Item 1

PROPOSED MINUTES

COMMISSION ON STATE MANDATES

State Capitol, Room 447
Sacramento, California
July 31, 2009

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

Absent: Member Sarah Olsen
Public Member

CALL TO ORDER AND ROLL CALL

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

APPROVAL OF MINUTES

Item 1 May 29, 2009

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

PROPOSED CONSENT CALENDAR

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

PROPOSED AMENDMENTS TO PARAMETERS AND GUIDELINES

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

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

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

Item 17* *CalSTRS Service Credit*, 02-TC-19
Education Code Sections 22455.5, Subdivision (b), 22460, 22509, Subdivision (a), 22718, Subdivision (a)(1)(A), 22724, and 22852, Subdivision (e)
Statutes 1994, Chapter 603 (AB 2554), Statutes 1996, Chapters 383 (AB 3221), 634 (SB 2041), and 680 (SB 1877), Statutes 1997, Chapter 838 (SB 227), Statutes 1998, Chapters 965 (AB 2765), Statutes 1999, Chapter 939 (SB 1074), Statutes 2000, Chapter 1021 (AB 2700)
Santa Monica Community College District, Claimant

Item 18* *Fifteen-Day Close of Voter Registration*, 01-TC-15
Elections Code Section 13303
Statutes 2000, Chapter 899 (AB 1094)
County of Orange, Claimant

Item 19* *In-Home Supportive Services II*, 00-TC-23
Welfare and Institutions Code Sections 12301.3, 12301.4 and 12302.25
Statutes 1999, Chapter 90 (AB 1682); Statutes 2000, Chapter 445 (SB 288)
County of San Bernardino, Claimant

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

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

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

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

Item 2 Staff Report (if necessary)

There were no appeals to consider.

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

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

TEST CLAIMS

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

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

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

There are three issues in dispute:

- Whether the permit activities in the test claim constitute a federal mandate on local agencies under the Clean Water Act. Staff finds that the activities in the permit are not mandated by federal law, and indeed exceed federal law.
- Whether the claimants have fee authority to place and maintain trash receptacles at transit stops. Staff finds that the claimants do not have fee authority to do so.
- Whether the claimants have fee authority to inspect construction and industrial sites already inspected under statewide industrial or construction permits. Staff finds that they do have fee authority for these inspections.

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

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

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

(Mr. Chivaro entered the meeting room.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chairperson Sheehy stated that it does not necessarily mean inspection.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

because the applicants already paid a fee for this purpose.

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

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

Member Bryant requested a brief recess.

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

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

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

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

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

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

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

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

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

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

However, the regional boards, as permitting agencies, are coming up with methods and means and ways to prevent stormwater pollution. Now, they could have not imposed the trash

receptacle activities, and instead required treatment facilities or requirements. The trash receptacles may have actually been a more cost-effective method of doing it. In the regional board's expertise and judgment at the time of issuing the permit, they did it that way.

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

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

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

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

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

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

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

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

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

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

Item 13 *Academic Performance Index*, 01-TC-22
Education Code Sections 44650-44654, 52050-52055.51, 52056-52057, 52058Statutes 1999-2000x1, Chapter 3; Statutes 1999, Chapter 52 (AB 1114); Statutes 2000, Chapters 71 (SB 1667), 190 (AB 2162) and 695 (SB 1552); Statutes 2001, Chapters 159 (SB 662), 745 (SB 1191), 749 (AB 961), and 887 (AB 1295)

California Code of Regulations, Title 5, Sections 1031-1039

Register 00, No. 52 (Dec. 28, 2000); Register 01, No. 4 (Jan. 26, 2001); Register 01, No. 5 (Jan. 30, 2001); Register 01, No. 24 (Jun. 11, 2001); Register 01, No. 31 (Aug. 2, 2001); Register 01, No. 46 (Nov. 15, 2001); Register 02, No. 2 (Jan. 8, 2002)
San Juan Unified School District, Claimant

