorded in public records and that the information is conveyed to all appropriate parties when there is a change in project or site ownership, since there is no way to capture those costs in permits that were already issued and because the database does not provide a benefit to the owners of those BMPs.[1258]

However, as indicated above, the database of priority development projects (which captures the correct property owner) falls within those categories of costs that are incidental to the building permits being issued by the claimants on priority development projects and are needed to ensure that the permittees verify and inspect the post-construction structural BMPs on those projects. There is no support in the law or evidence in the record that the claimants could not impose a fee on the owners of priority development projects, which bears a reasonable relationship to the burdens created by those projects, to ensure the BMPs that were approved in the permitting process for those projects are adequately maintained. The fact that the claimants already issued permits on priority development projects going back to 2001 does not defeat their *authority* to impose a fee to develop and maintain a BMP database. A regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors. "The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate

[1254] California Constitution, article XIII C, section 1(e)(1).

[1255] California Constitution, article XIII C, section 1(e)(2).

[1256] California Constitution, article XIII C, section 1(e)(3).

[1257] California Constitution, article XIII C, section 1(e)(6).

[1258] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, page 39.

payors." [1259] The fee just has to be related to the overall cost of the governmental regulation. This issue is no different than the 2022 *Department of Finance* case, which found that the permittees had regulatory fee authority sufficient to pay the costs of hydromodification and LID planning at a time when there were no developers or property owners to charge.[1260] Moreover, the service is being provided directly to the owners of priority development projects to ensure the BMPs on their properties are operating effectively and are adequately maintained; the service is not provided to those not charged.[1261] Thus, the Commission finds that the claimants have regulatory fee authority under their police powers sufficient as a matter of law to cover the costs of the new state-mandated activities related to BMP Maintenance Tracking pursuant to Government Code section 17556(d).

Accordingly, there are no costs mandated by the state for the LID, Hydromodification Plans, LID Waiver Program, BMPs for Priority Development Projects, and a Retrofitting Program required by sections F.1.d., F.1.h., and F.3.d. of the test claim permit; and the new BMP maintenance tracking and inspections activities required by section F.1.f., and thus, these activities are denied.

[1259] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[1260] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[1261] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 592-593.

c. The claimants do not have the authority to levy property-related fees within the meaning of Government Code section 17556(d) when voter approval of the fee is required and, thus, from December 16, 2009 through December 31, 2017 only, Government Code section 17556(d) does not apply to deny the claim for the remaining new activities to develop a monitoring plan to sample a representative percent of the major outfalls within each hydrologic subarea to determine SAL compliance (one-time activity as required by section D.2.); update the map of the entire MS4 and the corresponding drainage areas within each copermittees' jurisdiction *in GIS format* and submit GIS layers within 365 days of adoption of the permit to the Regional Board (one-time only, as required by section F.4.b.); the new requirements relating to JRMP Effectiveness Assessment and Reporting, and the work plan to address high priority water quality problems (sections J.1., J.3., and J.4.); the new requirements relating to the annual JRMP report (sections F.1.d.7.i., K.3.a.3.c., and Attachment D., section D-2.); and the new requirement to annually notice and conduct public meetings to review and update the watershed workplan (sections G.6., and K.1.b.4.n.). However, there are **no** costs mandated by the state within the meaning of Government Code section 17556(d) for these activities, beginning January 1, 2018, when, based on the plain language of SB 231, stormwater property-related fees became exempt from the voter approval requirements of article XIII D.

As indicated above, the following remaining activities mandate a new program or higher level of service:

- Develop a monitoring plan to sample a representative percent of the major outfalls within each hydrologic subarea to determine SAL compliance (one-time activity as required by section D.2.)
- Update the map of the entire MS4 and the corresponding drainage areas within each copermittees' jurisdiction *in GIS format* and submit GIS layers within 365 days of adoption of the permit to the Regional Board (one-time only, as required by section F.4.b.)
- JRMP Effectiveness Assessment and Reporting, and Work Plan to Address High Priority Water Quality Problems (J.1., J.3., and J.4.)
  a. Establish annual assessment measures for reducing discharges into each downstream 303(d) listed water body and downstream environmentally sensitive areas that conform to the six outcome levels developed by CASQA, and which target water quality outcomes and the results of municipal enforcement activities, and to annually assess those measures. (J.1.a.)
  b. Include the following effectiveness assessment information within each annual report, beginning with the 2011 annual report:

1) A description and results of the annual assessment measures or methods for reducing discharges of stormwater pollutants from the MS4 into each 303(d) listed waterbody. (J.3.a.1.)

2) A description and results of the annual assessment measures or methods for managing discharges of pollutants from the MS4 into each downstream environmentally sensitive area. (J.3.a.2.)

3) A description of the steps that will be taken to improve the copermittees' ability to assess program effectiveness using measurable targeted outcomes, assessment measures, assessment methods, and outcome levels 1-6, and include a time schedule for when improvement will occur. (J.3.a.8.)

c. Develop a work plan to address high priority water quality problems in an iterative manner over the life of the permit. The plan is required to be submitted to the Regional Board within 365 days of the adoption of the test claim permit, and shall be annually updated and included in the annual JRMP report. The work plan shall include the following information:

1) The problems and priorities identified during the assessment.

2) A list of priority pollutants and known or suspected sources.

3) A brief description of the strategy employed to reduce, eliminate or mitigate the negative impacts.

