STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

January 30, 2026

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

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

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

Re: Corrected Decision
California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2012-0175, 13-TC-01 and 13-TC-02
County of Los Angeles; Los Angeles County Flood Control District; and the Cities of Agoura Hills, Bellflower, Beverly Hills, Carson, Cerritos, Commerce, Downey, Huntington Park, Lakewood, Manhattan Beach, Norwalk, Pico Rivera, Rancho Palos Verdes, Redondo Beach, San Marino, Santa Clarita, Santa Fe Springs, Signal Hill, South El Monte, Vernon, Westlake Village, and Whittier, Claimants

Dear Mr. Gest and Mr. Hill:

On December 5, 2025, the Commission on State Mandates adopted the Decision partially approving the Test Claim on the above-captioned matter. Corrections were made on January 30, 2026. The corrections made to the Decision are as follows:

> This Decision has been corrected in accordance with section 1187.11(b) of the Commission's regulations by adding the City of Irwindale to the list of permittees required to comply with the U.S. EPA-adopted TMDL, San Gabriel River and Impaired Tributaries Metals and Selenium TMDL, effective March 26, 2007, which was inadvertently omitted from the list of permittees mandated to comply with this TMDL. See Exhibit A, Test Claim, page 1072 (Attachment K). Corrections are in underline.

The Corrected Decision can be found at https://csm.ca.gov/commission-decisions.shtml on the Commission's website.

Very truly yours,

Juliana F. Gmur
Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2012-0175, Parts III.A.1., III.A.2., and III.A.4.a.-d. (Non-stormwater Discharges); Part VI.E.1.c., Part VI.E.2.a., and Attachments K through Q, and the Monitoring Provisions in Part VI.B. and Attachment E - Parts II.E.1. through 3. and Part V.; and Parts VI.A.1.b.iii.-iv., VI.B.2., VI.C.1.a., VI.D.1.a., VIII.B.1.b.ii., IX.A.5., IX.C.1.a., IX.E.1.a. and b., IX.G.1.b., IX.G.2. (TMDLs); Parts VI.D.4.d.v.2., VI.D.4.d.v.3., VI.D.4.d.v.4., VI.D.4.d.vi.1.a., VI.D.4.d.vi.1.c., VI.D.4.d.vi.1.d., VI.D.10.d.iii., VI.D.10.d.iv., VI.D.10.d.v., VI.D.10.e.i.1., VI.D.10.e.i.3., and VI.D.10.e.i.4. (Illicit Connections and Discharge Elimination Program); Part VI.D.5.a.-d. (Public Information and Participation Program); Part VI.D.6.b., d., and e. (Industrial and Commercial Facilities Program); Part VI.D.7.d.iv.1.a., b., and c., and Attachment E, Part X (Planning and Land Development Program); Parts VI.D.8.g.i. and ii., VI.D.8.h., VI.D.8.i.i., ii., iv., and v., VI.D.8.j., and VI.D.8.l.i. and ii. (Development Construction Program); Parts VI.D.4.c.iii., VI.D.4.c.vi., VI.D.4.c.x.2., and Parts VI.D.9.c., VI.D.9.d.i., ii., iv., and v., VI.D.9.g.ii., VI.D.9.h.vii., VI.D.9.k.ii. (Public Agency Activities Program), Adopted on November 8, 2012, and effective on December 28, 2012.[1] Filed on June 30, 2014	Case No.: 13-TC-01; 13-TC-02 *California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2012-0175* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted December 5, 2025*) (*Served December 10, 2025*) (*Corrected January 30, 2026*) (*Served January 30, 2026*)

[1] The claimants filed a notice of withdrawal of claimants, Cities of San Marino and Santa Clarita, on October 8, 2025.

County of Los Angeles; Los Angeles County Flood Control District; and the Cities of Agoura Hills, Bellflower, Beverly Hills, Carson, Cerritos, Commerce, Downey, Huntington Park, Lakewood, Manhattan Beach, Norwalk, Pico Rivera, Rancho Palos Verdes, Redondo Beach, Santa Fe Springs, Signal Hill, South El Monte, Vernon, Westlake Village, and Whittier, Claimants.

CORRECTED TEST CLAIM

The Commission on State Mandates adopted the attached Decision on December 5, 2025.

This Decision has been corrected in accordance with section 1187.11(b) of the Commission's regulations by adding the City of Irwindale to the list of permittees required to comply with the U.S. EPA-adopted TMDL, San Gabriel River and Impaired Tributaries Metals and Selenium TMDL, effective March 26, 2007, which was inadvertently omitted from the list of permittees mandated to comply with this TMDL. See Exhibit A, Test Claim, page 1072 (Attachment K). Corrections are in underline.

Juliana F. Gmur, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2012-0175, Parts III.A.1., III.A.2., and III.A.4.a.-d. (Non-stormwater Discharges); Part VI.E.1.c., Part VI.E.2.a., and Attachments K through Q, and the Monitoring Provisions in Part VI.B. and Attachment E - Parts II.E.1. through 3. and Part V.; and Parts VI.A.1.b.iii.-iv., VI.B.2., VI.C.1.a., VI.D.1.a., VIII.B.1.b.ii., IX.A.5., IX.C.1.a., IX.E.1.a. and b., IX.G.1.b., IX.G.2. (TMDLs); Parts VI.D.4.d.v.2., VI.D.4.d.v.3., VI.D.4.d.v.4., VI.D.4.d.vi.1.a., VI.D.4.d.vi.1.c., VI.D.4.d.vi.1.d., VI.D.10.d.iii., VI.D.10.d.iv., VI.D.10.d.v., VI.D.10.e.i.1., VI.D.10.e.i.3., and VI.D.10.e.i.4. (Illicit Connections and Discharge Elimination Program); Part VI.D.5.a.-d. (Public Information and Participation Program); Part VI.D.6.b., d., and e. (Industrial and Commercial Facilities Program); Part VI.D.7.d.iv.1.a., b., and c., and Attachment E, Part X (Planning and Land Development Program); Parts VI.D.8.g.i. and ii., VI.D.8.h., VI.D.8.i.i., ii., iv., and v., VI.D.8.j., and VI.D.8.l.i. and ii. (Development Construction Program); Parts VI.D.4.c.iii., VI.D.4.c.vi., VI.D.4.c.x.2., and Parts VI.D.9.c., VI.D.9.d.i., ii., iv., and v., VI.D.9.g.ii., VI.D.9.h.vii., VI.D.9.k.ii. (Public Agency Activities Program), Adopted on November 8, 2012, and effective on December 28, 2012. Filed on June 30, 2014 County of Los Angeles; Los Angeles County Flood Control District; and the	Case No.: 13-TC-01; 13-TC-02 *California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2012-0175* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted December 5, 2025*) (*Served December 10, 2025*) (*Corrected January 30, 2026*) (*Served January 30, 2026*)

Cities of Agoura Hills, Bellflower, Beverly Hills, Carson, Cerritos, Commerce, Downey, Huntington Park, Lakewood, Manhattan Beach, Norwalk, Pico Rivera, Rancho Palos Verdes, Redondo Beach, Santa Fe Springs, Signal Hill, South El Monte, Vernon, Westlake Village, and Whittier, Claimants.[1]

CORRECTED DECISION[2]

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on December 5, 2025. Howard Gest appeared on behalf of the claimants. Marilyn Munoz appeared on behalf of the Department of Finance. Jennifer Fordyce, Jenny Newman, and Adriana Nunez appeared on behalf of the State Water Resources Control Board and Los Angeles Regional Water Quality Control Board.

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

The Commission adopted the Proposed Decision to partially approve the Test Claim by a vote of 6-0, as follows:

Member	**Vote**
Lee Adams, County Supervisor	Yes
Karen Greene Ross, Public Member	Yes
Renee Nash, School District Board Member	Absent
David Oppenheim, Representative of the State Controller, Vice Chairperson	Yes
William Pahland, Representative of the State Treasurer	Yes
Michele Perrault, Representative of the Director of the Department of Finance, Chairperson	Yes

[1] The claimants filed a notice of withdrawal of claimants, Cities of San Marino and Santa Clarita, on October 8, 2025.

[2] This Decision has been corrected in accordance with section 1187.11(b) of the Commission's regulations by adding the City of Irwindale to the list of permittees required to comply with the U.S. EPA-adopted TMDL, San Gabriel River and Impaired Tributaries Metals and Selenium TMDL, effective March 26, 2007, which was inadvertently omitted from the list of permittees mandated to comply with this TMDL. See Exhibit A, Test Claim, page 1072 (Attachment K). Corrections are in underline.

Alexander Powell, Representative of the Director of the Office of Land Use and Climate Innovation	Yes

Summary of the Findings

These consolidated Test Claims allege reimbursable state mandated activities arising from Order No. R4-2012-0175 (test claim permit), adopted by the Los Angeles Water Quality Control Board (Regional Board) on November 8, 2012, and effective on December 28, 2012.[3] The claimants have properly pled the following sections of the test claim permit, alleging these sections impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution:

A. Requirements to comply with 33 Total Maximum Daily Loads ("TMDL") adopted by the Regional Board and U.S. EPA for trash, bacteria, nitrogen compounds, chloride, toxics, metals, pesticides, and nutrients. (Part VI.E.1.c., Part VI.E.2.a., and Attachments K through Q, and the Monitoring Provisions in Part VI.B. and Attachment E - Parts II.E.1. through 3. and Part V; and Parts VI.A.1.b.iii.-iv., VI.B.2., VI.C.1.a., VI.D.1.a., VIII.B.1.b.ii., IX.A.5., IX.C.1.a., IX.E.1.a. and b., IX.G.1.b., IX.G.2.).

B. Requirements involving the prohibition of non-stormwater discharges. (Parts III.A.1., III.A.2., and III.A.4.a.-d.).

C. Requirements relating to the Illicit Connections and Discharge Elimination Program in Parts VI.D.4. and VI.D.10. to promote, publicize and facilitate public reporting of illicit discharges, ensure that signage adjacent to open channels includes information regarding dumping prohibitions and public reporting of illicit discharges, develop procedures regarding documentation of the handling of complaint calls, develop spill response plans, and expand training programs. (Parts VI.D.4.d.v.2., VI.D.4.d.v.3., VI.D.4.d.v.4., VI.D.4.d.vi.1.a., VI.D.4.d.vi.1.c., VI.D.4.d.vi.1.d., VI.D.10.d.iii., VI.D.10.d.iv., VI.D.10.d.v., VI.D.10.e.i.1., VI.D.10.e.i.3., and VI.D.10.e.i.4.).

D. Requirements relating to the Public Information and Participation Program in Part VI.D.5. to provide a means for public reporting of clogged catch basin inlets and illicit discharges, missing catch basin labels and other pollution prevention information. (Part VI.D.5.a.-d.).

E. Requirements relating to the Industrial and Commercial Facilities Program, including inspection of industrial and commercial facilities and to inventory or database critical industrial and commercial sources in Part VI.D.6. (Part VI.D.6.b., d., and e.).

F. Requirements contained in the Planning and Land Development Program, including requirements to track, enforce and inspect new development and

[3] Exhibit A, Test Claim 13-TC-01, pages 610, 627.

redevelopment post-construction best management practices ("BMPs"). (Part VI.D.7.d.iv.1.a., b., and c. and Attachment E, Part X.)

G. Requirements in Part VI.D.8. relating to the Development Construction Program, including requirements to inspect construction sites of one acre or greater covered by the general construction activities stormwater permit, to electronically inventory various land use permits and to update this inventory, to require review and approval of erosion and sediment control plans, to develop technical standards for the selection, installation and maintenance of construction BMPs, to develop procedures to review and approve relevant construction plan documents, and to train permittee employees with respect to review and inspections. (Parts VI.D.8.g.i. and ii., VI.D.8.h., VI.D.8.i.i., ii., iv., and v., VI.D.8.j., and VI.D.8.l.i. and ii.)

H. Requirements relating to the Public Agency Activities Program, including requirements to maintain an updated inventory of permittee-owned or operated public facilities that are potential sources of stormwater pollution, to develop an inventory of public rights of ways or other areas that can be retrofitted to reduce the discharge of stormwater, to develop and implement an Integrated Pest Management Program, and for areas not subject to a trash TMDL to install trash excluders or equivalent devices on catch basins or take alternative steps such as increased street sweeping, adding trash cans or installing trash nets. (Parts VI.D.4.c.iii., VI.D.4.c.vi., VI.D.4.c.x.2. and Parts VI.D.9.c., VI.D.9.d.i., ii., iv., v., VI.D.9.g.ii., VI.D.9.h.vii., VI.D.9.k.ii.).[4]

The Test Claims were timely filed on June 30, 2014,[5] within one year of first incurring costs,[6] and the period of reimbursement begins on the permit's effective date of December 28, 2012.

The Commission finds that except for developing and submitting a watershed plan to achieve the wasteload allocations (WLAs) contained in some of the *U.S. EPA-adopted TMDLs* as required by Part VI.E.1.c. and Attachments M, O, P, and Q of the test claim permit, the remaining TMDL provisions in Part VI.E.1.c., Part VI.E.2.a., and Attachments K through Q, and the monitoring provisions in Part VI.B. and Attachment E - Parts II.E.1. through 3. and Part V.; and Parts VI.A.1.b.iii.-iv., VI.B.2., VI.C.1.a., VI.D.1.a., VIII.B.1.b.ii., IX.A.5., IX.C.1.a., IX.E.1.a. and b., IX.G.1.b., do not mandate a new program or higher level of service for following reasons identified below.

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[4] Exhibit A, Test Claim 13-TC-01, pages 61-62; Exhibit B, Test Claim 13-TC-02, pages 8-9.

[5] Exhibit A, Test Claim 13-TC-01, page 1; Exhibit B, Test Claim 13-TC-02, page 1.

[6] Exhibit A, Test Claim 13-TC-01, page 100 (Declaration of Gregory Ramirez, City Manager for the City of Agoura Hills); Exhibit B, Test Claim 13-TC-02, page 49 (Declaration of Paul Alva, P.E., Principal Engineer for the Watershed Management Division of the County of Los Angeles Department of Public Works).

Attachment K and the TMDLs expressly incorporated into the prior permit do not mandate a new program or higher level of service.

- Attachment K to the test claim permit does not impose any requirements on the permittees but simply identifies the TMDLs at issue in this Test Claim and, therefore, does not impose a state-mandated program.[7]
- The test claim permit, in Part VI.E.1.c. and Attachment O, does not mandate a new program or higher level of service with respect to the Los Angeles River Trash TMDL, but simply carries over the final receiving water limitations and WQBELs for trash that were expressly required by a prior order (Order No. R4-2009-0130, which amended the prior permit Order 01-182).[8] In addition, Part VI.E.5. of the test claim permit identifies the same compliance options for trash that were contained in Order No. 01-182 as amended by R4-2009-0130 (*full capture*, *partial capture, institutional controls*) and adds another option to use a *minimum frequency of assessment and collection (MFAC)* approach for compliance with the effluent limitations.[9] Thus, the requirements to implement this TMDL are not new.
- The test claim permit, in Part VI.E.1.c. and Attachment M, does not mandate a new program or higher level of service with respect to the Marina del Rey Harbor Mother's Beach and Back Basins Bacteria TMDL, Summer Dry Weather (Attachment M),[10] but carries over the final receiving water limitations and water quality based effluent limits (WQBELs) that were expressly included to implement the TMDL in the prior permit (Order R4-2007-0042, which amended the prior permit, Order No. 01-182).[11] In addition, the requirements to implement this TMDL are the same as the prior permit; both permits left the planning and implementation of the TMDL to the local government permittees.[12]

Compliance with the Regional Board-adopted TMDLs was required by the prior permit and is not new and the development of a watershed plan (WMP or EWMP)

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[7] Exhibit A, Test Claim 13-TC-01, pages 1065-1082.

[8] Exhibit A, Test Claim 13-TC-01, pages 1246-1249 (Order No. 01-182, as amended by Order R4-2009-0130).

[9] Exhibit A, Test Claim 13-TC-01, pages 748-753.

[10] Exhibit A, Test Claim 13-TC-01, pages 742, 1115-1118 (test claim permit, Attachment M, Section F, and Part VI.E.1.d. ["A Permittee may comply with water quality based effluent limitations and receiving water limitations in Attachments L through R using any lawful means"]).

[11] Exhibit L (10), Order No. 01-182 as amended by R4-2007-0042, pages 17, 24-26.

[12] Exhibit L (10), Order No. 01-182 as amended by R4-2007-0042, pages 25-27 (Parts 2, 3); Exhibit A, Test Claim, 13-TC-01, pages 663, 743, pages 1115-1116; Exhibit L (20), Resolution 2003-012, Attachment A, pages 4, 8.

to comply with the Regional Board-adopted TMDLs is voluntary and not mandated by the state.

- Compliance with the numeric WQBELS and receiving water limitations for the remaining Regional Board-adopted TMDLs, as required by Part VI.E.1.c. of the test claim permit and Attachments L through Q, was expressly required by Part 3.C. of the prior permit and, thus, compliance with the TMDLs to meet water quality standards is not new and does not mandate a new program or higher level of service.[13]

  Moreover, the claimants were already required by the prior permit to comply with the numeric and narrative limits identified in the Basin Plan, the California Toxics Rule, and other statewide plans to meet water quality standards for these pollutants by implementing best management practices (BMPs) and control measures. If there was an exceedance determined with monitoring, the claimants were required by the prior permit to identify the source and implement *additional* BMPs and monitoring to control and reduce the discharge of those pollutants.[14] Accordingly, even without Part 3.C. of the prior permit (which expressly required the permittees to amend their stormwater plans to comply with the Regional Board-adopted TMDLs), the prior permit required compliance with water quality standards.[15] The only difference between the prior permit and the test claim permit is that the test claim permit now identifies the wasteload allocations for the pollutants calculated in the TMDLs so that claimants know the

[13] Exhibit A, Test Claim 13-TC-01, pages 639-640, 648, 1190-1193; see also, *County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985, 993.

[14] Exhibit A, Test Claim 13-TC-01, pages 1190-1193.

[15] In comments on the Draft Proposed Decision, the claimant relies on the recent U.S. Supreme Court decision in *City and County of San Francisco*, which found language, similar to the discharge prohibitions and receiving water limitations in Parts 2.1 and 2.2 of the prior permit, unlawful. (Exhibit I, Claimants' Comments on the Draft Proposed Decision, page 16, citing *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334, 355.) However, that decision does not invalidate the prior permit in this case because the prior permit is final and no longer subject to review. The courts have been clear that "[w]hen the Supreme Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases *still open on direct review. (Harper v. Virginia Dep't of Taxation* (1993) 509 U.S. 86, 97; *Citicorp North America, Inc. v. Franchise Tax Board* (2000) 83 Cal.App.4th 1403, 1422-1423.). The receiving water limitations in the prior permit were litigated twice and upheld, and the prior permit is no longer open on direct review. (Exhibit L (24), State Water Resources Control Board Order WQ 2015-0075, pages 12-13). Once quasi-judicial decisions are final, whether after judicial review or without judicial review, they are binding, just as are judicial decisions. (*California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.)

percentage of pollutant loads that need to be reduced to meet the existing water quality standards in the affected water bodies and the test claim permit gives claimants a schedule and, thus, more time to meet those objectives.

- The development of a Watershed Management Program (WMP) or an Enhanced Watershed Management Program (EWMP) to comply with the Regional Board-adopted TMDL effluent limits and receiving water limitations, pursuant to Part VI.E.2.a., is not mandated by the state, and the requirements to implement BMPs and control measures to meet the water quality standards for these pollutants are the same as what was required by prior law and do not mandate a new program or higher level of service.

  Part VI.C.1.b. of the test claim permit states that "Participation in a Watershed Management Program is *voluntary* and allows a Permittee to address the highest watershed priorities, including . . . Part VI.E. (Total Maximum Daily Load Provisions) and Attachments L through R, by customizing the control measures in Parts III.A.4. (Prohibitions – Non-Storm Water Discharges) and VI.D. (Minimum Control Measures)."[16] Implementation plans and schedules were included in the Regional Board-adopted TMDLs, and Parts VI.C. and VI.E. simply allow the claimants to customize those plans. In any event, Part VI.E.1.d. states that "A Permittee may comply with water quality based effluent limitations and receiving water limitations in Attachments L through R using any lawful means."[17]

  The claimants contend, however, they are practically compelled by the test claim permit to develop a WMP or EWMP because, otherwise, they would "immediately" be in violation of the receiving water limitations.[18] The Commission disagrees.