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Member Worthley clarified that it is a discretionary act to enroll. Then if that discretionary act is done, there are mandatory things that must be done after engaging in the discretionary act. Mr. Palkowitz confirmed that the downstream activities were mandatory and that it is a discretionary program. However, there is some precedent that even though a program is discretionary, once there is participation in that program, mandatory downstream activities are then reimbursable activities.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Item 11 (continued)
(SB 925), Statutes 1980, Chapters 855 (AB 2497), 1071 (SB 781), and 1117 (SB 1877), Statutes 1981, Chapters 29 (SB 322) and 435 (AB 518), Statutes 1982, Chapters 162 (AB 2303) and 905 (SB 1848), Statutes 1984, Chapters 1170 (AB 2702), 1391 (SB 1124), 1423 (SB 1899), 1613 (AB 2709), and 1718 (AB 2710),Statutes 1985, Chapters 189 (AB 701), 464 (SB 254), 1068 (AB 366), 1420 (AB 442), 1528 (SB 1306), 1572 (SB 1358), and 1598 (AB 505), Statutes 1986, Chapters 248 (SB 245), 1289 (AB 1981), and 1496 (AB 3608), Statutes 1987 Chapters 82 (AB 80), 531 (AB 1632), 640 (AB 285), 1020 (SB 691), 1418 (AB 1359), 1444 (SB 646), and 1459 (SB1219) Statutes 1988, Chapters 39 (AB 1241), 269 (AB 3022), 1497 (SB 2457), and 1580 (AB 4584), Statutes 1989, Chapter 153 (AB 627), Statutes 1990, Chapters 650 (SB 2423), 931 (AB 3521), 1330 (SB 2788), 1363 (AB 3532), and 1603 (SB 2669), Statutes 1991, Chapters 132 (AB 1133) and 1102 (AB 2232), Statutes 1992, Chapter 459 (SB 1695), Statutes 1993, Chapters 219(A1500), 346 (AB 331), 510 (SB 665), and 1253 (AB 897), Statutes 1994, Chapter 1263 (AB 1328), Statutes 1996, Chapters 1080 (AB 295), 1081 (AB 3354), and 1090 (AB 3215), Statutes 1997, Chapters 83 (AB 327), 134 (AB 273), 842 (SB 644), 843 (AB 753), and 844 (AB 1065), Statutes 1998, Chapter 311 (SB 933), Statutes 1999, Chapters 475 (SB 654) and 1012 (SB 525), Statutes 2000, Chapters 287 (SB 1955), and 916 (AB 1241), Statutes 2001, Chapters 133 (AB 102) and 754 (AB 1697)
San Bernardino Community College District, Claimant)

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

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

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

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

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

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

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

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

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

STAFF REPORTS

Item 22 Chief Legal Counsel's Report (info)

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

Item 23 Executive Director's Report (info)

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

- Audit by the Bureau of State Audits (BSA)

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

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

- 2009 Meeting Calendar

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

- 2010 Meeting Calendar

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

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

PUBLIC COMMENT

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

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

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

A. Pending Litigation

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

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

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

3. *California School Boards Association, Education Legal Alliance, and Sweetwater Union High School Dist. v. State of California, Commission on State Mandates, and John Chiang, in his capacity as State Controller* , Sacramento County Superior Court, Case No. 07CS01399, [School Accountability Report Cards, SARC]

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

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

B. PERSONNEL

To confer on personnel matters pursuant to Government Code sections 11126, subdivision (a) and 17526.

- Report of the Personnel Subcommittee.

Hearing no further comments, Chairperson Sheehy adjourned into closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda; and Government Code sections 11126, subdivision (a), and 17526, to confer on personnel matters listed on the published notice and agenda.

REPORT FROM CLOSED EXECUTIVE SESSION

At 1:05 p.m., Chairperson Sheehy reconvened in open session, and reported that the Commission met in closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda, and pursuant to Government Code sections 11126, subdivision (a), and 17526, to confer on personnel matters listed on the published notice and agenda.

ADJOURNMENT

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

PAULA HIGASHI
Executive Director