4) A description and schedule for new or modified BMPs. The schedule is to include dates for significant milestones.

5) A description of how the selected activities will address an identified high priority problem, including a description of the expected effectiveness and benefits of the new or modified BMPs.

6) A description of how efficacy results will be used to modify priorities and implementation.

7) A review of past activities implemented, progress in meeting water quality standards, and planned program adjustments. (J.4.)

- Gather and report the following new information in the annual JRMP reports:

a. Except for the permittee's own municipal priority development projects, notify the Regional Board in the annual report of all other priority development projects choosing to participate in the LID waiver program. The annual report must include the following information: name of the developer of the participating priority development project; site location; reason for LID waiver including technical feasibility analysis; description of BMPs implemented; total amount deposited, if any, into the stormwater mitigation fund; water quality

improvement projects proposed to be funded; and timeframe for implementation of water quality improvement projects. (F.1.d.7.i.)

b. Gather and report the following new information in the annual report checklist:

- Construction - Except for the permittee's own municipal construction, gather and report number of active sites, number of inactive sites, and number of violations for all other construction.
- New development - Except for the permittee's own municipal new development, gather and report the number of development plan reviews, number of grading permits issued, and number of projects exempted from interim/final hydromodification requirements for all other new development.
- Post construction development – Except for the permittee's own municipal priority development projects, gather and report the number of priority development projects; and number of SUSMP [standard urban storm water mitigation plans] required post construction BMP violations.
- MS4 maintenance –amount of waste removed, and total miles of MS4 inspected.
- Municipal/commercial/industrial – Except for the permittee's own municipal facilities, gather and report the number of facilities and number of violations. (K.3.a.3.c., and Attachment D., section D-2.)

- Annually notice and conduct public meetings to review and update the watershed workplan. (G.6. and K.1.b.4.n.)

The claimants have constitutional police power (Cal. Const., art. XI, § 7) and statutory authority[1262] to impose property-related fees for these remaining new state mandated activities. An example of such a property-related stormwater fee that covers the costs of complying "with applicable local, state, and federal stormwater regulations," which would include the activities here, is the property-related fee adopted in 2014 by the City of San Clemente (which is a permittee under the test claim permit), and was in effect from February 7, 2014 through June 30, 2020.[1263] In addition, the California Stormwater Quality Association (CASQA) has provided information to local agencies on how they

[1262] See, e.g., Health and Safety Code section 5471 (fees for storm drainage maintenance and operation); Government Code sections 38902 (providing for sewer standby charges); 53750 et seq. (Proposition 218 Omnibus Implementation Act, describing procedures for adoption of assessments, fees and charges); 53751 (as amended in 2017, providing that fees for sewer services includes storm sewers).

[1263] Exhibit K (12), City of San Clemente Municipal Code, title 13, chapter 13.34, sections 13.34.010-13.34.030.

can properly develop stormwater fees, including links to several fee ordinances passed by other cities.[1264]

As described below, however, stormwater property-related fees are subject to Proposition 218, or article XIII D of the California Constitution, which until January 1, 2018, required voter approval before new or increased fees could be charged. Effective January 1, 2018, SB 231 defined "sewer" to include stormwater as an exception to the voter approval requirement in article XIII D, which then makes only the voter protest provisions of article XIII D apply to property-related stormwater fees.

i. The voter protest and approval requirements of article XIII D for property-related fees and SB 231.

Article XIII D, as added by Proposition 218 "imposes certain substantive and procedural restrictions on taxes, assessments, fees, and charges 'assessed by any agency upon any parcel of property or upon any person as an incident of property ownership.'"[1265] Specifically, assessments and property-related fees are subject to notice and hearing requirements, and must meet a threshold of proportionality with respect to the amount of the exaction and the purposes to which it is put. Section 4, addressing assessments, provides:

> An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.[1266]

[1264] Exhibit K (11), CASQA, Fee Study and Ordinance, https://www.casqa.org/resources/funding-resources/creating-stormwater-utility/fee-study-and-ordinance (accessed on November 23, 2022).

[1265] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1200 (citing Cal. Const., art. XIII D, § 3).

[1266] California Constitution, article XIII D, section 4(a).

Once the amount of the proposed assessment is identified, notice must be mailed to the record owner of each parcel, stating the amount chargeable to the entire district, to the parcel itself, the reason for the assessment and the basis of the calculation, and the date, time and location of the public hearing on the proposed assessment. The notice must be in the form of a ballot, and at the public hearing the agency "shall consider all protests…and tabulate the ballots." If the majority of the returned ballots oppose the assessment, the agency "shall not impose" the assessment.[1267]

Similarly, section 6 provides for a proportionality requirement with respect to property-related fees and charges:

> A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:
>
> (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.
>
> (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
>
> (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.
>
> (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.
>
> (5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.[1268]

And, section 6 provides for notice and a public hearing similarly to section 4; but, unlike section 4, section 6 does not expressly require the notice to inform parcel owners of

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[1267] California Constitution, article XIII D, section 4(c; d; e).

[1268] California Constitution, article XIII D, section 6(b).

their right to protest the proposed fee, nor is the notice required to be in the form of a ballot to be returned.[1269]

Section 6(c) also provides that *voter approval* is required for property-related fees and *charges other than* for water, sewer, and refuse collection services.[1270] This section is discussed further below, but for charges other than for water, sewer, and refuse collection services, voter approval is not required to impose or increase fees. The fees may be adopted, but are subject only to the voter protest provisions of article XIII D.