  The test claim permit provides an incentive. Permittees with a WMP or EWMP may be deemed in compliance with the receiving water limitations and water quality based effluent limits (WQBELs) of the TMDLs, even though the WQBEL or receiving water limitation has not actually been achieved, if they have fully implemented the approved plan.[19]

  The test claim permit also provides that if a permittee has *not* submitted a WMP or EWMP or provided notice of its intent to do so, the permittee "shall demonstrate compliance with the receiving water limitations pursuant to Part V.A. and with the applicable interim water quality-based effluent limitations in Part VI.E. pursuant to subparts VI.E.2.d.i.(1)-(3)."[20]

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[16] Exhibit A, Test Claim 13-TC-01, page 648, emphasis added.

[17] Exhibit A, Test Claim 13-TC-01, page 742.

[18] Exhibit I, Claimants' Comments on the Draft Proposed Decision, page 21.

[19] Exhibit A, Test Claim 13-TC-01, pages 653, 654, 744-745.

[20] Exhibit A, Test Claim 13-TC-01, page 659 (test claim permit, Part VI.C.4.e.).

For purposes of a TMDL, however, "compliance with the receiving water limitations pursuant to Part V.A." means the permittee is complying with the TMDL requirements of the Order in Part E and Attachments L through R, which constitutes compliance with the receiving water limitations in Part V.A.[21] "In other words, if there is an exceedance for a pollutant in a water body that has a TMDL addressing that pollutant, as long as the Permittee is complying with the requirements for the TMDL, the Permittee is deemed in compliance with the receiving water limitation."[22] The test claim permit incorporates the TMDL implementation schedules as compliance schedules to achieve interim and final WQBELS and receiving water limitations, which gives the permittees more time to comply with water quality standards. Thus, compliance with receiving water limitations is not "immediate" as suggested by the claimants.

Moreover, the language in the test claim permit for failing to develop a WMP or EWMP for Regional Board-adopted TMDLs is materially different than the language in the test claim permit for failing to develop a WMP or EWMP for the *U.S. EPA-adopted TMDLs*. U.S. EPA-adopted TMDLs have no implementation plans or interim compliance requirements but are effective immediately. If a permittee does not submit a WMP or EWMP for a U.S. EPA-adopted TMDL, "the Permittee shall be required to demonstrate compliance with the [final] numeric WLAs *immediately* based on monitoring data collected under the MRP [Monitoring and Reporting Program] (Attachment E) for this Order."[23] Under the rules of statutory construction, where the Legislature (or, in this case, the Regional Board) uses materially different language in provisions addressing the same or related subjects, the normal inference is that the Regional Board intended a difference in meaning.[24]

Finally, Part VI.E.1.d. of the test claim permit states, "A Permittee may comply with water quality-based effluent limitations and receiving water limitations in Attachments L through R using any lawful means."[25] Thus, under both the test claim permit and the prior permit, the permittees are charged with developing and proposing their management programs, BMPs, and control measures to implement the TMDLs to comply with water quality standards, and under both permits, if there is an exceedance, the permittees are required to report that information to the Regional Board and implement any *additional* monitoring and BMPs required to reduce the discharge of the pollutant.[26] Federal law has long

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[21] Exhibit A, Test Claim 13-TC-01, page 744 (test claim permit, Part VI.E.2.c.ii.).

[22] Exhibit L (24), State Water Resources Control Board Order WQ 2015-0075, page 143.

[23] Exhibit A, Test Claim 13-TC-01, page 747, emphasis added.

[24] *People v. Trevino* (2001) 26 Cal.4th 237, 241.

[25] Exhibit A, Test Claim 13-TC-01, page 742.

[26] Exhibit A, Test Claim 13-TC-01, pages 639-640, 1191-1193.

required claimants to meet water quality standards by proposing and implementing BMPs and reporting progress and exceedances to the Water Boards.[27]

Compliance with the trash TMDLs does not mandate a new program or higher level of service.

Compliance with the nine trash TMDLs, as required by Part VI.E.1. and Attachments L, M, N, and O, using "any lawful means" as required by Part VI.E.5., does not mandate a new program or higher level of service.[28]

The state-adopted trash TMDLs require a zero trash discharge by the final compliance deadline and impose interim effluent limits requiring the permittees to reduce the discharge of trash by specified amounts by the interim compliance dates until a zero trash discharge is ultimately achieved, giving the claimants more time to comply with the water quality standards for trash established in the 1994 Basin Plan.[29] The two U.S. EPA-adopted trash TMDLs require zero trash upon the adoption of the test claim permit and do not have interim compliance requirements.[30] Part VI.E.5.b.i. states that permittees may comply with the trash effluent limitations "using any lawful means."[31] "Such compliance options are broadly classified" as full capture, partial capture, institutional controls, or a program for minimum frequency of assessment and collection (MFAC), as described below, and any combination of these may be employed to achieve compliance.[32]

Compliance with the trash TMDLs does not mandate a new program or higher level of service. Federal law requires the claimants to effectively prohibit non-stormwater

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[27] United States Code, title 33, section 1342(p)(3)(B)(iii); Code of Federal Regulations, title 40, section 122.26(d)(2); Code of Federal Regulations, title 40, section 122.44(d)(1), (i); Code of Federal Regulations, title 40, section 122.48; Code of Federal Regulations, title 40, Part 127 (electronic reporting).

[28] Exhibit A, Test Claim 13-TC-01, pages 748-753 (test claim permit, Part VI.E.5.) and pages 1083 (Lake Elizabeth Trash TMDL), 1100 (Santa Monica Bay Nearshore and Offshore Debris TMDL), 1105 (Malibu Creek Watershed Trash TMDL), 1106 (Ballona Creek Trash TMDL), 1122 (Machado Lake Trash TMDL), 1142 (Legg Lake Trash TMDL), which incorporate by reference Part VI.E.5.

[29] Exhibit A, Test Claim 13-TC-01, pages 1083, 1100, 1105, 1106, 1121-1122, 1129-1131, 1141, 1147. The 1994 Basin Plan provided that "[w]aters shall not contain floating materials, including solids, liquids, foams, and scum, in concentrations that cause nuisance or adversely affect beneficial uses," and "[w]aters shall not contain suspended or settleable material in concentrations that cause nuisance or adversely affect beneficial uses." (Exhibit L (1), Basin Plan 1994, page 89.)

[30] Exhibit A, Test Claim 13-TC-01, pages 1147, 1154.

[31] Exhibit A, Test Claim 13-TC-01, page 749.

[32] Exhibit A, Test Claim 13-TC-01, page 749.

discharges, including the discharge of trash, to comply with water quality standards.[33] To "effectively prohibit" non-stormwater discharges, including trash, means the claimants are required to implement a program to detect and remove illicit discharges, including trash, which under federal law includes inspections, on-going field screening activities, investigations, and procedures and controls to prevent the discharge.[34] And here, the test claim permit does not direct the claimants on how to address the trash TMDLs, but allows the claimants to use "any lawful means" to comply with the trash TMDLs, which may include full capture devices; partial capture devices and institutional controls; a combination of approaches; or monitoring, assessing, and collecting trash, and the implementation of BMPs using the MFAC approach.

Moreover, the claimants were required by the prior permit to effectively prohibit non-stormwater discharges and comply with the water quality standards in the Basin Plan, which required controls to prohibit the discharge of trash.[35] Part 2.3 of the prior permit required compliance with the discharge prohibitions and receiving water limitations through timely implementation of control measures and other actions identified in their local Stormwater Quality Management Program (SQMP), which was made enforceable by the prior permit.[36] The prior permit also required permittees that were subject to a trash TMDL which had not yet been adopted to implement programs to inspect and clean catch basins between May 1 and September 30 each year, and to conduct additional cleaning of any catch basin that was at least 40 percent full of trash or debris.[37] The claimants had to keep records of the catch basins cleaned and report the amount of trash collected.[38] Once the TMDLs and implementation plans became effective, they were required to amend their stormwater quality management plans in accordance with Part 3.C., which had to include "effective combination of measures such as street sweeping, catch basin cleaning, installation of treatment devices and trash receptacles, or other BMPs," much like the requirements and flexibility provided by the test claim permit.[39] The claimants were also required to implement BMPs for storm drain maintenance and removal of trash and debris from open channel storms drains, and had requirements to sweep streets identified as high priority for trash at least twice

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

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

[35] Exhibit L (1), Basin Plan 1994, page 89.

[36] Exhibit A, Test Claim 13-TC-01, page 1193 (Order No. 01-182, Part 3.A.1.).

[37] Exhibit A, Test Claim 13-TC-01, page 1223.

[38] Exhibit A, Test Claim 13-TC-01, page 1223.

[39] Exhibit A, Test Claim 13-TC-01, pages 1193, 1223.

per month.[40] *Additional BMPs and monitoring* were required by the prior permit if discharges continued to exceed the water quality standards in the Basin Plan.[41]

Developing and submitting a watershed plan (WMP or EWMP) to comply with some of the U.S. EPA-adopted TMDLs mandates a new program or higher level of service. However, implementing control measures and BMPs to comply with the U.S. EPA-adopted TMDLs is not new and does not mandate a new program or higher level of service.

In contrast to the state-adopted TMDLs, U.S. EPA-adopted TMDLs do not contain an implementation plan for achievement of the WLAs. "Such decisions are generally left with the States."[42] The Fact Sheet explains the Regional Board could have either adopted a separate implementation plan as a Basin Plan Amendment for each U.S. EPA-adopted TMDL or issued a schedule leading to full compliance in a separate enforcement order. However, at the time the test claim permit was adopted in 2012, the Regional Board had not done either of these. "As such, the final [numeric] WLAs in the seven USEPA established TMDLs identified above become effective immediately upon establishment by USEPA *and* placement in a NPDES permit."[43]

Thus, the U.S. EPA-adopted TMDLs addressed in Attachments M, O, P, and Q require the permittees to comply with the WLAs by complying with Part VI.E.3. of the test claim permit.[44] Part VI.E.3. of the test claim permit states the following: "In lieu of inclusion of numeric water quality based effluent limitations at this time, this Order requires Permittees subject to WLAs in USEPA established TMDLs to propose and implement best management practices (BMPs) [in a Watershed Management Program (WMP) or Enhanced Watershed Management Program (EWMP)] that will be effective in achieving compliance with USEPA established numeric WLAs."[45] "If a Permittee does *not* submit a WMP, or the plan is determined to be inadequate by the Regional Water Board Executive Officer and the Permittee does not make the necessary revisions within 90 days of written notification that plan is inadequate, the Permittee *shall be required to demonstrate compliance with the [final] numeric WLAs immediately* based on monitoring data collected under the MRP [Monitoring and Reporting Program] (Attachment E) for this Order."[46]

The plain language of Part VI.E.3. provides the claimants with a choice of developing and submitting a WMP or EWMP to comply with the U.S. EPA-adopted TMDLs or

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[40] Exhibit A, Test Claim 13-TC-01, pages 1224-1225.

[41] Exhibit A, Test Claim 13-TC-01, pages 1191-1192.

[42] Exhibit A, Test Claim 13-TC-01, page 986 (Fact Sheet).

[43] Exhibit A, Test Claim 13-TC-01, pages 986-987 (Fact Sheet), emphasis added.

[44] Exhibit A, Test Claim 13-TC-01, pages 1100, 1105, 1115, 1142, 1144, 1155, 1161.

[45] Exhibit A, Test Claim 13-TC-01, page 746.

[46] Exhibit A, Test Claim 13-TC-01, page 747, emphasis added.

demonstrating immediate compliance with the final WLAs. Thus, there is no legal compulsion to comply with the requirements to develop and submit a plan since legal compulsion "is present when the local entity has a mandatory, legally enforceable duty to obey."[47]

Although there is not legal compulsion to develop and submit a plan to implement the U.S. EPA-adopted TMDLs based on the plain language of the permit, there is practical compulsion and a state mandate to develop and submit a plan to implement *some* of these TMDLs. The courts have recognized that practical compulsion is a basis for a state mandate finding when local government faces certain and severe penalties or other draconian consequences for not complying with a technically optional program, leaving local government no real choice.[48]

The record shows there are three U.S. EPA TMDLs with wasteload allocations *equal* to the permittees' current loading, which means the MS4s were individually meeting the numeric water quality standards before the adoption of the TMDL and can demonstrate immediate compliance with the numeric wasteload allocations without further load reductions. These include the following:

1. The TMDL for DDT and PCBs, which states the following: "Because existing stormwater loads from the watersheds are lower than the calculated total allowable loads to achieve sediment targets, *the wasteload allocations for stormwater in this TMDL are based on existing load estimates* of 28 g/yr for DDT and 145 g/yr for PCBs.").[49]
2. U.S. EPA TMDLs for Los Angeles Lakes, Echo Park Lake Nutrients, which states the following: "Note that WLAs are *equal to existing loading rates* because no reductions in loading are required."[50] That TMDL further states "To prevent degradation of this waterbody, nutrient TMDLs will be allocated *based on existing loading*."[51]

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[47] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.

[48] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 817, 822; *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 749; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 74.

[49] Exhibit L (32), U.S. EPA TMDL for DDT and PCBs, page 56; Exhibit A, Test Claim 13-TC-01, Exhibit A, Test Claim 13-TC-01, pages 1100-1101 (test claim permit, Attachment M), emphasis added.

[50] Exhibit L (33), U.S. EPA TMDL for Los Angeles Lakes, Excerpts, page 213.

[51] Exhibit L (33), U.S. EPA TMDL for Los Angeles Lakes, Excerpts, page 212; see also Exhibit A, Test Claim 13-TC-01, pages 1144-1145 (test claim permit, Attachment O, Echo Park Lake Nutrient TMDL), emphasis added.

3. U.S. EPA TMDL Ballona Creek Wetlands TMDL for Sediments and Invasive Exotic Vegetation, which states "Since the current existing discharge of sediment load is not contributing to the listed impairments or otherwise causing a negative impact to Ballona Creek Wetlands, this TMDL *establishes WLAs based on existing conditions*. The allowable WLA is set at 58,354 yd3/yr (or 44,615 m3/yr)."[52]

Thus, if these permittees choose not to develop a WMP or EWMP, they could likely demonstrate immediate compliance with the numeric wasteload allocations, and thus penalties are *not* certain to occur.

However, there is no evidence to support the finding that the permittees subject to the remaining U.S. EPA-adopted TMDLs could immediately demonstrate compliance with the final numeric wasteload allocations and not face civil and criminal penalties for failing to develop a WMP or EWMP. The water bodies at issue had been 303(d)-listed since 1996 and 1998, meaning the beneficial uses of the water bodies were impaired because of these pollutants, which were not reduced at the time the TMDLs were developed.[53] The U.S. EPA TMDL reports in the record show that reductions by MS4 dischargers were still required in the remaining TMDLs.[54] The Regional Board states that it does not intend to take enforcement action for violations of wasteload allocations and receiving water limitations *if* a permittee has developed a WMP, but states that strict "immediate" compliance with the final numeric wasteload allocations is required if

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[52] Exhibit L (31), U.S. EPA TMDL for Ballona Creek Wetlands Sediment and Invasive Exotic Vegetation, page 82; Exhibit A, Test Claim 13-TC-01, page 1115 (test claim permit, Attachment M), emphasis added.

[53] *City of Arcadia v. U.S. EPA* (2003) 265 F.Supp.2d 1142, 1146.

[54] See, for example, Exhibit L (27) U.S. EPA Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL, page 17 ("The bacterial impairment in the LAR Estuary and the LBC beaches is of great concern as it poses a potential health risk to those recreating in these waterbodies.") and page 22 ("Exceedance rates [at City of Long Beach beaches] ranged from 36 to 81 percent during wet weather periods, 6 to 23 percent during summer dry periods, and 6 to 25 percent during winter dry periods when compared to the single sample maximum WQOs."); Exhibit L (29), U.S. EPA Malibu Creek Watershed Nutrients TMDL, page 40 (showing percent reductions in discharges of nitrogen and phosphorus for urban runoff); Exhibit L (28), U.S. EPA Los Cerritos Channel Metals TMDL, page 41 (Table 6-3. Average annual loads and percent reduction required for copper and zinc); and Exhibit L (33), U.S. EPA TMDL for Los Angeles Lakes, Excerpts, page 180 (Table 5.4 showing existing loads of nitrogen and phosphorus, and the reduced wasteload allocations for these pollutants); Exhibit L (30), U.S. EPA San Gabriel River and Impaired Tributaries Metals and Selenium TMDL, page 33 (". . . dry-weather runoff or nuisance flow and/or discharges from other NPDES permitted sources are a significant source of metals in the San Gabriel watershed.") and page 36 ("Wet-weather storm water runoff is thus the dominant source of annual metals loading,…").

a WMP or EWMP is not developed.[55] The test claim permit explains that a violation of the permit may subject the permittee to civil and criminal liabilities.[56] Thus, strict compliance with the final numeric wasteload allocations is required to avoid a penalty if a permittee does not develop a watershed plan.

The Water Boards argue that compliance with the wasteload allocations is not "immediate" despite the language in the permit because the permittees can request a time schedule order. Part VI.E.4. of the test claim permit allows a permittee to request a time schedule order for *State-adopted* TMDLs,[57] but there are no similar statements for U.S. EPA-adopted TMDLs. The Fact Sheet states that the Regional Board will consider issuing a time schedule order to provide the necessary time to fully implement the "watershed" control measures to achieve the wasteload allocation of a U.S. EPA TMDL.[58] Thus, a time schedule order will be considered only after a "watershed" plan (WMP or EWMP) is developed and approved. There is no indication in the record that the Regional Board will delay enforcing a final wasteload allocation of a U.S. EPA-adopted TMDL by approving a time schedule order for a permittee that does not develop a WMP or EWMP and cannot show compliance. The Water Boards admit that "even if an implementation plan is adopted, nothing in federal or state law requires a regional board to give responsible parties subject to a TMDL additional time to comply with the TMDL."[59]

Therefore, *except for* the U.S. EPA-adopted TMDLs for DDT and PCBs (Attachment M), Ballona Creek Wetlands TMDL for Sediments and Invasive Exotic Vegetation (Attachment M), and Echo Park Lake Nutrients (Attachment O), Part VI.E.1.c. and Attachments M, O, P, and Q (which incorporate by reference Part VI.E.3.) imposes a state-mandated program to develop a WMP or EWMP only as specified in Part VI.E.3.[60] to comply with the following U.S. EPA-adopted TMDLs:

- Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL (effective March 26, 2012 (Attachment O)).[61]
- Los Angeles Area Lakes TMDLs, effective March 26, 2012 (Attachment O for the TMDLs Los Angeles River Watershed Management Area, which include the

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[55] Exhibit A, Test Claim 13-TC-01, page 988 (Fact Sheet), emphasis added.

[56] Exhibit A, Test Claim 13-TC-01, page 645.

[57] Exhibit A, Test Claim 13-TC-01, page 747 (test claim permit, Part VI.E.4.).

[58] Exhibit A, Test Claim 13-TC-01, page 988 (Fact Sheet).

[59] Exhibit J, Water Boards' Comments on the Draft Proposed Decision, pages 3-4.

[60] Exhibit A, Test Claim 13-TC-01, pages 746-747.

[61] Exhibit A, Test Claim 13-TC-01, page 1142. The following permittees are required to comply with the Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL: Los Angeles County Flood Control District and Signal Hill. (Exhibit A, Test Claim 13-TC-01, pages 1070-1071 (test claim permit, Attachment K).)

following: Lake Calabasas Nutrient; Echo Park Lake PCBs, Chlordane, and Dieldrin; and Legg Lake Nutrient Peck Road Park Lake Nutrient, PCBs, Chlordane, DDT, and Dieldrin; and Attachment P for the TMDLs in the San Gabriel River Watershed Management Area, which include the Puddingstone Reservoir Nutrient, Mercury, PCBs, Chlordane, Dieldrin, DDT TMDLs.)[62]

- Los Cerritos Channel Metals TMDL, effective March 17, 2010 (Attachment Q).[63]
- San Gabriel River and Impaired Tributaries Metals and Selenium TMDL, effective March 26, 2007 (Attachment P).[64]
- Malibu Creek Watershed Nutrients TMDL, effective March 21, 2003 (Attachment M).[65]

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[62] Exhibit A, Test Claim 13-TC-01, page 1143-1154, 1155-1160, 1071 et seq. The following permittees are required to comply with the Los Angeles Area Lakes TMDLs: Los Angeles County Flood Control District, County of Los Angeles, and the Cities of Los Angeles, Arcadia, Bradbury, Calabasas, Duarte, El Monte, Irwindale, Monrovia, Sierra Madra, and South El Monte. (Exhibit A, Test Claim 13-TC-01, pages 1169-1171 (test claim permit, Attachment K).)

The permittees in the San Gabriel River Management Area include the Cities of Azusa, Claremont, Irwindale, La Verne, Pomona, San Dimas, the County of Los Angeles, and Los Angeles County Flood Control District. (Exhibit A, Test Claim 13-TC-01, pages 1072-1073 (test claim permit, Attachment K).)

[63] Exhibit A, Test Claim 13-TC-01, page 1161. The following permittees are required to comply with the Los Cerritos Channel Metals TMDL: Bellflower, Cerritos, Downey, Lakewood, County of Los Angeles, Los Angeles County Flood Control District, Paramount, and Signal Hill. (Exhibit A, Test Claim 13-TC-01, page 1074 (test claim permit, Attachment K).)

[64] Exhibit A, Test Claim 13-TC-01, page 1161. The following permittees are required to comply with the San Gabriel River and Impaired Tributaries Metals and Selenium TMDL: Arcadia, Artesia, Azusa, Baldwin Park, Bellflower, Bradbury, Cerritos, Claremont, Covina, Diamond Bar, Downey, Duarte, El Monte, Glendora, Hawaiian Gardens, Industry, Irwindale, La Habra Heights, La Mirada, La Puente, La Verne, Lakewood, County of Los Angeles, and Los Angeles County Flood Control District, Monrovia, Norwalk, Pico Rivera, Pomona, San Dimas, Santa Fe Springs, South El Monte, Walnut, West Covina, and Whittier. (Exhibit A, Test Claim 13-TC-01, pages 1072-1073 (test claim permit, Attachment K).)

[65] Exhibit A, Test Claim 13-TC-01, page 1105. The following permittees are required to comply with the Malibu Creek Watershed Nutrients TMDL: Agoura Hills, Calabasas, and Hidden Hills, County of Los Angeles, Los Angeles County Flood Control District, Malibu, and Westlake Village. (Exhibit A, Test Claim 13-TC-01, pages 1065-1066 (test claim permit, Attachment K).)

The Commission also finds that the requirement to develop a WMP or EWMP for the remaining U.S. EPA-adopted TMDLs is new and imposes a new program or higher level of service. The prior permit, in Part 3.C., required the permittees to revise their countywide SQMP to comply with the wasteload allocations adopted in the TMDLs, but the record explains this requirement applied to the Regional Board-adopted TMDLs since "[p]ublic review of the *Regional Board's TMDLs,* will occur during the TMDL adoption process (there need not be an additional public process for TMDL implementation and Basin Plan amendment)" and "[u]pon approval of a TMDL, the waste load allocations and load allocations (specified in that TMDL) will become effective and enforceable under this permit.[66] Thus, the TMDLs adopted by the Regional Board contained implementation plans that went through the public process during the adoption of those TMDLs and, thus, it made sense to require the permittees under Part 3.C. of the prior permit to simply revise their SQMP to implement the Regional Board-adopted TMDLs without further public review.[67]

However, the U.S. EPA-adopted TMDLs did not contain implementation plans and, thus, none of these TMDLs had undergone a public review process for implementation when the test claim permit was adopted. Therefore, when developing a WMP or EWMP for these TMDLs, permittees are required to "[p]rovide appropriate opportunity for meaningful stakeholder input, including but not limited to, a permit-wide watershed management program technical advisory committee (TAC) that will advise and participate in the development of the Watershed Management Programs and enhanced Watershed Management Programs from month 6 through the date of program approval."[68] Given the lack of an evaluation of the U.S. EPA-adopted TMDLs, the Regional Board found that it was "reasonable to include permit conditions that *require* Permittees to develop specific Watershed Management Program plans that include

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[66] Exhibit L (5), Fact Sheet for Order No. 01-182, pages 14-15, emphasis added; see also Exhibit L (12), Regional Board Notice of Public Meeting and Workshop, July 26, 2001.

[67] See for example, Exhibit L (12), Regional Board Notice of Public Meeting and Workshop, July 26, 2001, page 19, which said the following:

> Public review of TMDLs, which will typically be in the form of an amendment to the Basin Plan, will occur during the TMDL adoption process; *and staff does not anticipate that there will be a need for an additional public process for TMDL implementation measures*. Therefore, upon approval of a TMDL, implementation of municipal storm water requirements (specified in that TMDL) will become effective and enforceable under the permit. *In other words, municipal storm water requirements will be automatically included in this proposed permit upon* ***adoption of a TMDL by the Board****, without reopening this permit.* This TMDL requirement and structure is consistent with TMDL provisions in the City of Long Beach and County of Ventura permits. (Emphasis added.)

[68] Exhibit A, Test Claim 13-TC-01, page 649 (test claim permit, Part VI.C.1.f.v.).

interim milestones and schedules for actions to achieve the WLAs. These plans will facilitate a comprehensive planning process, including coordination among co-permittees where necessary, on a watershed basis to identify the most effective watershed control measures and implementation strategies to achieve the WLAs."[69] Moreover, these watershed plans are required *in addition* to the reports required when an exceedance of water quality standards exists.[70] The Regional Board could have required the permittees to continue applying their stormwater quality management plans (SQMPs) developed under the prior permit to control the pollutants at issue while the TMDLs were being evaluated for appropriate implementation, but instead required a new WMP or EWMP in addition to the exceedance reports referred to by the Water Boards.

The requirement to develop and submit a WMP or EWMP for these TMDLs is uniquely imposed on the local government permittees. Moreover, "[t]he challenged requirements are not bans or limits on pollution levels, they are mandates to perform specific actions" designed to reduce pollution entering stormwater drainage systems and receiving waters.[71] Thus, the requirement to develop and submit a WMP or EWMP for the remaining U.S. EPA-adopted TMDL provides a new program or higher level of service to the public.

However, implementing BMPs and control measures to comply with the U.S. EPA-adopted TMDLs does *not* mandate a new program or higher level of service. The claimants were required by the prior permit (Order 01-182) to comply with the numeric and narrative limits identified in the Basin Plan, the California Toxics Rule (CTR), and other statewide plans by adopting a Stormwater Quality Management Plan customizing BMPs and control measures to meet water quality standards for the pollutants that are the subject of the U.S. EPA-adopted TMDLs and if there was an exceedance determined with monitoring, the claimants were required to identify the source and implement additional BMPs and monitoring to reduce the discharge of those pollutants to the maximum extent practicable.[72] Part VI.E.1.d. of the test claim permit states, "A Permittee may comply with water quality-based effluent limitations and receiving water limitations in Attachments L through R using any lawful means."[73] Thus, the state has not required the implementation of any specific BMPs or directed the claimants on how to reduce or control the discharges that are subject to the TMDLs. Those decisions are left up to the claimants, just like they were under the prior permit.

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[69] Exhibit A, Test Claim 13-TC-01, page 987 (Fact Sheet), emphasis added.

[70] Exhibit A, Test Claim 13-TC-01, pages 639-640, 746-747.

[71] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560.

[72] Exhibit A, Test Claim 13-TC-01, pages 1190-1193.

[73] Exhibit A, Test Claim 13-TC-01, page 742.

The TMDL monitoring requirements do not mandate a new program or higher level of service.

The TMDL monitoring requirements in Part VI.B. and Attachment E, Parts II.E.1. through 3. and Part V.; and Parts VI.A.1.b.iii.-iv., VI.B.2., VI.C.1.a., VI.D.1.a., VIII.B.1.b.ii., IX.A.5., IX.C.1.a., IX.E.1.a., and b., IX.G.1.b., and IX.G.2., do not mandate a new program or higher level of service.

Part VI.B. states that "Dischargers shall comply with the MRP [Monitoring and Reporting Program] and future revisions thereto, in Attachment E of this Order or *may*, in coordination with an approved Watershed Management Program per Part VI.C., implement a *customized* monitoring program that achieves the five Primary Objectives set forth in Part II.A. of Attachment E and includes the elements set forth in Part II.E. of Attachment E."[74]

The customized monitoring programs allowed by the test claim permit are described in Attachment E, Part IV., and include an integrated monitoring program (IMP) and a coordinated monitoring program (CIMP) with other permittees, to provide flexibility to comply with the monitoring requirements in a cost effective and efficient manner.[75] These customized plans allow the permittees to select monitoring locations, parameters, or monitoring techniques, coordinate their monitoring programs with other permittees to address one or more of the monitoring elements, and use alternative approaches to meet the primary monitoring objectives.[76] These plans incorporate by reference the monitoring requirements contained in TMDL Monitoring Plans approved by the Executive Officer.[77] However, the permittees are also authorized to modify the requirements of an approved TMDL Monitoring Plan with the approval of the executive officer.[78] At a minimum, the plans are required to address all TMDL monitoring requirements, including receiving water monitoring, stormwater outfall based monitoring, non-stormwater outfall based monitoring, with additional monitoring required if exceedances continue to occur (which was also required by the prior permit).[79]

These requirements are not new. Stormwater and non-stormwater monitoring "sufficient" to determine if the TMDL receiving water limitations and WQBELs are being

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[74] Exhibit A, Test Claim 13-TC-01, page 647, emphasis added.

[75] Exhibit A, Test Claim 13-TC-01, pages 820-822 (test claim permit, Attachment E, Part IV.); see also, Exhibit A, Test Claim 13-TC-01, page 817 (test claim permit, Attachment E, Part II.C.).

[76] Exhibit A, Test Claim 13-TC-01, pages 820-821 (test claim permit, Attachment E, Parts IV.A.3., 4., IV.B.2.).

[77] Exhibit A, Test Claim 13-TC-01, pages 820-821 (test claim permit, Attachment E, Part IV.A.2.).

[78] Exhibit A, page 821 (test claim permit, Attachment E, Parts IV.A.5. and IV.B.3.).

[79] Exhibit A, Test Claim 13-TC-01, pages 640, 821 (test claim permit, Attachment E, Parts IV.A.6. and IV.B.2.), 1191-1192 (Order 01-182, Part 2.).

met is already required by federal law.[80] Since the choice between complying with the test claim permit's monitoring program or developing a customized program is left up to the claimants, there is no state-mandated program. The only requirement is to comply with federal law and conduct monitoring sufficient to meet water quality standards.

Moreover, the minimum requirements imposed by the test claim permit do not impose a new program or higher level of service, even if they do result in increased costs.[81] In this respect, the claimants contend that the requirements are new since under the prior permit, only the Los Angeles Flood Control District was required to conduct mass emission monitoring and now, all permittees are required to monitor and to conduct additional outfall monitoring.[82] Although the prior permit required the Flood Control District to conduct the "Countywide Monitoring Program," each permittee was responsible for applicable discharges within its boundaries.[83] And the prior permit required each permittee to comply with the receiving water limitations and discharge prohibitions, and if monitoring showed exceedances of water quality standards, the permittee "shall assure compliance with discharge prohibitions and receiving water limitations" by notifying the Regional Board, submitting a compliance report, and thirty days after the compliance report, "the Permittee shall revise the stormwater quality management plan and its components and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, an implementation schedule, *and any additional monitoring required*."[84]

In addition, the prior permit expressly required the permittees to revise their stormwater quality management plans to implement and comply with the Regional Board-adopted TMDLs once they became effective.[85] The TMDL resolutions identify the "responsible agencies" assigned wasteload allocations, which are also identified in Attachment K to the test claim permit, which are not limited to the Flood Control District.[86]

Parts III.A.1., III.A.2., and III.A.4.a.-d., relating to non-stormwater discharges do not mandate a new program or higher level of service.

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[80] Code of Federal Regulations, title 40, sections 122.26(d)(2)(i)(F), 122.48(b); see also *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1209.

[81] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 54; *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 735; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877.

[82] Exhibit G, Claimants' Rebuttal Comments, page 41.

[83] Exhibit A, Test Claim 13-TC-01, page 1194 (Order No. 01-182, Part D.6.).

[84] Exhibit A, Test Claim 13-TC-01, page 1194 (Order No. 01-182, Part E.).

[85] Exhibit A, Test Claim 13-TC-01, page 1193 (Order No. 01-182, Part 3.C.).

[86] Exhibit A, Test Claim 13-TC-01, pages 1065 et seq. (Attachment K).

The Commission further finds that Parts III.A.1., III.A.2., and III.A.4.a.-d., relating to non-stormwater discharges do not mandate a new program or higher level of service for the following reasons:

- The requirement in Part III.A.1. to prohibit non-stormwater discharges "through" the MS4 to receiving waters unless authorized by a permit or otherwise exempt is mandated by federal law and is not new. The Clean Water Act provides that permits for discharges from MS4s "shall include a requirement to effectively prohibit non-stormwater discharges *into* the storm sewers."[87] Federal regulations require programs "to prevent illicit discharges *to* the municipal separate storm sewer system" since "non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States."[88] Since the purpose of the Clean Water Act "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" with the "goal that the discharge of pollutants into the navigable waters be eliminated,"[89] a permittee is required to prohibit the discharge from entering the MS4, traveling through the MS4, and then leaving the MS4 into the waters of the United States. This interpretation is consistent with the prior permit and the test claim permit, both of which state that "Discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited" and that discharges from the MS4, "including non-stormwater, for which a permittee is responsible, shall not cause or contribute to a condition of nuisance."[90] In addition, the preamble to the federal regulations uses "into" and "through" interchangeably: "The CWA prohibits the point source discharge of non-storm water not subject to an NPDES permit ***through*** municipal separate storm sewers to waters of the United States;" and ". . . such discharges [street wash waters] . . . must be addressed by municipal management programs as part of the prohibition on non-storm water discharges ***through*** municipal separate storm sewer systems."[91] Furthermore, when adopting the federal regulations, U.S. EPA made it clear that non-stormwater discharges "through" an MS4 must be either removed from the system or become subject to an NPDES.[92] Thus, the prohibition of non-stormwater discharges "through" the MS4 to receiving waters is mandated by federal law and is not new.

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[87] United States Code, title 33, section 1342(p)(3)(B)(ii) (Public Law 100-4).

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

[89] United States Code, title 33, section 1251.

[90] Exhibit A, Test Claim 13-TC-01, pages 639, 1191.

[91] Exhibit L (9), NPDES Permit Application Regulations for Storm Water Discharges; Final Rule, 55 Federal Register 47990 et seq. (Nov.16, 1990), page 8, emphasis added.

[92] Exhibit L (9), NPDES Permit Application Regulations for Storm Water Discharges; Final Rule, 55 Federal Register 47990 et seq. (Nov. 16, 1990), page 6.

Moreover, the claimants' argument that Part III.A.1. mandates a new program or higher level of service simply because the prior permit required the permittees to "effectively prohibit" non-stormwater discharges and the test claim permit removes the word "effectively, thereby requiring the permittees to "absolutely prohibit" non-stormwater discharges, is not a correct interpretation of the law. The claimants' argument suggests that non-stormwater discharges are not prohibited by federal law, but are treated like stormwater discharges, which are subject to the maximum extent practicable (MEP) standard to *reduce,* but not prohibit, the discharge of pollutants. This interpretation conflicts with the Clean Water Act, which imposes separate and distinct standards for stormwater discharges and non-stormwater discharges: MS4 permits (1) "shall include a requirement to effectively prohibit nonstormwater discharges into the storm sewers" and (2) "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and [ii] such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[93] As made clear by U.S. EPA when adopting the regulations to implement the Clean Water Act, illicit, non-stormwater discharges through a municipal separate storm sewer "must be either removed from the system or become subject to an NPDES permit."[94]

- Parts III.A.2. and III.4.a., b., c., and d., addressing conditionally exempt non-stormwater discharges, do not mandate a new program or higher level of service. These Parts impose the following requirements:
    - Ensure that conditionally exempted non-stormwater dischargers comply with the requirements, conditions, and BMPs identified to prevent the introduction of pollutants to the MS4 and receiving waters. These include BMPs, coordination with conditionally exempt non-stormwater dischargers, conditions to provide notice prior to discharging, monitoring, and reporting as specified above.
    - Develop and implement procedures that minimize the discharge of landscape irrigation water into the MS4 by promoting conservation programs. This requires the permittee to coordinate with the local water purveyor and develop and implement coordinated outreach and education programs.
    - Evaluate monitoring data pursuant to the Monitoring and Reporting Program in Attachment E, and any other associated data or information, and determine whether any of the conditionally exempt non-stormwater discharges are a source of pollutants that may be causing or contributing

[93] United States Code, title 33, section 1342(p)(3)(B).

[94] Exhibit L (9), NPDES Permit Application Regulations for Storm Water Discharges; Final Rule, 55 Federal Register 47990 et seq. (Nov. 16, 1990), page 6.

to an exceedance of receiving water limitations or water quality-based effluent limitations.

- If a permittee determines that any of the conditionally exempt non-stormwater discharges is a source of pollutants that causes or contributes to an exceedance of receiving water limitations or water quality-based effluent limitations, the permittee is required to report the information to the Regional Board and either effectively prohibit the non-stormwater discharge to the MS4, impose additional conditions on the non-stormwater discharge such that the discharge will not be a source of pollutants, require diversion of the non-stormwater discharge to the sanitary sewer, or require treatment of the non-stormwater discharge before discharge to the receiving water.[95]

However, the permittees have the option of not complying with these requirements and, instead, are authorized to prepare Watershed Management Programs (WMPs) approved by the Regional Board's executive officer to address and customize the conditionally exempt non-stormwater discharges, which at a minimum, must comply with existing federal law.[96] Federal law allows the discharge of exempted non-stormwater discharge categories only if BMPs and control measures are implemented to manage any potential pollution from entering the MS4 and ultimately the receiving waters.[97] The discharge continues to be exempt *unless* the discharge is identified as a source of pollutants to waters of the United States.[98] If a discharge is identified as a pollutant, the MS4 permittee is required by federal law to effectively prohibit the illicit discharge from entering the MS4 by implementing a program to detect and remove the discharge.[99] To "effectively prohibit" non-stormwater discharges requires the implementation of a program to implement BMPs and control measures and enforce an ordinance to prevent illicit stormwater discharges to the MS4; procedures to conduct on-going monitoring, field screening activities, and investigations of portions of the MS4 that, based on field screening or other information, indicate a reasonable potential for containing illicit discharges or other sources of non-stormwater pollution; and legal authority established by statute, ordinance, or a series of contracts that enables the permittee to control, enforce conditions and orders, and prohibit illicit discharges to the MS4.[100] Thus,

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[95] Exhibit A, Test Claim 13-TC-01, pages 629-633.

[96] Exhibit A, Test Claim 13-TC-01, pages 629, 648, 663.

[97] Code of Federal Regulations, title 40, sections 122.26(d)(2)(iv)(B), 122.44(k).