Many of the limitations stated in Proposition 218 are not new, as most special assessment acts under prior law required notice and a public hearing, and many such acts also provided for majority protest of affected parcel owners to defeat a proposed assessment.[1271] Despite the existence of such limitations before Proposition 218, the court in *County of Placer v. Corin* held that assessments were sufficiently distinct from taxes as to be outside the scope of articles XIII A and XIII B.[1272]

After Proposition 218 came *Apartment Ass'n of Los Angeles County, Richmond*, and *Bighorn-Desert View*.[1273] In each of these cases the Court narrowly construed the procedural and substantive limitations of article XIII D. In *Apartment Ass'n*, the Court rejected a challenge under article XIII D, section 6 to the city's ordinance imposing fees on residential rental properties, finding that the fees were not "imposed by an agency upon a parcel or upon a person as *an incident of property ownership*…"[1274] The Court held that Proposition 218 imposes restrictions on taxes, assessments, fees, and charges only "when they burden landowners as *landowners*."[1275] The residential rental

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[1269] Compare California Constitution, article XIII D, section 6(a)(1-2) with article XIII D, section 4(a). See also, *Great Oaks Water Co. v. Santa Clara Valley Water Dist.* (2015) 196 Cal.Rptr3d 171 (review granted) ("Had the voters wished in 1996 to require express notification to owners of their nullification rights, or to prescribe a mechanism for the exercise of those rights, they were more than capable of doing so, as they demonstrated in the parallel provisions governing assessments.").

[1270] California Constitution, article XIII D, section 6(c).

[1271] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 454, Fn 9.

[1272] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 454, Fn 9.

[1273] *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, and *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205.

[1274] California Constitution, article XIII D, sections 2(e); 3 (emphasis added); *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 841-842.

[1275] *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842 (emphasis in original).

fee ordinance at issue "imposes a fee on its subjects by virtue of their ownership of a business-i.e., because they are landlords," and, thus, the fee was not subject to the requirements of article XIII D.[1276]

In *Richmond*, the District imposed a "capacity charge" on applicants for *new* water service connections, and thus could not prospectively identify the parcels to which the charge would apply; i.e., it could not have complied with the procedural requirements of notice and hearing under article XIII D, section 4. The Court held that the impossibility of compliance with section 4 was one reason to find that the capacity charge was not an assessment, within the meaning of article XIII D.[1277] The Court also found that the charge was to be imposed on applicants for new service, rather than users receiving service through existing connections, and that distinction is consistent with the overall intent of Proposition 218, to promote taxpayer consent.[1278] Accordingly, the Court concluded: "Because these fees are imposed only on the self-selected group of water service applicants, and not on real property that the District has identified or is able to identify, and because neither fee can ever become a charge on the property itself, we conclude that neither fee is subject to the restrictions that article XIII D imposes on property assessments and property-related fees."[1279]

In *Bighorn-Desert View*, the Court rejected a local initiative designed to impose a voter approval requirement on all future rate increases for water service,[1280] finding that article XIII D, section 6's express *exemption* from voter approval for sewer, water, and refuse collection "would appear to embody the electorate's intent as to when voter-approval should be required, or not required."[1281] The Court concluded:

> [U]nder section 3 of California Constitution article XIII C, local voters by initiative may reduce a public agency's water rate and other delivery charges, but…[article XIII C, section 3] does not authorize an initiative to impose a requirement of voter preapproval for future rate increases or new charges for water delivery. In other words, by exercising the initiative power voters may decrease a public water agency's fees and charges for water service, but the agency's governing board may then raise other fees or impose new fees without prior approval. Although this power-sharing arrangement has the potential for conflict, we must presume that both

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[1276] *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842.

[1277] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 419.

[1278] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 420.

[1279] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 430.

[1280] *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205, 219.

[1281] *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205, 218-219.

> sides will act reasonably and in good faith, and that the political process will eventually lead to compromises that are mutually acceptable and both financially and legally sound. (See *DeVita v. County of Napa, supra,* 9 Cal.4th at pp. 792–793, 38 Cal.Rptr.2d 699, 889 P.2d 1019 [“We should not presume ... that the electorate will fail to do the legally proper thing.”].) We presume local voters will give appropriate consideration and deference to a governing board’s judgments about the rate structure needed to ensure a public water agency’s fiscal solvency, and we assume the board, whose members are elected (see Stats.1969, ch. 1175, § 5, p. 2274, 72B West’s Ann. Wat.-Appen., *supra,* ch. 112, p. 190), will give appropriate consideration and deference to the voters’ expressed wishes for affordable water service. The notice and hearing requirements of subdivision (a) of section 6 of California Constitution article XIII D will facilitate communications between a public water agency’s board and its customers, and the substantive restrictions on property-related charges in subdivision (b) of the same section should allay customers’ concerns that the agency’s water delivery charges are excessive.[1282]