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

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

[100] Code of Federal Regulations, title 40, sections 122.26(d)(2)(i); 122.26(d)(2)(iv)(B); Code of Federal Regulations, title 40, sections 122.41 (conditions applicable to all

these requirements are not new and the specific BMPs, coordination requirements with conditionally exempt non-stormwater dischargers, conditions to provide notice prior to discharging, monitoring, and reporting as specified in Parts III.A.2. and III.A.4. for the conditionally exempt non-stormwater discharges are not mandated by the state because the claimants have the option of developing their own conditions either within their jurisdiction or with other co-permittees in the watershed area[101] to comply with federal law, which prohibits the discharge of illicit non-stormwater discharges.[102]

In addition, the claimants are required to "continue" to implement their existing stormwater quality management programs developed under the prior permit until their WMP or EWMP is approved.[103] Reimbursement is not required for any of the activities required by the prior permit, and to the extent the specific BMPs and control measures are in the permittees' existing stormwater management programs, those BMPs and control measures are not new.[104] The prior permit made the stormwater quality management programs enforceable.[105] And most of the specific activities required by Parts III.A.2. and III.A.4. were required by the prior permit and are not new.[106]

Moreover, the prior permit, like Parts III.A.4.c. and III.A.4.d. of the test claim permit, required the permittees to evaluate monitoring data to determine whether any of the conditionally exempt non-stormwater discharges are a source of pollutants that may be causing or contributing to an exceedance of receiving water limitations and to report to the Regional Board when that occurs and either effectively prohibit the non-stormwater discharge to the MS4 or impose additional conditions on the non-stormwater discharge such that the discharge will not be a source of pollutants.[107] The prior permit made it clear that "[e]ach permittee is responsible . . . for a discharge for which it is the operator" and expressly required that in the event a conditionally exempt non-stormwater discharge is determined to be a source of pollutants, the discharge will no longer be exempt

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permits, including monitoring and reporting requirements); section 122.44(i) (monitoring requirements to ensure compliance with permit limitations); section 122.48 (requirements for recording and reporting monitoring results); and Part 127 (electronic reporting).

[101] Exhibit A, Test Claim 13-TC-01, page 648.

[102] United States Code, title 33, section 1342(p)(3)(B)(ii).

[103] Exhibit A, Test Claim 13-TC-01, page 658.

[104] The stormwater quality management program (SQMP) has not been provided by the parties and is not publicly available.

[105] Exhibit A, Test Claim, 13-TC-01, page 1193.

[106] Exhibit A, Test Claim, 13-TC-01, pages 1190-1193, 1197.

[107] Exhibit A, Test Claim 13-TC-01, pages 1190-1191.

unless the permittee implements conditions to ensure that the discharge is not a source of pollutants.[108]

In addition, Part 4.G. of the prior permit contained an Illicit Connections and Illicit Discharge Elimination Program in accordance with federal law, requiring the permittees to eliminate all illicit connections and illicit discharges to the storm drain system and "document, track, and report all such cases."[109] Upon discovery of an illicit connection or discharge, the prior permit required the permittees to investigate, eliminate the source, and take enforcement action.[110] Thus, evaluating monitoring data and reporting on illicit non-stormwater discharges that may cause or contribute to an exceedance of receiving water limitations is not new and does not mandate a new program or higher level of service.

Finally, the requirement in Part III.A.4.b. to develop and implement procedures that minimize the discharge of landscape irrigation water into the MS4 by promoting conservation programs, which include a coordinated outreach and education program does not mandate a new program or higher level of service.[111] All permittees were required by Part IV. of the prior permit's Public Information and Participation Program to "conduct educational activities within its jurisdiction and participate in countywide [educational] events."[112] In addition, the claimants may choose to modify and customize the requirements with a WMP or EWMP. Part V.C.1. expressly allows permittees to customize the control measures in Parts III.A.4. by developing a WMP or EWMP and, thus, the requirement is not mandated by the state.[113]

Parts VI.D.4.-VI.D.6, and VI.8.-VI.10. (Minimum Control Measures) do not mandate a new program or higher level of service.

The Commission also finds that Parts VI.D.4.-VI.D.6, and VI.8.-VI.10. (Minimum Control Measures for the Illicit Connection and Illicit Discharge Elimination Program[114], the

[108] Exhibit A, Test Claim 13-TC-01, pages 1189, 1191.

[109] Exhibit A, Test Claim 13-TC-01, page 1226.

[110] Exhibit A, Test Claim 13-TC-01, pages 1227-1228.

[111] Exhibit A, Test Claim 13-TC-01, page 632.

[112] Exhibit A, Test Claim 13-TC-01, page 1200.

[113] Exhibit A, Test Claim 13-TC-01, page 648.

[114] Exhibit A, Test Claim 13-TC-01, pages 686, 733, 740-741 (test claim permit, Parts VI.D.4.d.v.2., VI.D.4.d.v.3., VI.D.4.d.v.4., VI.D.4.d.vi.1.a., VI.D.4.d.vi.1.c., VI.D.4.d.vi.1.d., VI.D.10.d.iii., VI.D.10.d.iv., VI.D.10.d.v., VI.D.10.e.i.1., VI.D.10.e.i.3., and VI.D.10.e.i.4.).

Public Agency Activities Program[115], the Public Information and Participation Program[116], the Industrial and Commercial Facilities Program[117], and the Development Construction Program)[118] do not impose a state-mandated program because the permittees have the option to comply with the requirements stated in the permit or develop a customized Watershed Management Program (WMP) with alternative BMPs, consistent with existing federal regulations, to reduce pollutants in stormwater to the MEP and to effectively prohibit non-stormwater discharges: "At a minimum, the Watershed Management Program shall include management programs consistent with [existing federal regulations at] 40 CFR section 122.26(d)(2)(iv)(A)-(D)."[119] If the permittees choose to develop a WMP, then they "shall assess" the minimum control measures (MCMs) as defined in Part VI.D.4. to Part VI.D.10. of the test claim permit to identify opportunities for focusing resources on the high priority issues in each watershed.[120] The prior permit and federal law both require an assessment of the effectiveness of their stormwater programs to reduce stormwater pollution.[121] Thus, assessment of the minimum control measures outlined in the test claim permit to see if they would be effective in a permittees' jurisdiction to reduce the discharge of pollutants is not new and not mandated by the state.[122] Once approved, the WMP "shall replace in part or in whole the requirements in Parts VI.D.4, VI.D.5, VI.D.6 and VI.D.8 to VI.D.10 for participating Permittees."[123] In addition, Part VI.D.1.b. provides that permittees electing to develop a WMP shall continue to implement their existing stormwater management programs, consistent with federal regulations, until the WMP is

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[115] Exhibit A, Test Claim 13-TC-01, pages 674-675, 724-726 (test claim permit, Parts VI.D.4.c.iii., VI.D.4.c.vi., VI.D.4.c.x.2., VI.D.9.c., VI.D.9.d.i., ii., iv., v., VI.D.9.g.ii., VI.D.9.h.vii., VI.D.9.k.ii.).

[116] Exhibit A, Test Claim 13-TC-01, pages 688-689 (test claim permit, Part VI.D.5.a.-d.).

[117] Exhibit A, Test Claim 13-TC-01, pages 690-693 (test claim permit, Part VI.D.6.b., d., and e.).

[118] Exhibit A, Test Claim 13-TC-01, pages 715-723 (test claim permit, Parts VI.D.8.g.i. and ii., VI.D.8.h., VI.D.8.i.i., ii., iv., and v., VI.D.8.j., and VI.D.8.l.i., ii.).

[119] Exhibit A, Test Claim 13-TC-01, pages 663, 668.

[120] Exhibit A, Test Claim 13-TC-01, pages 662-663.

[121] Exhibit L (23), Revised Monitoring and Reporting Program June 15, 2005, page 2; Code of Federal Regulations, title 40, section 122.26(d)(2)(v).

[122] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.)* (2003) 30 Cal.4th 727, 731.

[123] Exhibit A, Test Claim 13-TC-01, page 663. Note that a WMP does not replace the requirements in Part VI.D.7., which addresses the Planning and Land Development Program, and is separately addressed in this Decision. See also, Exhibit F, Water Boards' Comments on the Test Claims, page 42.

approved.[124] Reimbursement is not required to comply with the requirements of the prior permit. Thus, the specific requirements imposed by Parts VI.D.4.-VI.D.6. and VI.8.-VI.10. are not mandated by the state. Moreover, many of the requirements in Parts VI.D.4.-VI.D.6. and VI.8.-VI.10. are not new and do not result in increased costs mandated by the state.

In response to the Draft Proposed Decision, the claimants contend they are practically compelled to develop a WMP or EWMP for the minimum control measures since failure to develop a plan requires "immediate" compliance with the receiving water limitations.[125]

The test claim permit says permittees that choose not to develop a WMP or EWMP for the minimum control measures "shall be subject to the baseline requirements in Part VI.D. [i.e., the BMPs identified in the Minimum Control Measures] and shall demonstrate compliance with receiving water limitations pursuant to Part V.A. . . . ."[126]. Demonstrating compliance with receiving water limitations is not new. Both the prior permit and the test claim permit require compliance with the receiving water limitations by timely implementing control measures and other actions to reduce pollutants in the discharges. If an exceedance of a water quality standard persists, the permittee is required to notify the Regional Board, modify their BMPs, and conduct any additional monitoring required to achieve water quality standards.[127] Thus, while the Regional Board provides the permittees with options and flexibility to customize the minimum control measures, it did not establish any penalties.

Moreover, the language is materially different than the language in the test claim permit for failing to develop a WMP or EWMP for the U.S. EPA-adopted TMDLs, which does require "immediate" compliance with numeric wasteload allocations of those TMDLs. Under the rules of statutory construction, where the Legislature (or, in this case, the Regional Board) uses materially different language in provisions addressing the same or related subjects, the normal inference is that the Regional Board intended a difference in meaning.[128]

Thus, compliance with the minimum control measures does not mandate a new program or higher level of service.

Part VI.D.7. and Attachment E, Part X., regarding the Planning and Land Development Program, are new requirements, which mandate a new program or higher level of service.

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[124] Exhibit A, Test Claim 13-TC-01, page 668.

[125] Exhibit I, Claimants' Comments on the Draft Proposed Decision, page 30.

[126] Exhibit A, Test Claim 13-TC-01, page 659 (test claim permit, Part IV.C.4.e.).

[127] Exhibit A, Test Claim, 13-TC-01, pages 639-640 (test claim permit, Part V.A.), 1191-1191 (Order No. 01-182, Part 2.).

[128] *People v. Trevino* (2001) 26 Cal.4th 237, 241.

Finally, the Commission finds the following requirements in Part VI.D.7. and Attachment E, Part X., regarding the Planning and Land Development Program, are new requirements, which mandate a new program or higher level of service:

a. Implement a GIS or other electronic system for tracking projects that have been conditioned for post-construction BMPs, which "should contain" such information as project identification, acreage, BMP type and description, BMP locations, dates of acceptance and maintenance agreement, inspection dates and summaries and corrective action.[129]

b. Maintain a database providing specified information for each new development and re-development project approved by the permittee on or after the effective date of the test claim permit.[130]

c. Inspect all development sites upon completion of construction and before issuance of occupancy certificates to ensure proper installation of LID (low impact development) measures, structural BMPs, treatment control BMPs, and hydromodification control BMPs.[131]

d. Develop a post-construction BMP maintenance inspection checklist.[132]

e. *Except* for the post-construction inspections for critical commercial and industrial facilities required by Part 4.C.2. of the prior permit (Order 01-182) (which is not new), inspect the remaining new development or redevelopment projects, at least once every two years after project completion, post-construction BMPs to assess operation conditions with particular attention to criteria and procedures for post-construction treatment control and hydromodification control BMP repair, replacement, or re-vegetation.[133]

Federal law requires the permittees to have a management program for new development and redevelopment projects, which shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed."[134] However, federal law does not itself impose these specific requirements. "That the . . . Regional Board found the permit requirements were 'necessary' to meet the standard establishes only that the . . . Regional Board exercised its discretion."[135]

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[129] Exhibit A, Test Claim 13-TC-01, page 713 (test claim permit, Part VI.D.7.d.iv.1.a.).

[130] Attachment E, Part X (Monitoring and Reporting Program), pages 28-29.

[131] Exhibit A, Test Claim 13-TC-01, page 713 (test claim permit, Part VI.D.7.d.iv.1.b.).

[132] Exhibit A, Test Claim 13-TC-01, pages 713-714 (test claim permit, Part VI.D.7.d.iv.1.c.).

[133] Exhibit A, Test Claim 13-TC-01, page 714 (test claim permit, Part VI.D.7.d.iv.1.c.).

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

[135] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

Moreover, the new requirements are imposed on the permittees based on their authority to regulate land use and development and, thus, are uniquely imposed on government.[136] The requirements also provide a governmental service to the public by reducing the discharge of pollutants to waters of the United States.[137]

There are costs mandated by the state to develop and submit a plan to achieve the WLAs contained in the state-mandated U.S. EPA-established TMDLs, from December 28, 2012, through January 31, 2017.

Finally, there are costs mandated by the state for the new state-mandated activities in Part VI.E.1.c. and Attachments M, O, P, and Q (which incorporate by reference Part VI.E.3. of the test claim permit) to develop and submit a plan to achieve the WLAs contained in the state-mandated U.S. EPA-established TMDLs, from December 28, 2012, through January 31, 2017. Beginning January 1, 2018, there are no costs mandated by the state because the claimants have fee authority, subject only to the voter protest provisions of Proposition 218, pursuant to Government Code section 17556(d). In addition, there are no costs mandated by the state pursuant to Government Code section 17556(d) for the requirements in Part VI.D.7.d.iv.1.a., b., c., and Attachment E, Part X, of the test claim permit, as well as Part VI.D.6.b., d., and e. and Part VI.D.8. (requiring permittees to maintain an updated watershed-based inventory in electronic format of all industrial and commercial facilities that are critical sources of stormwater pollution and inspect such facilities as specified, and similar requirements imposed for the Development Construction Program) because the claimants have regulatory fee authority for these activities as explained below:

- The claimants have filed declarations under penalty of perjury stating they incurred increased costs exceeding $1,000, as required by Government Code sections 17514 and 17564, and used their local "proceeds of taxes" to comply with the new state-mandated activities.[138]

  However, reimbursement is not required to the extent the claimants receive fee revenue and used that revenue to pay for the state-mandated activities, or used any other revenues, including but not limited to grant funding, assessment revenue, and federal funds, that are *not* the claimants' proceeds of taxes. When state-mandated activities do not compel the increased expenditure of local "proceeds of taxes," reimbursement under section 6 is not required.[139]

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[136] Exhibit A, Test Claim 13-TC-01, page 618 ("Permittees that have such land use authority are responsible for implementing a storm water management program to inspect and control pollutants from industrial and commercial facilities, *new development and re-development projects*, and development construction sites within their jurisdictional boundaries.").

[137] Exhibit A, Test Claim 13-TC-01, pages 940-941.

[138] Exhibit A, Test Claim 13-TC-02, pages 41, 47 et seq., 90, 98 et seq., 113.

[139] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 (Reimbursement is required only when "the costs in question can be recovered solely from tax revenues.").

In this respect, the Legislature amended the Los Angeles Flood Control Act in Assembly Bill 2554 to authorize the Flood Control District to impose a fee or charge, in compliance with article XIII D of the California Constitution, to pay the costs and expenses of carrying out projects and providing services to improve water quality and reduce stormwater and urban runoff pollution in the District.[140] The statute requires the District to allocate the revenues derived from the fees as follows: ten percent to the district for implementation and administration of water quality programs; forty percent to the cities within the boundaries of the district and to the County of Los Angeles for water quality improvement programs; and 50 percent to the nine watershed authority groups to implement collaborative water quality improvement plans or programs.[141] Thus, to the extent the claimants use this revenue to pay for the new state mandated programs, reimbursement is not required.

There is no evidence in the record, however, showing the claimants used fee or grant revenue to pay for all the mandated activities here. And the State has not filed any evidence rebutting the claimants' assertion proceeds of taxes were used to pay for the new state-mandated activities. Thus, there is substantial evidence in the record, as required by Government Code section 17559, the claimants incurred increased costs exceeding $1,000 and used their local "proceeds of taxes" to comply with the new state-mandated activities.[142]

- The claimants have constitutional and statutory authority to charge property-related fees for the requirements imposed by the test claim permit, including the requirement to develop and submit a plan to achieve the WLAs contained in each U.S. EPA-established TMDL (Part VI.E.1.c. and Attachments M, O, P, and Q of the test claim permit, which incorporates by reference Part VI.E.3.).[143] However, from December 28, 2012, through December 31, 2017 only, and based on the court's holding in *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351 (*City of Salinas),* which interpreted article XIII D of the

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See also, *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189; *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 32; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986-987; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281.

[140] Water Code Appendix, section 28-2 (Stats. 2010, ch, 602 (AB 2554, sections 8a and 8b)).

[141] Water Code Appendix, section 28-2 (Stats. 2010, ch, 602 (AB 2552, section 8b.)).

[142] Government Code sections 17514, 17564.

[143] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 561; California Constitution, article XI, section 7; Health and Safety Code section 5471; Government Code sections 38902, 53750 et seq.

California Constitution as requiring the voter's approval before any stormwater fees can be imposed, Government Code section 17556(d) does not apply because the fee is subject to the voter's approval. When voter approval is required by article XIII D, the claimants do *not* have the authority to levy fees sufficient as a matter of law to cover the costs of these activities within the meaning of Government Code section 17556(d).[144] Thus, there are costs mandated by the state from December 28, 2012, through December 31, 2017, for the new state-mandated requirements imposed by Part VI.E.1.c. and Attachments M, O, P, and Q of the test claim permit (which incorporates by reference Part VI.E.3.).

- Beginning January 1, 2018, and based on *Paradise Irrigation District* case and Government Code sections 57350 and 57351 (SB 231, which overturned *Howard Jarvis Taxpayers Association v. City of Salinas* (2002) 98 Cal.App.4th 1351), there are no costs mandated by the state to comply with the requirements imposed by the test claim permit, including the requirements in Part VI.E.1.c. and Attachments M, O, P, and Q of the test claim permit (which incorporates by reference Part VI.E.3.), because claimants have constitutional and statutory authority to charge property-related fees for these costs subject only to the voter protest provisions of article XIII D, which is sufficient as a matter of law to cover the costs of the mandated activities within the meaning of Government Code section 17556(d).[145]
- There are no costs mandated by the state to comply with the new Planning and Land Development Program requirements imposed by Part VI.D.7.d.iv.1.a., b., c., and Attachment E, Part X, and as a separate ground for denial, the requirements imposed by Part VI.D.6.b. and Part VI.D.8., because the claimants have fee authority to impose regulatory fees, which are not subject to the voter's approval, and thus there are no costs mandated by the state pursuant to Government Code section 17556(d).[146]

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[144] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581.

[145] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194; *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 573-577.

[146] California Constitution, article XI, section 7; Government Code section 37101 ("The legislative body may license, for revenue and regulation, and fix the license tax upon, every kind of lawful business transacted in the city"); Government Code section 66001 (providing for development fees under the "Mitigation Fee Act," requiring local entity to identify the purpose of the fee and the uses to which revenues will be put, to determine a reasonable relationship between the fee's use and the type of project or projects on which the fee is imposed); *Department of Finance v. Commission on State Mandates*

Based on the foregoing analysis, the Commission partially approves this Test Claim and finds that Part VI.E.1.c. and Attachments M, O, P, and Q, which incorporate by reference Part VI.E.3. of the test claim permit, impose a reimbursable state-mandated program for the pro rata costs to develop and submit a WMP or EWMP for only the U.S. EPA-adopted TMDLs identified below and in accordance with Part VI.E.3., as follows:

a. Each Permittee subject to one of the U.S. EPA-adopted TMDLs identified below shall propose BMPs to achieve the WLAs contained in the applicable U.S. EPA-established TMDL, and a schedule for implementing the BMPs that is as short as possible, in a WMP or EWMP.

b. Each Permittee subject to one of the U.S. EPA-adopted TMDLs identified below may either individually submit a WMP or may jointly submit a WMP or EWMP with other Permittees subject to the WLAs contained in the U.S. EPA-established TMDL.

c. At a minimum, each Permittee subject to one of the U.S. EPA-adopted TMDLs identified below shall include the following information in its WMP or EWMP, relevant to each applicable U.S. EPA-established TMDL:

   - Available data demonstrating the current quality of the Permittee's MS4 discharge(s) in terms of concentration and/or load of the target pollutant(s) to the receiving waters subject to the TMDL;
   - A detailed description of BMPs that have been implemented, and/or are currently being implemented by the Permittee to achieve the WLA(s), if any;
   - A detailed time schedule of specific actions the Permittee will take in order to achieve compliance with the applicable WLA(s);
   - A demonstration that the time schedule requested is as short as possible, taking into account the time since USEPA establishment of the TMDL, and technological, operation, and economic factors that affect the design, development, and implementation of the control measures that are necessary to comply with the WLA(s); and
   - If the requested time schedule exceeds one year, the proposed schedule shall include interim requirements and numeric milestones and the date(s) for their achievement.

d. Each Permittee subject to a WLA in a TMDL established by U.S. EPA identified below shall submit a draft of a WMP or EWMP to the Regional Water Board Executive Officer for approval per the schedule Part VI.C.4.[147]

(2021) 59 Cal.App.5th 546, 564-565; *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[147] Exhibit A, Test Claim 13-TC-01, pages 742, 746-747, 1100, 1105, 1115, 1142, 1143-1154, 1155-1160, and 1161 (test claim permit, Parts VI.E.1.c., VI.E.3., and Attachments M, O, P, and Q, which incorporate by reference Part VI.E.3.).

These requirements apply only to the following U.S. EPA-adopted TMDLs:

- Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL (effective March 26, 2012 (Attachment O).[148]
- Los Angeles Area Lakes TMDLs, effective March 26, 2012 (Attachment O for the TMDLs Los Angeles River Watershed Management Area, which include the following: Lake Calabasas Nutrient; Echo Park Lake PCBs, Chlordane, and Dieldrin; and Legg Lake Nutrient Peck Road Park Lake Nutrient, PCBs, Chlordane, DDT, and Dieldrin; and Attachment P for the TMDLs in the San Gabriel River Watershed Management Area, which include the Puddingstone Reservoir Nutrient, Mercury, PCBs, Chlordane, Dieldrin, DDT TMDLs.)[149]
- Los Cerritos Channel Metals TMDL, effective March 17, 2010 (Attachment Q).[150]
- San Gabriel River and Impaired Tributaries Metals and Selenium TMDL, effective March 26, 2007 (Attachment P).[151]

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[148] Exhibit A, Test Claim 13-TC-01, page 1142. The following permittees are required to comply with the Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL: Los Angeles County Flood Control District and Signal Hill. (Exhibit A, Test Claim 13-TC-01, pages 1070-1071 (test claim permit, Attachment K).)

[149] Exhibit A, Test Claim 13-TC-01, page 1143-1154, 1155-1160, 1071 et seq. The following permittees are required to comply with the Los Angeles Area Lakes TMDLs: Los Angeles County Flood Control District, County of Los Angeles, and the Cities of Los Angeles, Arcadia, Bradbury, Calabasas, Duarte, El Monte, Irwindale, Monrovia, Sierra Madra, and South El Monte. (Exhibit A, Test Claim 13-TC-01, pages 1169-1171 (test claim permit, Attachment K).)

The permittees in the San Gabriel River Management Area include the Cities of Azusa, Claremont, Irwindale, La Verne, Pomona, San Dimas, the County of Los Angeles, and Los Angeles County Flood Control District. (Exhibit A, Test Claim 13-TC-01, pages 1072-1073 (test claim permit, Attachment K).)

[150] Exhibit A, Test Claim 13-TC-01, page 1161. The following permittees are required to comply with the Los Cerritos Channel Metals TMDL: Bellflower, Cerritos, Downey, Lakewood, County of Los Angeles, Los Angeles County Flood Control District, Paramount, and Signal Hill. (Exhibit A, Test Claim 13-TC-01, page 1074 (test claim permit, Attachment K).)

[151] Exhibit A, Test Claim 13-TC-01, page 1161. The following permittees are required to comply with the San Gabriel River and Impaired Tributaries Metals and Selenium TMDL: Arcadia, Artesia, Azusa, Baldwin Park, Bellflower, Bradbury, Cerritos, Claremont, Covina, Diamond Bar, Downey, Duarte, El Monte, Glendora, Hawaiian Gardens, Industry, Irwindale, La Habra Heights, La Mirada, La Puente, La Verne, Lakewood, County of Los Angeles, and Los Angeles County Flood Control District, Monrovia, Norwalk, Pico Rivera, Pomona, San Dimas, Santa Fe Springs, South El

- Malibu Creek Watershed Nutrients TMDL, effective March 21, 2003 (Attachment M).[152]

Reimbursement for these activities is denied beginning January 1, 2018, because the claimants have fee authority sufficient as a matter of law to cover the costs of these activities pursuant to Government Code section 17556(d) and, thus, there are no costs mandated by the state.

In addition, reimbursement for these mandated activities from any source, including but not limited to, state and federal funds, any service charge, fees, or assessments to offset all or part of the costs of this program, and any other funds that are not the claimant's proceeds of taxes that are used to pay for the mandated activities, shall be identified and deducted from any claim submitted for reimbursement.

All other sections, activities, and costs pled in the Test Claim are denied.

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Monte, Walnut, West Covina, and Whittier. (Exhibit A, Test Claim 13-TC-01, pages 1072-1073 (test claim permit, Attachment K).)

[152] Exhibit A, Test Claim 13-TC-01, page 1105. The following permittees are required to comply with the Malibu Creek Watershed Nutrients TMDL: Agoura Hills, Calabasas, and Hidden Hills, County of Los Angeles, Los Angeles County Flood Control District, Malibu, and Westlake Village. (Exhibit A, Test Claim 13-TC-01, pages 1065-1066 (test claim permit, Attachment K).)

COMMISSION FINDINGS

I. Chronology

12/28/2012	The test claim permit, Los Angeles Regional Water Control Board, Order R4-2012-0175, was adopted November 8, 2012 and became effective 50 days thereafter, on December 28, 2012.[153]
06/30/2014	The Cities of Agoura Hills, Bellflower, Beverly Hills, Carson, Cerritos, Commerce, Downey, Huntington Park, Lakewood, Manhattan Beach, Norwalk, Pico Rivera, Rancho Palos Verdes, Redondo Beach, San Marino, Santa Clarita, Santa Fe Springs, Signal Hill, South El Monte, Vernon, Westlake Village, and Whittier filed Test Claim 13-TC-01.[154]
06/30/2014	The County of Los Angeles, Los Angeles County Flood Control District (LACFCD) filed Test Claim 13-TC-02.[155]
07/10/2014	Commission staff issued separate Notices of Complete Test Claim Filing and Schedule for Comments (13-TC-01, 13-TC-02).
07/17/2014	The claimants requested Inactive Status of the Test Claims (13-TC-01, 13-TC-02).
07/21/2014	Commission staff issued separate Notices of Approval of Request for Inactive Status of Test Claims (13-TC-01, 13-TC-02).
08/29/2016	The California Supreme Court issued its decision in *Department of Finance v. Commission on State Mandates*, Case No. S214855.
05/25/2017	Commission staff issued Notices of Incomplete Joint Test Claim Filing (13-TC-01, 13-TC-02).
06/01/2017	The claimants requested extension of time to respond to the Notices of Incomplete Joint Test Claim Filing (13-TC-01, 13-TC-02).
06/02/2017	Commission staff issued Notices of Extension Request Approval (13-TC-01, 13-TC-02).
08/04/2017	The claimants requested extension of time to respond to the Notice of Incomplete Joint Test Claim Filing (13-TC-02).
08/08/2017	Commission staff issued Notices of Extension Request Approval (13-TC-02).

[153] Exhibit A, Test Claim 13-TC-01, filed June 30, 2014, Revised September 6, 2017, September 7, 2017, October 23, 2017, pages 610, 627 (test claim permit).

[154] Exhibit A, Test Claim 13-TC-01, filed June 30, 2014, Revised September 6, 2017, September 7, 2017, October 23, 2017.

[155] Exhibit B, Test Claim 13-TC-02, filed June 30, 2017, Revised August 10, 2017, August 21, 2017, November 20, 2017, December 4, 2017.

08/10/2017	The claimants filed a Response to the Notice of Incomplete Joint Test Claim (13-TC-01).
08/14/2017	The claimants filed a City of Huntington Park Revised Declaration in response to the Notice of Incomplete Joint Test Claim (13-TC-01).
08/21/2017	The claimants filed a City of Downey Revised Test Claim Form in response to the Notice of Incomplete Joint Test Claim (13-TC-01).
09/06/2017	Claimant Los Angeles County filed the Response to the Notice of Incomplete Joint Test Claim Filing (13-TC-02).
09/07/2017	Claimant LACFCD filed the Response to the Notice of Incomplete Joint Test Claim Filing (13-TC-02).
9/22/2017	Commission staff issued Second Notices of Incomplete Joint Test Claim Filing (13-TC-01, 13-TC-02).
10/10/2017	The claimants requested an extension of time to respond to the Second Notice of Incomplete Joint Test Claim Filing (13-TC-01).
10/11/2017	Commission staff issued Notices of Extension Request Approval (13-TC-01).
10/23/2017	The claimants Los Angeles County and LACFCD filed the Response to the Second Notice of Incomplete Joint Test Claim Filing (13-TC-02).
10/31/2017	Commission staff issued a Notice of Complete Joint Test Claim, Removal from Inactive Status, Schedule for Comments, Renaming of Matter, Request for Administrative Record, and Notice of Tentative Hearing Date (13-TC-02).
11/13/2017	The State Water Resources Control Board (SWRCB) and Regional Board requested an extension of time to file comments (13-TC-02).
11/17/2017	Commission staff issued the Notice of Limited Extension Request Approval (13-TC-02).
11/20/2017	The city claimants filed the Response to the Second Notice of Incomplete Joint Test Claim Filing (13-TC-01).
11/30/2017	The State Water Resources Control Board filed the State Board Administrative Record for R4-2012-0175.
11/30/2017	The Regional Board filed the Administrative Records for the 2010 Ventura Co. MS4 Permit Order No. R4-2010-0108; the 2009 amendment to the 2001 Los Angeles County MS4 Permit Order No. R4-2009-0130; the 2007 amendment to the 2001 Los Angeles County MS4 Permit Order No. R4-2009-0042; the 2001 Los Angeles County MS4

	Permit Order No. 01-182; and the Regional Board record for the 2012 Los Angeles County MS4 Permit Order No. R4-2012-0175.[156]
12/04/2017	The claimants filed City of Vernon's Ordinance Regarding City Administrator Duties (13-TC-01).
12/14/2017	Commission staff issues Notice of Complete Test Claim, Removal from Inactive Status, Consolidation with 13-TC-02, Renaming of Matter, Schedule for Comments, and Tentative Hearing Date.
01/22/2018	The State Water Resources Control Board and the Regional Board ("Water Boards") requested an extension of time to file comments.
01/26/2018	Commission staff issues Notice of Extension Request Approval.
01/26/2018	Department of Finance (Finance) filed Comments on the Test Claim.
01/29/2018	Interested Party (City of Sierra Madre) filed Comments on the Test Claim.
01/29/2018	Interested Party (City of South Pasadena) filed Comments on the Test Claim.
01/29/2018	The claimants requested an extension of time to file rebuttal comments to the comments filed by Finance.
02/01/2018	Commission staff issued Notice of Extension Request Approval.
03/19/2018	The Water Boards requested extension of time to file comments.
03/21/2018	Commission staff issued Notice of Extension Request Approval.
04/12/2018	The Water Boards requested extension of time to file comments.
04/13/2018	Commission staff issued Notice of Extension Request Approval.
05/8/2018	The Water Boards requested extension of time to file comments and postponement of hearing.
05/10/2018	Commission staff issued Notice of Extension Request Approval.
06/01/2018	The Water Boards filed Comments on the Test Claim.
06/20/2018	The claimants requested extension of time to file rebuttal comments.
06/21/2018	Commission staff issued Notice of Extension Request Approval.
08/14/2018	The claimants requested extension of time to file rebuttal comments.
08/15/2018	Commission staff issued Notice of Extension Request Approval.

[156] Because of the enormous size of the Water Boards' administrative records, the administrative records cannot reasonably be included as an exhibit. However, the entirety of the administrative records are available on the Commission's website on the matter page for this test claim: https://www.csm.ca.gov/matters/13-TC-01.shtml.

10/16/2018	The claimants requested extension of time to file rebuttal comments.
10/19/2018	Commission staff issued Notice of Extension Request Approval.
11/16/2018	The claimants requested extension of time to file rebuttal comments.
11/19/2018	Commission staff issued Notice of Extension Request Approval.
01/29/2019	The claimants filed rebuttal comments.
09/02/2025	Commission staff issued the Draft Proposed Decision.[157]
09/10/2025-09/12/2025	The claimants, the Water Boards, and Finance filed requests for extensions of time to file comments on the Draft Proposed Decision, which were approved for good cause.
10/08/2025	The claimants filed a notice of withdrawal of claimants, Cities of San Marino and Santa Clarita.
10/08/2025-10/09/2025	The claimants and the Water Boards filed requests for extensions of time to file comments on the Draft Proposed Decision, which were approved for good cause.
10/17/2025	The claimants, the Water Boards, and Finance filed comments on the Draft Proposed Decision.[158]

II. Background

A. Federal Clean Water Act

The federal Clean Water Act was enacted in 1972 and is a comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the nation's waters.[159] The Act's national goal was to eliminate "the discharge of pollutants into the navigable waters" of the United States by the year 1985.[160] "To accomplish this goal the Act established 'effluent limitations,' which are restrictions on the 'quantities, rates, and concentrations of chemical, physical, biological, and other constituents'; these effluent limitations allow the discharge of pollutants only when the water has been satisfactorily treated to conform with federal water quality standards."[161]

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[157] Exhibit H, Draft Proposed Decision.

[158] Exhibit I, Claimants' Comments on the Draft Proposed Decision. Exhibit J, Water Boards' Comments on the Draft Proposed Decision. Exhibit K, Finance's Comments on the Draft Proposed Decision.

[159] United States Code, title 33, section 1251 et seq.; *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, 620; *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 757.

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

[161] *City of Burbank v. State Water Resources Control Board* (2005) 35 Cal.4th 613, 620, citing United States Code, title 33, sections 1311, 1362(11).

The Clean Water Act prohibits pollutant discharges unless they comply with: (1) a permit; (2) established effluent limitations or standards; or (3) established national standards of performance.[162] The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source."[163] A "point source" is any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[164]

The Clean Water Act created the National Pollutant Discharge Elimination System (NPDES), authorizing the Environmental Protection Agency (EPA) to issue a permit for any pollutant discharge that will satisfy all requirements established by the Act or the EPA Administrator, which must be designed to ensure that discharges do not violate applicable water quality standards established by EPA or the state.[165] A state may administer its own permitting system if authorized by EPA, so long as those standards and limitations are not "less stringent" than those in effect under the Clean Water Act [166]

In 1973, EPA adopted regulations to implement the Act which provided exclusions for several types of discharges including "uncontrolled discharges composed entirely of storm runoff when these discharges are uncontaminated by any industrial or commercial activity" and have not been identified "as a significant contributor of pollution."[167] This particular exclusion applied only to municipal separate storm sewer systems (MS4s). In 1977, however, the Court in *Natural Resources Defense Council v. Costle* held EPA had no authority to exempt point source discharges, including stormwater discharges from MS4s, from the requirements of the Act and doing so contravened Congress' intent.[168] Since the Act prohibits "the discharge of any pollutant by any person" without an NPDES permit, MS4 municipal storm sewer systems are included in the definition of a point source.[169]

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[162] United States Code, title 33, sections 1311(a), 1312, 1316, 1317, 1328, 1342, and 1344.

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

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

[165] United States Code, title 33, section 1342(a)(1), (2).

[166] United States Code, title 33, section 1370.

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

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

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

Thus, the Clean Water Act was amended by the Water Quality Act of 1987 to require NPDES permits for stormwater discharges from MS4s, stormwater discharges associated with industrial and construction activities, and designated stormwater discharges considered significant contributors of pollutants to waters of the United States.[170] Federal law states that permits for discharges from MS4 municipal storm sewers:

- may be issued on a system- or jurisdiction-wide basis;
- shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
- shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.[171]

Discharges from MS4s include stormwater runoff, which "…is generated from rain and snowmelt events that flow over land or impervious surfaces, such as paved streets, parking lots, and building rooftops, and does not soak into the ground."[172] Polluted stormwater runoff is commonly transported through MS4s, and then often discharged, untreated, into local water bodies and, thus, stormwater runoff requires "best management practices" (BMPs) and controls to the maximum extent practicable to reduce the discharge of these pollutants as stated above. As the Ninth Circuit Court of Appeal stated:

> Storm water runoff is one of the most significant sources of water pollution in the nation, at times "comparable to, if not greater than, contamination from industrial and sewage sources." [Citation omitted.] Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorus), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants into streams, rivers, lakes, and estuaries across the United States. [Citation omitted.] In 1985, three-quarters of the States cited urban storm water runoff as a major cause of waterbody impairment, and forty percent reported construction site runoff as a major cause of impairment. Urban runoff has been named as the foremost cause of impairment of surveyed ocean waters. Among the sources of storm water contamination are urban development, industrial

[170] United States Code, title 33, section 1342(p)(3)(B).

[171] United States Code, title 33, section 1342(p)(3)(B).

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

facilities, construction sites, and illicit discharges and connections to storm sewer systems.[173]

A discharge to a MS4 that "is *not* composed entirely of stormwater" is considered an illicit non-stormwater, or dry weather discharge.[174] According to a fact sheet issued by EPA, illicit non-stormwater discharges may contribute to high levels of pollutants, including heavy metals, toxics, oil and grease, solvents, nutrients, viruses, and bacteria to receiving waterbodies.[175] Examples of illicit non-stormwater discharges include trash, sanitary wastewater, effluent from septic tanks, car wash wastewater, improper oil disposal, radiator flushing disposal, laundry wastewaters, spills from roadway accidents, and improper disposal of automobile and household toxics.[176] As stated above, federal law requires MS4 permits to "include a requirement to effectively prohibit non-stormwater discharges into the storm sewers," except as authorized by an NPDES permit.[177]

On November 16, 1990, EPA published regulations (40 CFR Part 122), which prescribe permit application requirements for MS4s under the Clean Water Act. EPA regulations specify the information to be included in a permit application.[178] Among other things, an applicant must set out a proposed management program that includes management practices; control techniques; and system, design, and engineering methods to reduce the discharge of pollutants to the maximum extent practicable; a program including inspections and ordinances to detect and remove prohibited, illicit discharges; a monitoring program to ensure compliance with water quality standards; an assessment of controls and reporting; and a fiscal analysis of the necessary capital and operation and maintenance expenditures necessary to accomplish the activities of the

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

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

[175] Exhibit L (25), Stormwater Phase II Final Rule, Illicit Discharge Detection and Elimination, USEPA Fact Sheet 2.5.

[176] Exhibit L (25), Stormwater Phase II Final Rule, Illicit Discharge Detection and Elimination, USEPA Fact Sheet 2.5.

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

[178] Code of Federal Regulations, title 40, section 122.26(d)(1)(i-viii).

programs.[179] The permit-issuing agency has discretion to determine which practices, whether or not proposed by the applicant, will be imposed as conditions to ensure compliance with water quality standards.[180] The state is required to transmit to EPA a copy of each permit application and permit proposed to be issued.[181]

In addition, the Clean Water Act requires states to develop water quality standards and criteria to protect the beneficial uses of any given waterbody, which are included in the Regional Board's Basin Plans.[182] States are required to adopt water quality standards and criteria based on sound scientific rationale that identifies sufficient parameters or constituents to protect the designated use, and numerical values related to any constituents should be based on the U.S. EPA's guidance documents or other defensible methods.[183] The water quality standard or criteria can be expressed in narrative form, which are broad statements of desirable water quality goals, or in a numeric form, which identifies specific pollutant concentrations.[184] When water quality criteria are met, water quality will generally protect the designated use."[185] Federal regulations state the purpose of a water quality standard as follows:

> A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria that protect the designated uses. States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (the Act). "Serve the purposes of the Act" (as defined in sections 101(a)(2) and 303(c) of the Act) means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.[186]

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

[180] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 757, citing to Code of Federal Regulations, title 40, section 122.26(d)(2).

[181] United States Code, title 33, section 1342(d).

[182] United States Code, title 33, section 1313(a), (c)(1); Code of Federal Regulations, title 40, sections 131.6, 131.10-131.12; Water Code sections 13240, 13241.