In 2002, the Sixth District Court of Appeal in *Howard Jarvis Taxpayers’ Ass’n v. City of Salinas* (2002) 98 Cal.App.4th 1351 (which the parties refer to as “*City of Salinas*”) held that “sewer,” for purposes of the voter approval exemption in article XIII D does *not* include storm sewers or storm drains.[1283] *City of Salinas* involved a challenge to a "storm drainage fee" imposed by the City of Salinas in order to fund its efforts "to reduce or eliminate pollutants contained in storm water, which was channeled into a drainage system separate from the sanitary and industrial waste systems," as required by the Clean Water Act.[1284] The fee was imposed on owners of developed parcels of property, and the amount "was to be calculated according to the degree to which the property contributed to runoff to the City's drainage facilities. That contribution, in turn, would be measured by the amount of the ‘impervious area’ on that parcel."[1285] Taxpayers challenged the imposition of the fee, arguing it was subject to voter approval under Proposition 218. The City argued the fee was exempt from the voter approval requirements because it was for "sewer" or "water" services under article XIII D, section 6(c). The court disagreed, and construed the term "sewer" narrowly, holding that “sewer” referred solely to "sanitary sewerage" (i.e., the system that carries "putrescible

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[1282] *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205, 220-221.

[1283] *Howard Jarvis Taxpayers’ Ass’n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358-1359.

[1284] *Howard Jarvis Taxpayers’ Ass’n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1353.

[1285] *Howard Jarvis Taxpayers’ Ass’n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1353.

waste" from residences and businesses), and did not encompass a sewer system designed to carry only stormwater.[1286] It also held the term "water services" meant "the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean."[1287]

Thus, under the *City of Salinas* case, a local agency's charges on developed parcels to fund stormwater management were property-related fees that were not covered by Proposition 218's exemption for "sewer" or "water" services. Therefore, in order for local agencies to impose new or increased stormwater fees on property owners, an election and majority vote of the affected property owners or two-thirds of the electorate in the area was first required to affirmatively approve those fees.

That holding has since been the subject of legislation. In 2017, the Legislature enacted SB 231, which amended Government Code sections 53750 and 53751 to expressly overrule the 2002 *City of Salinas* case.[1288] Government Code section 53750(k) defines the term "sewer" for purposes of article XIII D as including systems that "facilitate sewage collection, treatment, or disposition for . . . drainage purposes, including . . . drains, conduits, outlets for . . . storm waters, and any and all other works, property, or structures necessary or convenient for the collection or disposal of . . . storm waters." Government Code section 53751 explains why the Legislature thinks the *City of Salinas* case is wrong:

> The court in *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351 failed to follow long-standing principles of statutory construction by disregarding the plain meaning of the term "sewer." Courts have long held that statutory construction rules apply to initiative measures, including in cases that apply specifically to Proposition 218 (see *People v. Bustamante* (1997) 57 Cal.App.4th 693; *Keller v. Chowchilla Water Dist.* (2000) 80 Cal.App.4th 1006). When construing statutes, courts look first to the words of the statute, which should be given their usual, ordinary, and commonsense meaning (*People v. Mejia* (2012) 211 Cal.App.4th 586, 611). The purpose of utilizing the plain meaning of statutory language is to spare the courts the necessity of trying to divine the voters' intent by resorting to secondary or subjective indicators. The court in *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98

[1286] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1357-1358.

[1287] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358.

[1288] Government Code sections 53750; 53751 (amended, Stats. 2017, ch. 536 (SB 231)).

> Cal.App.4th 1351 asserted its belief as to what most voters thought when voting for Proposition 218, but did not cite the voter pamphlet or other accepted sources for determining legislative intent. Instead, the court substituted its own judgment for the judgment of voters.[1289]

In 2019, the Third District Court of Appeal issued its decision in *Paradise Irrigation District* (a challenge to the Commission's Decision in *Water Conservation,* 10-TC-12/12-TC-01), which held, in the context of water services, that the voter protest requirements of Proposition 218 do not divest local agencies of their authority to impose fees sufficient as a matter of law pursuant to Government Code section 17556(d) and, thus, when even when the voter protest provisions apply, there are no costs mandated by the state.[1290] In *Paradise Irrigation District*, the Third District Court of Appeal observed:

> This case takes up where *Connell* left off, namely with the question of whether the passage of Proposition 218 undermined water and irrigation districts' authority to levy fees so that they are entitled to subvention for state-mandated regulations requiring water infrastructure upgrades. The Water and Irrigation Districts do not argue this court wrongly decided *Connell, supra,* 59 Cal.App.4th 382, 69 Cal.Rptr.2d, but only that the rule of decision was superseded by Proposition 218. Consequently, we proceed to examine the effect of Proposition 218 on the continuing applicability of *Connell.*[1291]

Ultimately the court preserved and followed the rule of *Connell*, finding, based in large part on a discussion of *Bighorn-Desert View*, that "Proposition 218 implemented a power-sharing arrangement that does not constitute a revocation of the Water and Irrigation Districts' fee authority."[1292] The court held, "[c]onsistent with the California Supreme Court's reasoning in *Bighorn*, we presume local voters will give appropriate consideration and deference to state mandated requirements relating to water conservation measures required by statute."[1293] In addition, the court held "[w]e also reject the Water and Irrigation Districts' claim that, as a matter of practical reality, the majority protest procedure allows water customers to defeat the Districts' authority to

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[1289] Government Code section 53751(f).

[1290] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 189.

[1291] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 189.

[1292] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194-195.