[183] Code of Federal Regulations, title 40, section 131.11.

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

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

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

U.S. EPA publishes water quality criteria in receiving waters to reflect the latest scientific knowledge on the kind and extent of all identifiable effects on health and welfare, which may be expected from the presence of pollutants in any body of water.[187] In addition, on May 18, 2000, U.S. EPA also established numeric water quality criteria for priority toxic pollutants and other provisions for water quality standards to be applied to waters in the state of California, which is known as the California Toxics Rule (CTR).[188] As the courts have explained, the CTR is a water quality standard that applies to "'all waters' for 'all purposes and programs under the CWA.'"[189]

States are required to hold public hearings from time to time but "at least once each three year period" for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards:

> Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the [US EPA] Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.[190]

When reviewing, revising, or adopting new water quality standards, the state is required to adopt numeric criteria for all toxic pollutants listed in federal law.[191]

The Clean Water Act also requires states to develop a list of "impaired" waters within their jurisdiction, meaning that existing controls of pollutants are not sufficient to meet water quality standards necessary to permit the designated beneficial uses, such as fishing or recreation.[192] States must then rank those impaired waters by priority, and

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[187] United States Code, title 33, section 1314(a).

[188] Code of Federal Regulations, title 40, section 131.38 (65 Federal Register 31682, 31711, May 18, 2000).

[189] *Santa Monica Baykeeper v. Kramer Metals, Inc.* (2009) 619 F.Supp.2d 914, 927.

[190] United States Code, title 33, section 1313(c)(2)(A).

[191] United States Code, title 33, section 1313(c)(2)(B).

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

establish a TMDL, which includes a calculation of the maximum amount of each constituent pollutant that the water body can assimilate and still meet water quality standards.[193]

B. The California Water Pollution Control Program

California's water pollution control laws were substantially overhauled in 1969 with the Porter-Cologne Water Quality Control Act (Porter-Cologne).[194] Beginning with section 13000, Porter-Cologne provides:

> The Legislature finds and declares that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by all the people of the state.
>
> The Legislature further finds and declares that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible.
>
> The Legislature further finds and declares that the health, safety, and welfare of the people of the state requires that there be a statewide program for the control of the quality of all the waters of the state…and that the statewide program for water quality control can be most effectively administered regionally, within a framework of statewide coordination and policy.[195]

The state water pollution control program was again modified, beginning in 1972, to substantially comply with the Clean Water Act, and "on May 14, 1973, California became the first state to be approved by the EPA to administer the NPDES permit program."[196]

Section 13160 provides the State Water Resources Control Board (State Board) "is designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act…[and is] authorized to exercise any powers delegated to the state by the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.) and acts amendatory thereto."[197] Section 13001 describes the state and the nine

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[193] United States Code, title 33, section 1313(d); Code of Federal Regulations, title 40, section 130.7(c).

[194] Water Code section 13020.

[195] Water Code section 13000.

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

[197] Water Code section 13160.

regional boards as being "the principal state agencies with primary responsibility for the coordination and control of water quality."

To achieve the objectives of conserving and protecting the water resources of the state, and in exercise of the powers delegated, Porter-Cologne, like the Clean Water Act, employs a combination of water quality standards and point source pollution controls.[198]

Under Porter Cologne, the nine regional boards' primary regulatory tools are the water quality control plans, or Basin Plans.[199] These plans fulfill the planning function for the water boards, are regulations adopted under the Administrative Procedure Act with a specialized process,[200] and provide the underlying basis for most of the regional board's actions (e.g., NPDES permit conditions, cleanup levels). Basin plans consist of three elements:

- Determination of beneficial uses;
- Water quality objectives to reasonably protect beneficial uses; and
- An implementation program to achieve water quality objectives.[201]

Water Code sections 13240-13247 address the development and implementation of the basin plans, including "water quality objectives," defined in section 13050 as "the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area."[202] Section 13241 provides each regional board "shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance."[203]

Beneficial uses, in turn, are defined in section 13050 as including, but not limited to "domestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves."[204] In addition, section 13243 permits a regional board to define "certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted."[205]

Sections 13260-13274 address the development of "waste discharge requirements," which section 13374 states "is the equivalent of the term 'permits' as used" in federal

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[198] Water Code section 13142.

[199] Water Code sections 13240-13247.

[200] Water Code sections 11352–11354.

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

[202] Water Code section 13050.

[203] Water Code section 13241.

[204] Water Code section 13050.

[205] Water Code section 13243.

law.[206] Section 13263 authorizes the regional boards, after a public hearing, to prescribe waste discharge requirements "as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge, except discharges into a community sewer system." Section 13263 provides "[a]ll discharges of waste into waters of the state are privileges, not rights."[207] Section 13372 states "[t]his chapter shall be construed to ensure consistency with the requirements for state programs implementing the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto." Section 13377 permits a regional board to issue waste discharge requirements "which apply and ensure compliance with all applicable provisions of the [Federal Water Pollution Control Act]."[208] In effect, sections 13263 and 13377 permit the issuance of waste discharge requirements concurrently with an NPDES permit "if a discharge is to waters of both California and the United States."

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

> California was the first state authorized to issue its own pollutant discharge permits. (Citations omitted.) Shortly after the CWA's enactment, the Legislature amended the Porter–Cologne Act, adding chapter 5.5 (Wat. Code, § 13370 et seq.) to authorize state issuance of permits (Wat. Code, § 13370, subd. (c)). The Legislature explained the amendment was "in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to [the Porter–Cologne Act]." (*Ibid*.) The Legislature provided that Chapter 5.5 be "construed to ensure consistency" with the CWA. (Wat. Code, § 13372, subd. (a).) It directed that state and regional boards issue waste discharge requirements "ensur[ing] compliance with all applicable provisions of the [CWA] ... *together with any more stringent effluent standards or limitations* necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance." (Wat. Code, § 13377, italics added.) To align the state and federal permitting systems, the legislation provided that the term " 'waste discharge requirements' " under the Act was equivalent to the term " 'permits' " under the CWA. (Wat. Code, § 13374.) Accordingly, California's permitting system now regulates discharges under both state and federal law. (Citations omitted.)[209]

California has adopted an Ocean Plan in accordance with federal law, applicable to interstate waters, and two other state-wide plans (California Inland Surface Waters Plan (ISWP) and the Enclosed Bays and Estuaries Plan (EBEP)), which

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[206] Water Code section 13374.

[207] Water Code section 13263(a-b); (g).

[208] Water Code section 13377.

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

establish water quality criteria or objectives for all fresh waters, bays and estuaries in the State.[210] These statewide plans contain narrative and numeric water quality criteria for toxic pollutants, in part to satisfy the Clean Water Act (United States Code, title 33, section 1313(c)(2)(B)). The water quality criteria contained in these statewide plans, together with the designated uses in each of the Basin Plans, create a set of water quality standards for waters within the State of California.[211]

C. The Test Claim Permit

The test claim permit, Order No. R4-2012-0175, is the third NPDES stormwater permit issued to the Los Angeles Flood Control District and 84 cities within the coastal watersheds of Los Angeles County, with the exception of the City of Long Beach, on November 8, 2012, and effective December 28, 2012.[212] The prior permit, Order 01-182, was adopted in 2001 and was the subject of Test Claim, *Municipal Storm Water and Urban Runoff Discharges*, 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21, which was partially approved by the Commission and upheld by the courts.[213] The sections of the test claim permit pled by the claimants are identified below.

III. Positions of the Parties

A. Claimants' Position

The claimants allege the following sections of the permit impose reimbursable state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution:

1. Requirements to comply with 33 Total Maximum Daily Load ("TMDL") programs set forth in Permit Part VI.E. and Attachments K through Q and in the Permit's Monitoring and Reporting Program;
2. Requirements involving the prohibition of non-stormwater discharges into and through the permittees' MS4s, contained in Permit Part III.A.;
3. Requirements relating to the provision of a means for public reporting of clogged catch basin inlets and illicit discharges, missing catch basin labels and other pollution prevention information, contained in Permit Part VI.D.5.;

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[210] United States Code, title 33, section 1313(c)(3)(A), (B).

[211] See also, Water Code section 13170, which provides that the statewide plans supersede the Basin Plans to the extent any conflict exists.

[212] Exhibit A, Test Claim 13-TC-01, pages 610-611, 614, 884 (Fact Sheet).

[213] Commission on State Mandates, Decision in *Municipal Storm Water and Urban Runoff Discharges,* 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21, adopted July 31, 2009, https://www.csm.ca.gov/decisions/121.pdf (accessed on August 7, 2025); *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546.

4. Requirements relating to the inspection of industrial and commercial facilities and to inventory or database critical industrial and commercial sources in Permit Part VI.D.6.;
5. Requirements contained in the planning and development program requirements in the Permit (Part VI.D.7.), including to track, enforce and inspect new development and redevelopment post-construction best management practices ("BMPs");
6. Requirements in Permit Part VI.D.8 relating to construction site activities, including to inspect construction sites of one acre or greater covered by the general construction activities stormwater permit, to electronically inventory various land use permits and to update this inventory, to require review and approval of erosion and sediment control plans, to develop technical standards for the selection, installation and maintenance of construction BMPs, to develop procedures to review and approve relevant construction plan documents, and to train permittee employees with respect to review and inspections;
7. Requirements relating to public agencies in Permit Part VI.D.9., including to maintain an updated inventory of permittee-owned or operated public facilities that are potential sources of stormwater pollution, to develop an inventory of public rights of ways or other areas that can be retrofitted to reduce the discharge of stormwater, to develop and implement an Integrated Pest Management Program, and for areas not subject to a trash TMDL to install trash excluders or equivalent devices on catch basins or take alternative steps such as increased street sweeping, adding trash cans or installing trash nets; and
8. Requirements in Permit Parts VI.D.4. and VI.D.10. to promote, publicize and facilitate public reporting of illicit discharges, ensure that signage adjacent to open channels includes information regarding dumping prohibitions and public reporting of illicit discharges, develop procedures regarding documentation of the handling of complaint calls, develop spill response plans, and expand training programs.[214]

The claimants state they are not aware of any designated State, federal or non-local agency funds that are or will be available to fund the mandated activities, except for portions of a small grant for low impact development BMPs. The claimants further contend they are restricted by the California Constitution with respect to their ability to assess fees or assessments sufficient to pay for the Permit's mandates.[215] The County of Los Angeles and the Los Angeles County Flood Control District state that it incurred costs of $3,212,000 in fiscal year 2012-2013 and $10,692,000 in fiscal year 2013-

[214] Exhibit A, Test Claim 13-TC-01, pages 61-62; Exhibit B, Test Claim 13-TC-02, pages 8-9.

[215] Exhibit A, Test Claim 13-TC-01, page 93; Exhibit B, Test Claim 13-TC-02, page 42.

2014.[216] The City claimants state they have incurred costs of $3,172,000 in fiscal year 2012-2013 and $4,070,000 in fiscal year 2013-2014.[217]

The claimants filed comments on the Draft Proposed Decision, disagreeing with findings that result in the conclusion that all activities, except to develop and submit a plan to achieve the wasteload allocations (WLAs) contained in each U.S. EPA-established TMDL, do not impose a reimbursable state-mandated program.[218] The claimants' specific comments are addressed in the Decision.

B. Water Boards

The Water Boards contend that the Test Claims should be denied on several grounds. The Water Boards generally contend that compliance with NPDES requirements is required by private industry and non-local governments, and thus, NPDES permits do not constitute a program subject to article XIII B, section 6 of the California Constitution.[219] Second, the Water Boards assert that permit is not a new program because there were past permits issued in 1990, 1996 and 2001, and "many (if not all) of the requirements at issue are not new."[220] Third, the Water Boards allege that there is no evidence that the permit imposes a higher level of service by enhancing services to the public.[221] Fourth, the Water Boards contend the claimants cannot show that the challenged provisions carry out state and not federal requirements. In considering the 2012 permit, the Regional Board expressly found that the provisions were necessary to meet the CWA and are based on federal law, and the factual findings supporting this conclusion are entitled to Commission deference.[222] The Water Boards also assert that other exceptions under mandates law applies to each permit provision,[223] including the permittees' fee authority to pay for the program, and that the permittees proposed many of the provisions in their permit applications or Reports of Waste Discharge (ROWD) or during the permitting process.[224]

Specific contentions with respect to the sections of the permit pled are addressed in the analysis below.

The Water Boards filed comments on the Draft Proposed Decision, disagreeing with the finding that developing and submitting a plan to achieve the wasteload allocations

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[216] Exhibit B, Test Claim 13-TC-02, page 41.

[217] Exhibit A, Test Claim 13-TC-01, page 90.

[218] Exhibit I, Claimants' Comments on the Draft Proposed Decision.

[219] Exhibit F, Water Boards' Comments on the Test Claims, pages 4, 21-22.

[220] Exhibit F, Water Boards' Comments on the Test Claims, page 4.

[221] Exhibit F, Water Boards' Comments on the Test Claims, page 4.

[222] Exhibit F, Water Boards' Comments on the Test Claims, pages 4, 22.

[223] Exhibit F, Water Boards' Comments on the Test Claims, page 4.

[224] Exhibit F, Water Boards' Comments on the Test Claims, page 22.

(WLAs) contained in each U.S. EPA-established TMDL, as required by Part VI.E.1.c., and Attachments M, O, P, and Q of the test claim permit, imposes a reimbursable state-mandated program.[225] The Water Boards' specific comments are addressed in the Decision.

C. Department of Finance

Finance asserts that the Test Claims should be denied since the claimants have fee authority within the meaning of Government Code section 17556(d), which is undiminished by Propositions 218 or 26. According to Finance, Proposition 26 excludes assessments and property-related fees imposed in accordance with Proposition 218 from the definition of taxes, and claimants have fee authority to impose property-related fees under their police power regardless of political feasibility. If local governments choose not to submit a fee to the voters, or if voters reject a proposed fee, that does not turn permit costs to reimbursable state mandates.[226]

Finance filed comments on the Draft Proposed Decision contending that the claimants have fee authority sufficient as a matter of law to pay for the cost of any new state-mandated activities and, thus, reimbursement should be fully denied.[227]

D. Interested Party, City of Sierra Madre

The City of Sierra Madre is one of the permittees under the test claim permit.[228] The City states that it would incur over $23 million to comply with the permit, or more than twice the city's annual budget, and is forced to undertake costly structural BMPs without additional state or federal funding and cannot raise revenue through fees or assessments.[229] The City is a member of the Rio Hondo/San Gabriel River Water Quality Group, which drafted a EWMP in order to meet the applicable numeric effluent limitations and other permit requirements at a cost of over $1.7 million, of which the City contributed about $53,367. The overall cost estimate of the EWMP is $1,417,717,256 incurred over "the next 11 years" of which City's costs are estimated to be $23,152,349, more than twice its annual budget, and does not include ongoing operation and maintenance costs beyond the 11-year period.[230]

The City supports the Test Claims and requests that the Commission approve the claims for reimbursement.

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[225] Exhibit J, Water Boards' Comments on the Draft Proposed Decision.

[226] Exhibit C, Finance's Comments on the Test Claims, page 1.

[227] Exhibit K, Finance's Comments on the Draft Proposed Decision.

[228] Exhibit A, Test Claim 13-TC-01, page 617 (test claim permit).

[229] Exhibit D, City of Sierra Madre's Comments on the Test Claims, page 1.

[230] Exhibit D, City of Sierra Madre's Comments on the Test Claims, page 2.

E. Interested Party, City of South Pasadena

The City of South Pasadena is one of the permittees under the test claim permit.[231] The City states that it expects to spend $64.66 million on its permit's requirements, almost triple its annual budget.[232] The City participated in crafting the EWMP for the Upper Los Angeles Watershed Management Group, which cost about $1.4 million to prepare and carries overall costs of $6.1 billion of capital costs and over $3 billion in annual operations and maintenance costs, totaling $9.1 billion over approximately 20 years. The City's share is estimated at $64.66 million, about triple its annual budget.[233]

The City supports the Test Claims and requests that the Commission approve the claims for reimbursement.

IV. Discussion

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

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

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[234] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[235]

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

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[236]
2. The mandated activity constitutes a "program" that either:
   a. Carries out the governmental function of providing a service to the public; or

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[231] Exhibit A, Test Claim 13-TC-01, page 617 (test claim permit).

[232] Exhibit E, City of South Pasadena's Comments on the Test Claims, page 1.

[233] Exhibit E, City of South Pasadena's Comments on the Test Claims, page 1.

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

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

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

b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[237]

3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[238]

4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[239]

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[240] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[241] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[242]

A. The Commission Has Jurisdiction Over These Consolidated Test Claims

1. The Test Claims Were Timely Filed and Have a Potential Period of Reimbursement Beginning December 28, 2012.

Government Code section 17551 provides local government test claims shall be filed "not later than 12 months following the effective date of a statute or executive order or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later."[243] At the time the test claim permit was adopted on

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

[238] *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

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

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

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

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

[243] Government Code section 17551(c).

November 8, 2012, and became effective on December 28, 2012,[244] the Commission's regulations defined "within 12 months" as follows:

> For purposes of claiming based on the date of first incurring costs, "within 12 months" means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant.[245]

The claimants state they first incurred costs to implement the permit during fiscal year 2012-2013.[246] This assertion is supported by the declarations in the record. For example, the claimants filed declarations under penalty of perjury indicating that costs were first incurred to comply with the TMDL requirements in January 2013.[247] There is no evidence rebutting these declarations.

Therefore, pursuant to Government Code section 17551, and the interpretation of the Commission's regulations that provides until June 30 of the fiscal year following the fiscal year in which costs were first incurred, a timely filing on the 2012 test claim permit must occur on or before June 30, 2014. The test claims were filed June 30, 2014, and are therefore timely filed.[248]

Government Code section 17557(e) requires a test claim to be "submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year." Because the Test Claims were filed June 30, 2014 (fiscal year 2013-2014), the potential period of reimbursement under Government Code section 17557 begins on July 1, 2012 (fiscal year 2012-2013). However, since the test claim permit has a later effective date, the potential period of reimbursement for this claim begins on the permit's effective date, or December 28, 2012.[249]

2. The Water Boards' General Arguments to Deny the Claims are Not Correct as a Matter of Law.

The Water Boards argue generally that many of the provisions were proposed by the permittees in their permit application or Report of Waste Discharge (ROWD) and,

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[244] Exhibit A, Test Claim 13-TC-01, pages 610, 627 (test claim permit).

[245] California Code of Regulations, title 2, former section 1183 (Register 2010, No. 44); later renumbered as former section 1183.1(b) (Register 2016, No. 38).

[246] Exhibit A, Test Claim 13-TC-01, page 63; Exhibit B, Test Claim 13-TC-02, page 10.

[247] Exhibit A, Test Claim 13-TC-01, page 100 (Declaration of Gregory Ramirez, City Manager for the City of Agoura Hills); Exhibit B, Test Claim 13-TC-02, page 49 (Declaration of Paul Alva, P.E., Principal Engineer for the Watershed Management Division of the County of Los Angeles Department of Public Works).

[248] Exhibit A, Test Claim 13-TC-01, page 1; Exhibit B, Test Claim 13-TC-02, page 1.

[249] Exhibit A, Test Claim 13-TC-01, page 610 (test claim permit).

therefore, reimbursement is not required since the activities are triggered by a discretionary decision.[250] The Commission disagrees with this argument.[251]

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

> a) *Duty to apply.* (1) Any person[252] who discharges or proposes to discharge pollutants … and who does not have an effective permit … must submit a complete application to the Director in accordance with this section and part 124 of this chapter.[253]

Moreover, the ROWD (tantamount to an NPDES permit application) is required by California law, as follows: "Any person discharging pollutants or proposing to discharge pollutants to the navigable water of the United States within the jurisdiction of this state . . . . shall file a report of the discharge in compliance with the procedures set forth in Section 13260…."[254]

In addition, federal law requires permittees to include the following in their permit application, which must be considered by the Regional Board when adopting a permit:

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

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[250] Exhibit F, Water Boards' Comments on the Test Claims, page 22.

[251] The Commission rejected the same argument in *Discharge of Stormwater Runoff*, 07-TC-09 (Commission on State Mandates, Test Claim Decision adopted March 26, 2010, https://csm.ca.gov/decisions/doc14.pdf (accessed on August 29, 2025), page 35; and in *California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009*-0002 (10-TC-11), Test Claim Decision adopted October 27, 2023, https://www.csm.ca.gov/decisions/10-TC-11-103123.pdf (accessed on August 29, 2025), pages 66-67.

[252] Code of Federal Regulations, title 40, section 122.2 ("*Person* means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.").

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

[254] Water Code section 13376.

> on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. *Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable.*[255]

However, it is ultimately the Regional Board that determines which conditions or requirements to include in the permit, and the position that the ROWD proposal itself makes a permit requirement discretionary is not correct as a matter of law.

The Water Boards further argue that the NPDES permits are not subject to article XIII B, section 6 at all since compliance with NPDES requirements is also required by private industry and non-local governments.[256] As determined by the Third District Court of Appeal, however, it is irrelevant that both public and private parties who discharge pollution from point sources into waters must obtain an NPDES permit to do so. "[T]he applicability of permits to public and private discharges does not inform us about whether a particular permit or an obligation thereunder imposed on local governments constitutes a state mandate necessitating subvention under article XIII B, [S]ection 6."[257] Rather, the permit requirements will be interpreted individually based on the plain language of the permit, the law, and the evidence in the record.

3. The Requirements Pled in the Test Claim Permit Are Compared to the Law in Effect Immediately Prior to the Adoption of the Test Claim Permit, Including the Prior Permit, Other Regional Board Orders, and Existing Federal Law, to Determine if the Activities Required by the Test Claim Permit Are New.

The courts have held "simply because a state law or order may increase the costs borne by local government in providing services, this does not necessarily establish that the law or order constitutes an increased or higher level of the resulting 'service to the public' under article XIII B, section 6, and Government Code section 17514."[258] Rather, as explained below, all of the elements required under article XIII B, section 6 must be met, including that the activity or duty imposed by the permit is newly required and mandated by the state when compared to prior law.

Under the CWA, the term of an NPDES permit is five years.[259] However, states authorized to administer the NPDES program may continue the state-issued permit until

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

[256] Exhibit F, Water Boards' Comments on the Test Claims, page 22.

[257] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 559.

[258] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 54; *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 735; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877.

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

the effective date of a new permit, if state law allows.[260] California's regulations provide the terms and conditions of an expired permit are automatically continued pending issuance of a new permit if all requirements of the federal NPDES regulations on continuation of expired permits have been complied with.[261] Thus, there was no gap in time between the prior permit (Order 01-182) and the test claim permit.

The courts have found NPDES permits are executive orders issued by a state agency within the meaning of article XIII B, section 6.[262] The purpose of article XIII B, section 6 is to prevent the state from forcing extra programs on local government each year in a manner that negates their careful budgeting of increased expenditures counted against the local government's annual spending limit and, thus, article XIII B, section 6 requires a showing that the test claim statute or executive order mandates *new* activities and associated costs compared to the prior year.[263] This was the case in *Department of Finance. v. Commission on State Mandates* (2021) 59 Cal.App.5th 546. There, the court found installing and maintaining trash receptacles at transit stops and performing certain inspections, as required by that stormwater permit, were *new duties* that local governments were required to perform, when compared to prior law ("the mandate to install and maintain trash receptacles at transit stops is a 'new program' within the meaning of section 6 because it was not required prior to the Regional Board's issuance of the permit").[264]

Other examples include *Lucia Mar Unified School Dist.*, which addressed a 1981 test claim statute requiring local school districts to pay the cost of educating pupils in state schools for the severely handicapped — costs the state had previously paid in full until the 1981 statute became effective.[265] The court held the requirement imposed on local school districts to fund the cost of educating these pupils was new "*since at the time [the test claim statute] became effective* they were not required to contribute to the

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

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

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

[263] California Constitution, articles XIII B, sections 1, 8(a) and (b); *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1595; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763.

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

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

education of students from their districts at such schools."[266] The same analysis was applied in *County of San Diego*, where the court found the state took full responsibility to fund the medical care of medically indigent adults in 1979, which lasted until the 1982 test claim statute shifted the costs back to counties.[267] In *City of San Jose*, the court addressed a 1990 test claim statute, which authorized counties to charge cities for the costs of booking into county jails persons who had been arrested by employees of the cities.[268] The court denied the city's claim for reimbursement, finding the costs were not shifted by the state since "*at the time [the test claim statute] was enacted*, and indeed long before that statute, the financial and administrative responsibility associated with the operation of county jails and detention of prisoners was borne entirely by the county."[269] In *San Diego Unified School District*, the court determined the required activities imposed by test claim statutes, which addressed the suspension and expulsion of K-12 students from school, were "new in comparison with the preexisting scheme in view of the circumstances that they did not exist prior to the enactment of [the test claim statutes]."[270]

Accordingly, the requirements pled in the test claim permit are compared to prior law, including the prior permit, other Regional Board orders, and existing federal law to determine if the requirements in the test claim permit are new.

B. Except for Developing and Submitting a Watershed Plan to Achieve the WLAs Contained in Some of the *U.S. EPA-Adopted TMDLs* as Required by Part VI.E.1.c. and Attachments M, O, P, and Q of the Test Claim Permit, the Remaining TMDL Provisions in Part VI.E.1.c., Part VI.E.2.a., and Attachments K through Q, and the Monitoring Provisions in Part VI.B. and Attachment E (Parts II.E.1. through 3. and Part V.; and Parts VI.A.1.b.iii.-iv., VI.B.2., VI.C.1.a., VI.D.1.a., VIII.B.1.b.ii., IX.A.5., IX.C.1.a., IX.E.1.a. and b., IX.G.1.b., IX.G.2.), Do Not Mandate a New Program or Higher Level of Service.

The claimants are requesting reimbursement to comply with 33 TMDLs identified in Attachment K of the test claim permit, as required by Part IV.E.1.c. of the test claim permit and Attachments L through Q.[271] The claimants also plead Part VI.B. and

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

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

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

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

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

[271] Exhibit A, Test Claim 13-TC-01, pages 70-74, Exhibit B, Test Claim 13-TC-02, pages 17-21. See also, Exhibit A, Test Claim 13-TC-01, page 742 (test claim permit, Part

various parts in Attachment E relating to the TMDL monitoring requirements.[272] The TMDLs at issue include the following twenty-five TMDLs adopted by the Regional Board and seven TMDLs adopted by U.S. EPA to reduce trash; bacteria; and nitrogen compounds, chloride, toxics, metals, pesticides, and nutrients in the waterbodies in Los Angeles County.

Regional Board Adopted TMDLs:

Trash:

1. Lake Elizabeth Trash – Attachment L[273]
2. Santa Monica Nearshore and Offshore Debris – Attachment M[274]
3. Malibu Creek Trash – Attachment M[275]
4. Ballona Creek Trash – Attachment M[276]
5. Machado Lake Trash – Attachment N[277]
6. Los Angeles River Watershed Management Area Trash – Attachment O[278]

VI.E.1.c.), pages 1065 et seq. (Attachment K), and 1083 et seq. (Attachments L through Q).

[272] Exhibit A, Test Claim 13-TC-01, page 71; Exhibit B, Test Claim 13-TC-02, page 18. See also, Exhibit A, Test Claim 13-TC-01, page 647 (test claim permit, Part VI.B.) and pages 815 et seq. (Attachment E, the Monitoring and Reporting Program).

[273] Exhibit A, Test Claim 13-TC-01, page 1083 (Attachment L). This TMDL was adopted through Resolution R4-2007-009, and codified in California Code of Regulations, title 23, section 3939.28, effective March 6, 2008.

[274] Exhibit A, Test Claim 13-TC-01, page 1099 (Attachment M). This TMDL was adopted through Resolution No. R10-010, and codified in California Code of Regulations, title 23 section 3939.43, effective March 20, 2012.

[275] Exhibit A, Test Claim 13-TC-01, page 1104 (Attachment M). This TMDL was adopted through Resolution No. 2008-07, and codified in California Code of Regulations, title 23, section 3939.36, effective July 7, 2009.

[276] Exhibit A, Test Claim 13-TC-01, pages 1105-1106 (Attachment M). This TMDL was adopted through Resolution Nos. 01-014 and 2004-023, and codified in California Code of Regulations, title 23, section 3936, effective August 11, 2005.

[277] Exhibit A, Test Claim 13-TC-01, page 1121 (Attachment N). This TMDL was adopted through Resolution No. 2007-006, and codified in California Code of Regulations, title section 3939.30, effective March 6, 2008.

[278] Exhibit A, Test Claim 13-TC-01, page 1129 (Attachment O). This TMDL was adopted through Resolution No. 2007-012, and codified in California Code of Regulations, title 23, section 3935, effective September 23, 2008.

7. Legg Lake Trash – Attachment O[279]

Bacteria:

8. Santa Clara River, Reaches 5, 6, and 7 - Attachment L[280]
9. Santa Monica Bay Beaches Bacteria - Attachment M[281]
10. Malibu Creek and Lagoon Bacteria - Attachment M[282]
11. Ballona Creek Estuary and Sepulveda Channel Bacteria - Attachment M[283]
12. Mother's Beach and Back Basins (Marina Del Rey Subwatershed) Bacteria - Attachment M[284]
13. LA Harbor Bacteria – Inner Cabrillo and Main Ship Channel - Attachment N[285]
14. LA River WMA Bacteria – Attachment O[286]

Nitrogen Compounds, Chloride, Toxics, Metals, Pesticides, Nutrients:

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[279] Exhibit A, Test Claim 13-TC-01, page 1141 (Attachment O). This TMDL was adopted through Resolution No. 2007-010, and codified in California Code of Regulations, title 23, section 3939.29, effective March 6, 2008.

[280] Exhibit A, Test Claim 13-TC-01, page 1084 (Attachment L). This TMDL was adopted through Resolution No. R10-006, and codified in California Code of Regulations, title 23 section 3939.40, effective March 21, 2012.

[281] Exhibit A, Test Claim 13-TC-01, page 1086 (Attachment M). This TMDL was adopted through Resolution Nos. 02-004 (dry weather) and 02-22 (wet weather), and codified in California Code of Regulations, title 23, sections 3938 and 3939 (wet, No. 02-22), effective July 15, 2003.

[282] Exhibit A, Test Claim 13-TC-01, page 1101 (Attachment M). This TMDL was adopted through Resolution No. 2004-019R, and codified in California Code of Regulations, title 23, section 3939.15, No. effective January 24, 2006.

[283] Exhibit A, Test Claim 13-TC-01, page 1108 (Attachment M). This TMDL was adopted through Resolution No. 2006-011, and codified in California Code of Regulations, title 23, section 3939.24, effective April 27, 2007.

[284] Exhibit A, Test Claim 13-TC-01, page 1115 (Attachment M). This TMDL was adopted through Resolution No. 2003-012, and codified in California Code of Regulations, title 23, section 3939.4, effective March 18, 2004.

[285] Exhibit A, Test Claim 13-TC-01, page 1121 (Attachment N). This TMDL was adopted through Resolution No. 2004-011, and codified in California Code of Regulations, title 23, section 3939.12, effective March 10, 2005.

[286] Exhibit A, Test Claim 13-TC-01, page 1133 (Attachment O). This TMDL was adopted through Resolution R10-007, and codified in California Code of Regulations, title 23, section 3939.41, effective March 23, 2012.

15. Santa Clara River Nitrogen Compounds – Attachment L[287]
16. Upper Santa Clara River Chloride – Attachment L[288]
17. Ballona Creek Toxics (cadmium, copper, lead, silver, zinc, chlordane, DDTs, Total PCBs, Total PAHs) – Attachment M[289]
18. Ballona Creek Metals (copper, lead, selenium, zinc) – Attachment M[290]
19. Marina del Rey Toxics (copper, lead, zinc, chlordane, Total PCBs) – Attachment M[291]
20. Machado Lake Nutrient (Phosphorus, Nitrogen) – Attachment N[292]
21. Machado Lake Pesticides and PCBs (DDT, DDE, DDD, Total DDT, Chlordane, Dieldrin) – Attachment N[293]

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[287] Exhibit A, Test Claim 13-TC-01, page 1083 (Attachment L). This TMDL was adopted through Resolution No. 2003-011, and codified in California Code of Regulations, title 23, section 3939.6, effective March 23, 2004.

[288] Exhibit A, Test Claim 13-TC-01, page 1083 (Attachment L). This TMDL was adopted through Resolution No. 2008-012, and codified in California Code of Regulations, title 23, section 3939.10, effective March 6, 2010.

The Commission previously heard and determined a Test Claim filed by the Santa Clarita Valley Sanitation District on Resolution No. 2008-012 and denied the Test Claim on the ground that the Resolution did not mandate a new program or higher level of service. Commission on State Mandates, Statement of Decision adopted January 24, 2014, *Upper Santa Clara River Chloride Requirements*, 10-TC-09, https://www.csm.ca.gov/decisions/013114.pdf (accessed on July 17, 2025). The Decision was upheld by the Los Angeles County Superior Court, Case No. BS148024.

[289] Exhibit A, Test Claim 13-TC-01, page 1107 (Attachment M). This TMDL was adopted through Resolution No. 2005-008, and codified in California Code of Regulations, title 23, section 3939.18, effective January 11, 2006.

[290] Exhibit A, Test Claim 13-TC-01, page 1113 (Attachment M). This TMDL was adopted through Resolution No. 2007-015, and codified in California Code of Regulations, title 23, section 3939.20, effective October 29, 2008.

[291] Exhibit A, Test Claim 13-TC-01, page 1118 (Attachment M). This TMDL was adopted through Resolution No. 2005-012, and codified in California Code of Regulations, title 23, section 3939.21, effective March 22, 2006.

[292] Exhibit A, Test Claim 13-TC-01, page 1122 (Attachment N). This TMDL was adopted through Resolution No. 2008-006, and codified in California Code of Regulations, title 23, section 3939.35, effective March 11, 2009.

[293] Exhibit A, Test Claim 13-TC-01, page 1123 (Attachment N). This TMDL was adopted through Resolution No. R10-008, and codified in California Code of Regulations, title 23 section 3939.42, effective March 20, 2012.

22. Dominguez Channel, Greater LA, Long Beach Harbor Toxics (copper, lead, zinc, DDT, PAHs, PCBs) – Attachment N[294]

23. Los Angeles River WMA Nitrogen Compounds and Related Effects – Attachment O[295]

24. Los Angeles River WMA Metals (cadmium, copper, lead, zine) – Attachment O[296]

25. Los Cerritos Channel and Alamitos Bay WMA, Colorado Lagoon (Pesticides, PCBs, Sediment Toxicity, PAHs, and Metals) – Attachment Q[297]

U.S. EPA-adopted TMDLs:

1. Santa Monica Bay TMDL for DDTs and PCBs (USEPA established), effective March 26, 2012 – Attachment M[298]

2. Malibu Creek Watershed Nutrients TMDL (USEPA established), effective March 21, 2003 – Attachment M[299]

3. Ballona Creek Wetlands TMDL for Sediment and Invasive Exotic Vegetation (USEPA established), effective March 26, 2012 - Attachment M[300]

4. Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL (USEPA established), effective March 26, 2012 – Attachment O[301]

5. Los Angeles Area Lakes TMDLs (USEPA-established), effective March 26, 2012 – Attachment O identifies the TMDLs in the Los Angeles River Watershed Management Area, and there are several TMDLS including the following: Lake Calabasas Nutrient; Echo Park Lake Nutrient, PCBs,

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[294] Exhibit A, Test Claim 13-TC-01, page 1124 (Attachment N). This TMDL was adopted through Resolution No. R11-008, and codified in California Code of Regulations, title 23, section 3939.44, effective March 23, 2012.

[295] Exhibit A, Test Claim 13-TC-01, page 1131 (Attachment O). This TMDL was adopted through Resolution Nos. 2003-009, 2003-016 and 2012-010, and codified in California Code of Regulations, title 23, section 3939.7, effective September 27, 2004.

[296] Exhibit A, Test Claim 13-TC-01, page 1131 (Attachment O). This TMDL was adopted through Resolution No. R10-003, and codified in California Code of Regulations, title 23, section 3939.19, effective November 3, 2011.

[297] Exhibit A, Test Claim 13-TC-01, page 1161 (Attachment Q). This TMDL was adopted through Resolution No. R09-005, and codified in California Code of Regulations, title 23, section 3939.38, effective July 28, 2011.

[298] Exhibit A, Test Claim 13-TC-01, page 1100 (Attachment M).

[299] Exhibit A, Test Claim 13-TC-01, page 1105 (Attachment M).

[300] Exhibit A, Test Claim 13-TC-01, page 1115 (Attachment M).

[301] Exhibit A, Test Claim 13-TC-01, page 1142 (Attachment O).

Chlordane, Dieldrin, Trash; and Legg Lake Nutrient Peck Road Park Lake Nutrient, PCBs, Chlordane, DDT, Dieldrin, and Trash.[302]

Attachment P identifies the TMDLs in the San Gabriel River Watershed Management Area including the Puddingstone Reservoir Nutrient, Mercury, PCBs, Chlordane, Dieldrin, DDT TMDLs.[303]

6. San Gabriel River and Impaired Tributaries Metals and Selenium TMDL (USEPA-established), effective March 26, 2007 – Attachment P[304]
7. Los Cerritos Channel Metals TMDL (USEPA-established), effective March 17, 2010 – Attachment Q[305]

Prior to the adoption of these TMDLs, the Regional Board in 1996 and 1998 identified several water bodies that were impaired and over 700 waterbody-pollutant combinations in the Los Angeles Region where TMDLs would be required. A 13-year schedule for development of TMDLs in the Los Angeles Region was established in a consent decree approved by the court on March 22, 1999, in *Heal the Bay Inc., et al. v. Browner, et al*. This consent decree is explained as follows:

> The events underlying the instant action were set in motion by the disposition of *Heal the Bay, Inc., et al. v. Browner, et al.,* No. C 98-4825 SBA ("*Heal the Bay*"), an action previously before this Court. In *Heal the Bay,* an individual and two environmental groups (which groups are now two of the three Intervenors in the instant action) brought a civil action against EPA, the EPA Administrator, and the EPA Region IX Administrator. Their suit primarily concerned EPA's alleged failure to perform its alleged duty under the CWA either to approve or to disapprove TMDLs submitted to EPA by the state of California.
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> On March 23, 1999, the Court filed an Amended Consent Decree (the "Consent Decree") [fn. omitted] in which "EPA agree[d] to ensure that a TMDL [would] be completed for each and every pairing of a [Water Quality Limited Segment, as defined in 40 C.F.R. 130.2(j),] and an associated pollutant in the Los Angeles Region" set forth in an attachment to the Consent Decree by specified deadlines. (Consent Decree ¶¶ 2a, 2b, 3, 3c.) [fn. omitted.] Pursuant to the Consent Decree, for each pairing EPA was required either to approve a TMDL submitted by California by a specified deadline or, if it did not approve a TMDL by the date specified, to establish a TMDL within one year of the deadline, unless California submitted and EPA approved a TMDL prior to EPA's establishing the TMDL within the one-year period. (*Id.* ¶ 3a.) By March 24, 2002, EPA was

[302] Exhibit A, Test Claim 13-TC-01, pages 1143-1144 (Attachment O).

[303] Exhibit A, Test Claim 13-TC-01, pages 1156, et al. (Attachment P).

[304] Exhibit A, Test Claim 13-TC-01, pages 1155 (Attachment P).