[1293] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

levy fees."[1294] However, the court said, "[w]e adhere to our holding in *Connell* that the inquiry into fee authority constitutes an issue of law rather than a question of fact."[1295] The court found that water service fees, being expressly exempt from the voter approval provisions of article XIII D, section 6(c), therefore do not require voter preapproval, as would new taxes.[1296] In addition, the court followed and relied upon *Bighorn-Desert View*'s analysis of a power-sharing relationship between local agencies and their constituents, including the presumption that "local voters will give appropriate consideration and deference to a governing board's judgments about the rate structure needed to ensure a public water agency's fiscal solvency…" and that the notice and hearing requirements of article XIII D, section 6(a) "will facilitate communications between a public water agency's board and its customers, and the substantive restrictions on property-related charges in subdivision (b) of the same section should allay customers' concerns that the agency's water delivery charges are excessive."[1297] Accordingly, the court found that the power-sharing arrangement "does not undermine the fee authority that the districts have," and the majority protest procedure of article XIII D, section 6(a) "does not divest the Water and Irrigation Districts of their authority to levy fees."[1298] The court noted that statutory protest procedures already existed, and "the possibility of a protest under article XIII D, section 6 does not eviscerate the Water and Irrigation Districts' ability to raise fees to comply with the Water Conservation Act."[1299] Thus, the court found that Government Code section 17556(d) still applies to deny a claim when the fee authority is subject to voter protest under article XIII D, section 6(a).

The court in *Paradise Irrigation District* did not analyze whether Government Code section 17556(d) applies when voter approval is required.

Recently, however, the Third District Court of Appeal addressed the voter approval issue in *Department of Finance v. Commission on State Mandates* (*Discharge of Stormwater Runoff*) and found that Government Code section 17556(d) does not apply

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[1294] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

[1295] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

[1296] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 192.

[1297] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 192-193.

[1298] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

[1299] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

when voter approval is required and, thus, there are costs mandated by the state.[1300] The court's reasoning is as follows:

> The State contends the reasoning in *Paradise Irrigation Dist*. applies equally here where article XIII D requires the voters to preapprove fees. It argues that as with the voter protest procedure, under article XIII D permittees' governing bodies and the voters who elected those officials share power to impose fees. The governing bodies propose the fee, and the voters must approve it. The "fact that San Diego property owners could theoretically withhold approval—just as a majority of the governing body could theoretically withhold approval to impose a fee—does not 'eviscerate' San Diego's police power; that power exists regardless of what the property owners, or the governing body, might decide about any given fee."
>
> The State's argument does not recognize a key distinction we made in *Paradise Irrigation Dist*.: water service fees were not subject to voter approval. We contrasted article XIII D's protest procedure with the voter-approval requirement imposed by Proposition 218 on new taxes. Under article XIII C, no local government may impose or increase any general or special tax "unless and until that tax is submitted to the electorate and approved" by a majority of the voters for a general tax and by a two-thirds vote for a special tax. (Cal. Const., art. XIII C, § 2, subds. (b), (d).) Under article XIII D, however, water service fees do not require the consent of the voters. (Cal. Const., art. XIII D, § 6, subd. (c).) (*Paradise Irrigation Dist., supra*, 33 Cal.App.5th at p. 192, 244 Cal.Rptr.3d 769.) The implication is the voter approval requirement would deprive the districts of fee authority.
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> Since the fees in *Paradise Irrigation Dist*. were not subject to voter approval, the protest procedure created a power sharing arrangement like that in *Bighorn* which did not deprive the districts of their fee authority. In *Bighorn*, the power-sharing arrangement existed because voters could possibly bring an initiative or referendum to reduce charges, but the validity of the fee was not contingent on the voters preapproving it. In *Paradise Irrigation Dist.*, the power-sharing arrangement existed because voters could possibly protest the water fee, but the validity of the fee was not contingent on voters preapproving the fee. The water fee was valid unless the voters successfully protested, an event the trial court in *Paradise Irrigation Dist*. correctly described as a "speculative and uncertain threat." (*Paradise Irrigation Dist., supra*, 33 Cal.App.5th at p.

[1300] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 581.

184, 244 Cal.Rptr.3d 769.)

Here, a fee for stormwater drainage services is *not* valid unless and until the voters approve it. For property-related fees, article XIII D limits permittees' police power to proposing the fee. Like article XIII C's limitation on local governments' taxing authority, article XIII D provides that "[e]xcept for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area." (Cal. Const., art. XIII D, § 6, subd. (c).) The State's argument ignores the actual limitation article XIII D imposes on permittees' police power. Permittees expressly have no authority to levy a property-related fee unless and until the voters approve it. There is no power sharing arrangement.

This limitation is crucial to our analysis. The voter approval requirement is a primary reason Section 6 exists and requires subvention. As stated earlier, the purpose of Section 6 "is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose." (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81, 61 Cal.Rptr.2d 134, 931 P.2d 312.) And what are those limitations? Voter approval requirements, to name some.

Articles XIII A and XIII B "work in tandem, together restricting California governments' power both to levy and to spend for public purposes." (*City of Sacramento, supra*, 50 Cal.3d at p. 59, fn. 1, 266 Cal.Rptr. 139, 785 P.2d 522.) Article XIII A prevents local governments from levying special taxes without approval by two-thirds of the voters. (Cal. Const., art. XIII A, § 4.) It also prevents local governments from levying an ad valorem tax on real and personal property. (Cal. Const., art. XIII A, § 1.) Article XIII B, adopted as the "next logical step" to article XIII A, limits the growth of appropriations made from the proceeds of taxes. (Cal. Const., art. XIII B, §§ 1, 2, 8; *City Council v. South* (1983) 146 Cal.App.3d 320, 333-334, 194 Cal.Rptr. 110.) And, as stated above, article XIII C extends the voter approval requirement to local government general taxes. (Cal. Const., art. XIII C, § 2, subd. (b).)

Subvention is required under Section 6 because these limits on local governments' taxing and spending authority, especially the voter approval requirements, deprive local governments of the authority to enact taxes to pay for new state mandates. They do not create a power-sharing

> arrangement with voters. They limit local government's authority to proposing a tax only, a level of authority that does not guarantee resources to pay for a new mandate. Section 6 provides them with those resources.
>
> Article XIII D's voter approval requirement for property-related fees operates to the same effect. Unlike the owner protest procedure at issue in *Paradise Irrigation Dist.*, the voter approval requirement does not create a power sharing arrangement. It limits a local government's authority to proposing a fee only; again, a level of authority that does not guarantee resources to pay for a state mandate. Section 6 thus requires subvention because of Article XIII D's voter approval requirement. Contrary to the State's argument, *Paradise Irrigation Dist*. does not compel a different result.[1301]

Thus, after *Paradise Irrigation District* and the 2022 *Department of Finance* case, the Commission is required to find that Government Code section 17556(d) does not apply to deny a claim when voter approval of the fee is required under article XIII D (Proposition 218). However, Government Code section 17556(d) applies to deny a claim when the voter protest provisions of article XIII D (Proposition 218) apply.

ii. The Commission is required to presume that SB 231 is constitutional, and there is no indication in the law that SB 231 is clarifying of existing law or was intended to be applied retroactively and, thus, SB 231 applies prospectively and there are no costs mandated by the state beginning January 1, 2018.

As indicated above, the *City of Salinas* case held that a local agency's charges on developed parcels to fund stormwater management were property-related fees that were not covered by Proposition 218's exemption for "sewer" or "water" services. Therefore, in order for local agencies to impose new or increased stormwater fees on property owners, an election and majority vote of the affected property owners or two thirds of the electorate in the area was first required to affirmatively approve those fees.

However, in 2017, the Legislature enacted SB 231, which amended Government Code sections 53750 and 53751 to overrule the 2002 *City of Salinas* case and define "sewer" to include stormwater sewers subject only to the voter protest provisions of article XIII D.[1302] SB 231 became effective January 1, 2018.

[1301] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581 (review denied March 1, 2023).

[1302] Government Code sections 53750; 53751 (amended, Stats. 2017, ch. 536 (SB 231)).

The claimants contend that the Commission should not apply SB 231 to this claim because the plain language and structure of Proposition 218 do not support SB 231's definition of sewer and, therefore, SB 231 is not consistent with the Constitution.[1303]

However, the Commission is required to presume that the statutes amended by SB 231 are constitutional. Article III, section 3.5 of the California Constitution prohibits administrative agencies, such as the Commission, from refusing to enforce a statute or from declaring a statute unconstitutional (as requested by the claimants). Article III, section 3.5 states in relevant part the following:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> [¶]

The Commission also finds that the amendments, absent a clear and unequivocal statement to the contrary, operate *prospectively* beginning January 1, 2018.[1304] Thus, pursuant to SB 231 and *Paradise Irrigation District*, there are no costs mandated by the state beginning January 1, 2018.

iii. From December 16, 2009, through December 31, 2017, when voter approval of property-related stormwater fees is required, Government Code section 17556(d) does not apply to deny the claim. Beginning January 1, 2018, when stormwater fees are exempt from the voter approval requirement, there are no costs mandated by the state.

As indicated above, once SB 231 became effective on January 1, 2018, defining the exception to the voter approval requirement to include stormwater, only the voter protest provisions of article XIII D apply to property-related fees for stormwater. Pursuant to the court's ruling in *Paradise Irrigation District*, the claimants have fee authority sufficient to cover the costs of any state-mandated activities within the meaning of Government Code section 17556(d) when the law allows for voter protest of new or increased fees and, thus, there are no costs mandated by the state for the activities to develop a monitoring plan to sample a representative percent of the major outfalls within each hydrologic subarea to determine SAL compliance (one-time activity as required by

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[1303] Exhibit J, Claimants' Comments on the Draft Proposed Decision, filed August 25, 2023, pages 40-46.

[1304] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 573-577 (review denied March 1, 2023).

section D.2.); update the map of the entire MS4 and the corresponding drainage areas within each copermittees' jurisdiction in GIS format and submit GIS layers within 365 days of adoption of the permit to the Regional Board (one-time only, as required by section F.4.b.); the activities relating to JRMP Effectiveness Assessment and Reporting, and the work plan to address high priority water quality problems (sections J.1., J.3., and J.4.); the new requirements relating to the annual JRMP report (sections F.1.d.7.i., K.3.a.3.c., and Attachment D., section D-2.); and the requirement to annually notice and conduct public meetings to review and update the watershed workplan (sections G.6. and K.1.b.4.n.), beginning January 1, 2018.

However, until January 1, 2018, the Commission is required by law to follow the *City of Salinas* decision,[1305] which holds that stormwater does not fall within the exception to the voter approval requirement and, thus, the voters must approve any new or increased stormwater fees.[1306]

The Water Boards contend that the claimants have the authority sufficient as a matter of law to cover the costs of the mandated activities even if voter approval is required, and note that the cities of Los Angeles, San Clemente, Santa Cruz, and Palo Alto have adopted fee ordinance based on property assessments to implement their stormwater programs.[1307]

The Department of Finance also urges the Commission to find that the claimants have fee authority sufficient as a matter of law to cover the costs of the mandated activities pursuant to Government Code section 17556(d).[1308]

However, as the Third District Court of Appeal recently held, Government Code section 17556(d) does not apply when voter approval is required.[1309] As the court indicated, the voter approval provisions are materially different than the voter protest provisions when it comes to a local agency's fee authority under Government Code section 17556(d).[1310] In *Paradise Irrigation District*, the water and irrigation districts had the statutory authority

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[1305] *Fenske v. Board of Administration* (1980) 103 Cal.App.3d 590, 596.

[1306] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1357-1358.

[1307] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 20; Exhibit H, Water Boards' Comments on the Draft Proposed Decision, filed August 25, 2023, page 3.

[1308] Exhibit B, Finance's Comments on the Test Claim, filed October 10, 2016, page 1; Exhibit I, Finance's Comments on the Draft Proposed Decision, page 1, fn.1.

[1309] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581 (review denied March 1, 2023).

[1310] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-580.

to impose fees for water service improvements, subject only to the voter protest provisions of article XIII D. The court held that the protest procedures did not divest the districts of their fee authority. Rather, the protest procedures created a power-sharing arrangement similar to that in *Bighorn* where presumably voters would appropriately consider the state-mandated requirements imposed on the districts.[1311] In *Bighorn*, the power-sharing arrangement existed because voters could possibly bring an initiative or referendum to reduce charges, but the validity of the fee was not contingent on the voters preapproving it.[1312] "[T]he *possibility* of a protest under article XIII D, section 6, does not eviscerate [the districts'] ability to raise fees to comply with the [Water] Conservation Act."[1313] Thus, under the voter protest provisions, local agencies have the authority to levy a fee unless there is a majority protest.

With the voter approval requirements, however, a local agency has no authority to establish or increase fees unless the fee is first approved by an affirmative majority vote of affected parcel owners. Thus, for property-related fees subject to voter approval, there is no power sharing arrangement like there is for fees subject only to the voters' possible protest. Rather, article XIII D limits the claimants' police power and statutory authority to impose the fee.[1314] Therefore, the claimants do not have the authority to impose fees sufficient as a matter of law within the meaning of article XIII B, section 6 to cover the costs of the new mandated activities to develop a monitoring plan to sample a representative percent of the major outfalls within each hydrologic subarea to determine SAL compliance (one-time activity as required by section D.2.); update the map of the entire MS4 and the corresponding drainage areas within each copermittees' jurisdiction in GIS format and submit GIS layers within 365 days of adoption of the permit to the Regional Board (one-time only, as required by section F.4.b.); the new requirements relating to JRMP Effectiveness Assessment and Reporting, and the work plan to address high priority water quality problems (sections J.1., J.3., and J.4.); the new requirements relating to the annual JRMP report (sections F.1.d.7.i., K.3.a.3.c., and Attachment D., section D-2.); and the new requirement to annually notice and conduct public meetings to review and update the watershed workplan (sections G.6., and K.1.b.4.n.) from December 16, 2009, through December 31, 2017.

[1311] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194-195.

[1312] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 192.

[1313] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

[1314] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 580.

This conclusion is further supported by the purpose of article XIII B, section 6 "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill-equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[1315] Like articles XIII A and XIII B, the voter approval requirements in article XIII D impose limits on local government authority to raise revenues to pay for new state-mandated requirements and, therefore, requires subvention within the meaning of article XIII B, section 6.

Therefore, there are costs mandated by the state for the activities identified above from December 16, 2009, through December 31, 2017, when voter approval of property-related stormwater fees is required.

V. Conclusion

Based on the foregoing analysis, the Commission partially approves this Test Claim and finds that the following activities constitute a reimbursable state-mandated program from December 16, 2009, through, through December 31, 2017, only:

1. Develop a monitoring plan to sample a representative percent of the major outfalls within each hydrologic subarea to determine SAL compliance (one-time activity as required by section D.2.).[1316]
2. Update the map of the entire MS4 and the corresponding drainage areas within each copermittees' jurisdiction *in GIS format* and submit GIS layers within 365 days of adoption of the permit to the Regional Board (one-time activity, as required by section F.4.b.)[1317]
3. JRMP Effectiveness Assessment and Reporting, and Work Plan to Address High Priority Water Quality Problems (Sections J.1., J.3., and J.4.)[1318]
    a. Establish annual assessment measures for reducing discharges into each downstream 303(d) listed water body and downstream environmentally sensitive areas that conform to the six outcome levels developed by CASQA, and which target water quality outcomes and the results of municipal

[1315] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81; *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 580-581.

[1316] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2141 (Order No. R9-2009-0002, section D.2.).

[1317] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2186 (Order No. R9-2009-0002, section F.4.b.).

[1318] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2195-2198 (Order No. R9-2009-0002, sections J.1., J.3., and J.4.).

enforcement activities, and to annually assess those measures. (Section J.1.a.)

b. Include the following effectiveness assessment information within each annual report, beginning with the 2011 annual report:

- A description and results of the annual assessment measures or methods for reducing discharges of stormwater pollutants from the MS4 into each 303(d) listed waterbody. (Section J.3.a.1.)
- A description and results of the annual assessment measures or methods for managing discharges of pollutants from the MS4 into each downstream environmentally sensitive area. (Section J.3.a.2.)
- A description of the steps that will be taken to improve the copermittees' ability to assess program effectiveness using measurable targeted outcomes, assessment measures, assessment methods, and outcome levels 1-6, and include a time schedule for when improvement will occur. (Section J.3.a.8.)

c. Develop a work plan to address high priority water quality problems in an iterative manner over the life of the permit. The plan is required to be submitted to the Regional Board within 365 days of the adoption of the test claim permit, and shall be annually updated and included in the annual JRMP report. The work plan shall include the following information (Section J.4):[1319]

- The problems and priorities identified during the assessment.
- A list of priority pollutants and known or suspected sources.
- A brief description of the strategy employed to reduce, eliminate or mitigate the negative impacts.
- A description and schedule for new or modified BMPs. The schedule is to include dates for significant milestones.
- A description of how the selected activities will address an identified high priority problem, including a description of the expected effectiveness and benefits of the new or modified BMPs.
- A description of how efficacy results will be used to modify priorities and implementation.
- A review of past activities implemented, progress in meeting water quality standards, and planned program adjustments. (Section J.4.)

[1319] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, page 2198 (Order No. R9-2009-0002, section J.4.).

4. Annual JRMP Reports (Section F.1.d.7.i.; K.3.a.3.c., and Attachment D., section D-2., of the test claim permit)[1320]

    a. Except for the permittee's own municipal priority development projects, notify the Regional Board in the annual report of all other priority development projects choosing to participate in the LID waiver program. The annual report must include the following information: name of the developer of the participating priority development project; site location; reason for LID waiver including technical feasibility analysis; description of BMPs implemented; total amount deposited, if any, into the stormwater mitigation fund; water quality improvement projects proposed to be funded; and timeframe for implementation of water quality improvement projects. (Section F.1.d.7.i.)

    b. Gather and report the following new information in the annual report checklist:

    - Construction - Except for the permittee's own municipal construction, gather and report number of active sites, number of inactive sites, and number of violations for all other construction.
    - New development - Except for the permittee's own municipal new development, gather and report the number of development plan reviews, number of grading permits issued, and number of projects exempted from interim/final hydromodification requirements for all other new development.
    - Post construction development – Except for the permittee's own municipal priority development projects, gather and report the number of priority development projects; and number of SUSMP [standard urban storm water mitigation plans] required post construction BMP violations.
    - MS4 maintenance –amount of waste removed, and total miles of MS4 inspected.
    - Municipal/commercial/industrial – Except for the permittee's own municipal facilities, gather and report the number of facilities and number of violations. (Section K.3.a.3.c., and Attachment D., section D-2., of the test claim permit.)

5. Annually notice and conduct public meetings to review and update the watershed workplan. (Sections G.6. and K.1.b.4.n.)[1321]

[1320] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2155, 2202, 2235 (Order No. R9-2009-0002, section F.1.d.7.i., section K.3.a.3.c., and Attachment D., section D-2.).

[1321] Exhibit C, Water Boards' Comments on the Test Claim, filed October 21, 2016, pages 2190, 2200 (Order No. R9-2009-0002, sections G.6. and K.1.b.4.n.).

Reimbursement for these activities is denied beginning January 1, 2018, because the claimants have fee authority sufficient as a matter of law to cover the costs of these activities pursuant to Government Code section 17556(d) and, thus, there are no costs mandated by the state.

In addition, reimbursement for these mandated activities from any source, including but not limited to, state and federal funds, any service charge, fees, or assessments to offset all or part of the costs of this program, and any other funds that are not the claimant's proceeds of taxes including Measure M2 funds received from the Orange County Local Transportation Authority, shall be identified and deducted from any claim submitted for reimbursement.

All other sections, activities, and costs pled in the Test Claim are denied.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

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

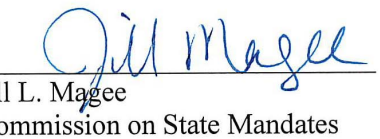
On October 31, 2023, I served the:

- **Current Mailing List dated October 30, 2023**
- **Draft Expedited Parameters and Guidelines, Schedule for Comments, and Notice of Tentative Hearing Date issued October 31, 2023**
- **Decision adopted October 27, 2023**

  California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, Sections D.2.; F.1.d.7.i.; F.4.b.; G.6.; K.1.b.4.n.; K.3.a.3.c.; J.1.; J.3.; J.4.; and Attachment D, Section D-2, Adopted December 16, 2009, 10-TC-11
  Cities of Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, San Juan Capistrano, the County of Orange, and the Orange County Flood Control District, Claimants

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 31, 2023 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 10/30/23

Claim Number: 10-TC-11

Matter: California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, Sections B.2.; C.; D.; F.1.d.; F.1.d.7.i.; F.1.f.; F.1.h.; F.3.a.4.c.; F.3.d.; F.4.b.; F.4.d.; F.4.e.; G.6.; I.; J.; K.1.b.4.n.; and, Only as They Relate to the Reporting Checklist, Section K.3.a. and Attachment D, Adopted December 16, 2009

Claimants: City of Dana Point
City of Laguna Hills
City of Laguna Niguel
City of Lake Forest
City of Mission Viejo
City of San Juan Capistrano
County of Orange
Orange County Flood Control District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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

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