[305] Exhibit A, Test Claim 13-TC-01, page 1161 (Attachment Q).

required either to have approved a state-submitted TMDL for trash in the Los Angeles River or to have established the TMDL itself.[306]

Several parts of the test claim permit identify the schedules for compliance, effluent limitations and receiving water limitations to reduce these pollutants, and implementation and monitoring requirements. The claimants state that the permit's "specific mandates" are as follows:

a. Part VI.E.1.c. requires Claimants to "comply with the applicable water quality based effluent limitations and/or receiving water limitations contained in Attachments L through R, consistent with the assumptions and requirements of the WLAs [wasteload allocations] established in the TMDLs, including implementation plans and schedules, where provided for in the State adoption and approval of the TMDL (40 CFR 122.44(d)(1)(vii)(B); Cal. Wat. Code § 13263(a))."

b. Permit Attachment K sets forth the TMDLs with which Claimants must comply.

c. Attachments L through Q of the Permit set forth the requirements of each TMDL and its "waste load allocations ("WLAs")" with which Claimants must comply.

d. Part VI.B. of the Permit requires Claimants "to comply with the [Monitoring and Reporting Program] and future revisions thereto, in Attachment E of this Order or may, in coordination with an approved Watershed Management Program per Part VI.C, implement a customized monitoring program that achieves the five Primary Objectives set forth in Part II.A of Attachment E and includes the elements set forth in Part II.E of Attachment E."

e. Permit Attachment E requires that in the performance of the monitoring program, Claimants must include monitoring at "TMDL receiving water compliance points" and other "TMDL monitoring requirements specified in approved TMDL Monitoring Plans." (Permit, Attachment E, Parts II.E.1. through 3. and Part V.; *see also* Permit Attachment E. Parts VI.A.1.b.(iii.-iv.), VI.B.2., VI.C.1.a., VI.D.1.a., VIII.B.1.b.(ii.), IX.A.5., IX.C.1.a., IX.E.1.a. and b., IX.G.1.b., and IX.G.2.)

   Claimants can meet their TMDL compliance requirements through participation in a WMP [Watershed Management Program] or EWMP [Enhanced Watershed Management Program] that addresses the TMDL. Permit Part VI.E.2.a.[307]

The city claimants allege they have incurred increased costs of approximately $3,358,100 in fiscal year 2012-2013 and $6,150,875 in fiscal year 2013-2014 to comply

[306] *City of Arcadia v. U.S. EPA* (2003) 265 F.Supp.2d 1142, 1146.

[307] Exhibit A, Test Claim 13-TC-01, page 71, Exhibit B, Test Claim 13-TC-02, page 18.

with the TMDL requirements.[308] The declarations filed by the cities also identify "costs for staff time in analyzing and deciding whether to implement an EWMP and an integrated monitoring program ("IMP") or Coordinated Integrated Monitoring Program ("CIMP") . . . ."[309] The County of Los Angeles and the County Flood Control District allege they have incurred costs of $6,937,000, including costs to participate in the EWMP and WMP process.[310]

The Water Boards contend reimbursement is not required since the requirements are necessary to comply with federal law and are not new or unique to government.[311] The Water Boards further contend participation in a WMP or EWMP is not a mandate for any permittee since the permit makes that process voluntary. "Permittees that elect to develop and implement a WMP or EWMP, including costs for meetings, staff time, work

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[308] Exhibit A, Test Claim 13-TC-01, page 74.

[309] Exhibit A, Test Claim 13-TC-01, page 100 (Declaration of Gregory Ramirez, City Manager for the City of Agoura Hills); page 119 (Declaration of Jeffery L. Stewart, City Manager for the City of Bellflower); page 141 (Declaration of Patricia Rhay, Director of Public Works for the City of Beverly Hills); page 167 (Declaration of Julio Gonzalez, Acting Water Program Manager for the City of Carson; page 187 (Declaration of Michael O'Grady, Environmental Services Manager for the City of Cerritos); page 208 (Declaration of Maryam Babaki, Director of Public Works for the City of Commerce); page 240 (Declaration of Gilbert A. Livas, City Manager for the City of Downey); page 262 (Declaration of Daniel Hernandez, Director of Public Works for the City of Huntington Park); page 294 (Declaration of Lisa Rapp, Director of Public Works for the City of Lakewood); page 314 (Declaration of Stephanie Katsouleas, Director of Public Works for the City of Manhattan Beach); page 333 (Declaration of Adriana Figueroa, employee for the City of Norwalk); page 352 (Declaration of Douglas Willmore, City Manager for the City of Rancho Palos Verdes); page 371 (Declaration of Joe Hoefgen, City Manager for the City of Redondo Beach); page 390 (Declaration of Michael W. Throne, Public Works Director and City Engineer for the City of San Marino); page 409 (Declaration of Noe Negrete, employee of City of Santa Fe Springs); page 427 (Declaration of Charlie Honeycutt, City Manager for the City of Signal Hill); page 464 (Declaration of Jennifer E. Vasquez, Interim City Manager for the City of South El Monte); page 492 (Declaration of Carlos R. Fandino Jr., employee of the City of Vernon); page 523 (Declaration of Ray Taylor, City Manager for the City of Westlake Village); page 543 (Declaration of Jeff Collier, City Manager for the City of Whittier); page 562 (Declaration of Rene Bobadilla, City Manager for the City of Pico Rivera); and page 581 (Declaration of Kenneth W. Striplin, City Manager for the City of Santa Clarita).

[310] Exhibit B, Test Claim 13-TC-02, pages 49-50 (Declaration of Paul Alva, P.E., Principal Engineer for the County of Los Angeles Public Works Department).

[311] Exhibit F, Water Boards' Comments on the Test Claims, pages 40-60.

by consultants, and submittals to the Los Angeles Water Board are not subject to a subvention of funds."[312]

As explained below, the Commission does not have jurisdiction to address Attachment R, the Middle Santa Ana River Watershed Bacterial Indicator TMDL, because it was not pled in the Test Claims.

The Commission further finds that except for developing and submitting a watershed plan to achieve the WLAs contained in some of the *U.S. EPA-Adopted TMDLs* as required by Part VI.E.1.c. and Attachments M, O, P, and Q of the test claim permit, the remaining TMDL provisions in Part VI.E.1.c., Part VI.E.2.a., and Attachments K through Q, and the monitoring provisions in Part VI.B. and Attachment E (Parts II.E.1. through 3. and Part V.; and Parts VI.A.1.b.iii.-iv., VI.B.2., VI.C.1.a., VI.D.1.a., VIII.B.1.b.ii., IX.A.5., IX.C.1.a., IX.E.1.a. and b., IX.G.1.b., IX.G.2.), do not mandate a new program or higher level of service.

1. State and Federal Law Require the Regional Board to Include Effluent Limits in the Permit that Are Consistent with the Assumptions and Requirements of Any Available Wasteload Allocation for the Discharge Once a TMDL Is Adopted.

The Clean Water Act requires states to develop a list of "impaired" waters within their jurisdiction, meaning that existing controls of pollutants are not sufficient to meet water quality standards necessary to permit the designated beneficial uses, such as fishing or recreation. States must then rank those impaired waters by priority, and establish a TMDL, which includes a calculation of the maximum amount of each constituent pollutant that the water body can assimilate and still meet water quality standards.[313] The test claim permit's Fact Sheet explains the federal law on TMDLs as follows:

> A TMDL specifies the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards, and allocates the acceptable pollutant load to point and nonpoint sources. The elements of a TMDL are described in 40 CFR sections 130.2 and 130.7. A TMDL is defined as "the sum of the individual waste load allocations for point sources and load allocations for nonpoint sources and natural background" (40 CFR § 130.2). Regulations further require that TMDLs must be set at "levels necessary to attain and maintain the applicable narrative and numeric water quality standards with seasonal variations and a margin of safety that takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality" (40 CFR section 130.7(c)(1)). The regulations at 40 CFR section 130.7 also state that TMDLs shall take into account critical conditions for stream flow, loading and water quality parameters. Essentially, TMDLs serve as a

[312] Exhibit F, Water Boards' Comments on the Test Claims, pages 40-41.

[313] United States Code, title 33, section 1313(d); Code of Federal Regulations, title 40, section 130.7(c).

backstop provision of the CWA designed to implement water quality standards when other provisions have failed to achieve water quality standards.

Upon establishment of TMDLs by the State or the USEPA, the State is required to incorporate, or reference, the TMDLs in the State Water Quality Management Plan (40 CFR sections 130.6(c)(1) and 130.7). The Regional Water Board's Basin Plan, and applicable statewide plans, serves as the State Water Quality Management Plan governing the watersheds under the jurisdiction of the Regional Water Board. When adopting TMDLs as part of its Basin Plan, the Regional Water Board includes, as part of the TMDL, a program for implementation of the WLAs for point sources and load allocations (LAs) for nonpoint sources.

TMDLs are not self-executing, but instead rely upon further Board orders to impose pollutant restrictions on discharges to achieve the TMDL's WLAs. Section 402(p)(3)(B)(iii) of the Clean Water Act requires the Regional Water Board to impose permit conditions, including: "management practices, control techniques and system, design and engineering methods, and *such other provisions as the Administrator of the State determines appropriate for the control of such pollutants*." (emphasis added.) Section 402(a)(1) of the Clean Water Act also requires states to issue permits with conditions necessary to carry out the provisions of the Clean Water Act. Federal regulations also require that NPDES permits must include conditions consistent with the assumptions and requirements of any available waste load allocation (40 CFR section 122.44(d)(1)(vii)(B)). Similarly, state law requires both that the Regional Water Board implement its Basin Plan when adopting waste discharge requirements (WDRs) and that NPDES permits apply "any more stringent effluent standards or limitations necessary to implement water quality control plans…" (Cal. Wat. Code §§ 13263, 13377).[314]

As explained above, TMDLs developed by the Regional Board may contain implementation provisions, which are incorporated into the Basin Plan.[315] TMDLs developed by U.S. EPA contain the WLAs, but do not contain implementation provisions.[316]

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[314] Exhibit A, Test Claim 13-TC-01, pages 960-961 (Fact Sheet); see also, *City of Arcadia v. U.S. EPA* (2003) 265 F.Supp.2d 1142, 1145.

[315] Water Code sections 13050(j), 13242.

[316] Exhibit L (24), State Water Resources Control Board Order WQ 2015-0075, page 54 ("TMDLs developed by regional water boards include implementation provisions [fn. omitted] and are typically incorporated into the regional water board's water quality control plan. [Fn. omitted.] TMDLs developed by USEPA typically contain the total load

Once a TMDL is adopted by the Regional Board, it must be approved by U.S. EPA. If U.S. EPA does not approve the TMDL, it must, within 30 days after disapproval "establish such loads for such waters as [it] determines necessary to implement the water quality standards applicable to such waters."[317] Federal law requires the TMDL to be incorporated into water quality management plans (i.e., the Basin Plan) to implement the TMDLs.[318] Basin Plan amendments do not become effective until approved by the State Water Board and the Office of Administrative Law (OAL) and are codified in the California Code of Regulations.[319]

The development of a TMDL usually triggers further regulatory action by the state to impose requirements on discharges in NPDES stormwater permits that implement the TMDL's WLAs. As explained by the court in *City of Arcadia v. U.S. EPA*:

> TMDLs established under Section 303(d)(1) of the CWA function primarily as planning devices and are not self-executing. *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir.2002) ("TMDLs are primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans.") (citing *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 984–85 (9th Cir. 1994)). A TMDL does not, by itself, prohibit any conduct or require any actions. Instead, each TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source controls. See, e.g., *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002) ("Each TMDL serves as the goal for the level of that pollutant in the waterbody to which that TMDL applies.... The theory is that individual-discharge permits will be adjusted and other measures taken so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL."); *Idaho Sportsmen's Coalition v. Browner*, 951 F.Supp. 962, 966 (W.D.Wash.1996) ("TMDL development in itself does not reduce pollution.... TMDLs inform the design and implementation of pollution control measures."); *Pronsolino*, 291 F.3d at 1129 ("TMDLs serve as a link in an implementation chain that includes ... state or local plans for point and nonpoint source pollution reduction ...."); *Idaho Conservation League v. Thomas*, 91 F.3d 1345, 1347 (9th Cir. 1996) (noting that a TMDL sets a goal for reducing pollutants). Thus, a TMDL forms the basis for further administrative actions that may require or

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and load allocations required by section 303(d), but do not set out comprehensive implementation provisions. [Fn. omitted].").

[317] United States Code, title 33, section 1313(d)(2); Code of Federal Regulations, title 40, section 130.7(d)(2).

[318] United States Code, title 33, section 1313(d)(2); Code of Federal Regulations, title 40, sections 130.6, 130.7(d)(2).

[319] California Government Code section 11353.

> prohibit conduct with respect to particularized pollutant discharges and waterbodies.
>
> For point sources, limitations on pollutant loadings may be implemented through the NPDES permit system. 40 C.F.R. § 122.44(d)(1)(vii)(B). EPA regulations require that effluent limitations in NPDES permits be "consistent with the assumptions and requirements of any available wasteload allocation" in a TMDL. *Id*.[320]

Federal law requires the Regional Board to include effluent limits in compliance with "all applicable water quality standards" and "consistent with the assumptions and requirements of any available wasteload allocation for the discharge" in stormwater permits as follows:

> When developing water quality-based effluent limits under this paragraph the permitting authority shall ensure that:
>
> (A) The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards; and
>
> (B) Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.[321]

An "effluent limitation" is defined in the CWA as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance."[322] Effluent limitations may be expressed as a numeric limitation or narrative limitations, with the use of best management practices. The definition of "effluent limitation" in the CWA "does not specify that a limitation must be numeric, and provides that an effluent limitation may be a schedule of compliance."[323] Federal EPA guidance states, however, that in cases where adequate information exists to develop more specific numeric effluent limitations to meet water quality standards, these numeric limitations are to be incorporated into stormwater permits as necessary and

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[320] *City of Arcadia v. U.S. EPA* (2003) 265 F.Supp.2d 1142, 1145.

[321] Code of Federal Regulations, title 40, section 122.44(d)(1)(vii).

[322] United States Code, title 33, section 1362(11). See also, Code of Federal Regulations, title 40, section 122.2.

[323] *Communities for a Better Environment v. State Water Resources Control Board* (2003) 109 Cal.App.4th 1089, 1104.

appropriate.[324] Any schedule of compliance shall require compliance as soon as possible, but not later than the applicable statutory deadline under the CWA.[325] Compliance schedules that are longer than one year in duration must set forth interim requirements and dates for their achievement.[326] If the compliance schedule extends past the expiration date of the permit, the schedule must include the final effluent limitations in the permit to ensure enforceability under the CWA.[327] Schedules of compliance included in a permit must be approved by EPA and be based on a reasonable finding, adequately supported by the administrative record, that:

- The compliance schedule will lead to compliance with an effluent limitation to meet water quality standards by the end of the compliance schedule.[328]
- The compliance schedule is "appropriate" and that compliance with the final water quality based effluent limit is required "as soon as possible."[329]
- The discharger cannot immediately comply with the water quality based effluent limit upon the effective date of the permit.[330]

In addition, to meet water quality standards federal law also requires dischargers to monitor compliance with the effluent limitations identified in an NPDES permit, implement best management practices to reduce and control the pollutants, and report monitoring results at least once per year, or within 24 hours for any noncompliance

[324] Exhibit L (6), *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 FR 43761, August 26, 1996.

[325] Code of Federal Regulations, title 40, section 122.47(a)(1).

[326] Code of Federal Regulations, title 40, section 122.47(a)(3).

[327] Exhibit L (26), U.S. EPA Memorandum, *Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits*, May 10, 2007, page 2.

[328] United States Code, title 33, section 1311(b)(1)(C); Code of Federal Regulations, title 40, sections 122.2, 122.44(d)(1)(vii)(A).

[329] Code of Federal Regulations, title 40, section 122.47(a)(1); Exhibit L (26), U.S. EPA Memorandum, *Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits*, May 10, 2007, pages 2-3.

[330] Code of Federal Regulations, title 40, section 122.47(a)(1).

which may endanger health or the environment.[331] An NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance.[332]

If a permittee fails to comply with these federal requirements, or otherwise violates the conditions in an NPDES permit, it may be subject to state and federal enforcement actions and private citizen lawsuits for injunctive relief and civil penalties.[333]

2. Except for Developing and Submitting a Watershed Plan to Achieve the WLAs Contained in Some of the *U.S. EPA-adopted TMDLs* as Required by Part VI.E.1.c., and Attachments M, O, P, and Q of the Test Claim Permit, the Requirements to Comply with the Remaining TMDL Provisions Are Not New and Do Not Mandate a New Program or Higher Level of Service.

Provision VI.E.1.c. of the test claim permit states the permittees "shall comply with the applicable water quality-based effluent limitations and/or receiving water limitations contained in Attachments L through R, consistent with the assumptions and requirements of the WLAs established in the TMDLs, including implementation plans and schedules, where provided for in the State adoption and approval of the TMDL (40 CFR §122.44(d)(1)(vii)(B); Cal. Wat. Code §13263(a))."[334] The permittees subject to each TMDL are identified in Attachment K.[335]

As explained below, except for developing and submitting a watershed plan to achieve the WLAs contained in some of the *U.S. EPA-adopted TMDLs* as required by Part VI.E.1.c., and Attachments M, O, P, and Q of the test claim permit, the requirements to comply with the remaining TMDL provisions are not new and do not mandate a new program or higher level of service.

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[331] United States Code, title 33, section 1342(p)(3)(B)(iii) requires that permits for discharges from municipal storm sewers "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, *including management practices*, control techniques and system, design and engineering methods, and such other provisions as . . . the State determines appropriate for the control of such pollutants." Emphasis added. See also, Code of Federal Regulations, title 40, sections 122.41 (conditions applicable to all permits, including monitoring and reporting requirements); section 122.44(i) (monitoring requirements to ensure compliance with permit limitations); section 122.48 (requirements for recording and reporting monitoring results); and Part 127 (electronic reporting).

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

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

[334] Exhibit A, Test Claim 13-TC-01, page 742 (test claim permit, Part VI.E.1.c.).

[335] Exhibit A, Test Claim 13-TC-01, page 742 (test claim permit, Part VI.E.1.b.).

a. The Commission does not have jurisdiction over Attachment R.

The Commission first finds that it does not have jurisdiction over Attachment R of the test claim permit (the Middle Santa Ana River Watershed Bacterial Indicator TMDL). This TMDL was adopted by the Santa Ana Regional Water Quality Control Board (not the Los Angeles Regional Water Quality Control Board) and applies solely to the two cities in the Middle Santa Ana River watershed: Claremont and Pomona.[336] The Test Claims specifically request reimbursement to comply with the TMDL requirements in Attachments L though Q, but do not mention Attachment R except for two obscure references.[337]

Government Code section 17553(b) requires Test Claims to include a "written narrative that identifies the *specific* sections of statutes or executive orders" alleged to contain a mandate. In addition, the Test Claims do not include evidence that Claremont, Pomona, nor any other permittee incurred costs to comply with the TMDL in Attachment R as required by Government Code section 17553(b)(2)(A).

Thus, this Decision does not address Attachment R.

b. Attachment K to the test claim permit does not impose any requirements on the permittees but simply identifies the TMDLs at issue in this Test Claim and, therefore, does not impose a state-mandated program.

As indicated above, Attachment K identifies the TMDLs in each watershed management area and the responsible permittees.[338] However, Attachment K does not impose any requirements on the permittees. Instead, as stated in Part VI.E.1.c. of the test claim permit, the permittees are required to comply with the applicable water quality-based effluent limitations or receiving water limitations contained in "Attachments L through R."[339]

Therefore, Attachment K does not impose a state-mandated program.

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[336] Exhibit A, Test Claim 13-TC-01, pages 975-976, 961-962 (Fact Sheet).

[337] Exhibit A, Test Claim 13-TC-01, pages 70-72. Claimants' mention Attachment R on pages 70 and 72 only in their citations and general statements. For example, on page 70, the claimants state: "The Permit requires Claimants to comply with applicable water quality-based effluent limitations and receiving water limitations contained in the Total Maximum Daily Loads ("TMDLs") set forth in the Permit's attachments L through R." Claimants' also mention Attachment R on page 72, "These WLAs are numeric limitations on the permittees' discharges; the permittees must develop programs to limit the pollutants in their discharges to these WLAs. Permit Part VI.E.1.c; Permit, Attachments L through R."

[338] Exhibit A, Test Claim 13-TC-01, pages 1065-1082 (Attachment K).

[339] Exhibit A, Test Claim 13-TC-01, page 742.

c. The test claim permit, in Part VI.E.1.c. and Attachment O, does not mandate a new program or higher level of service with respect to the Los Angeles River Trash TMDL, but simply carries over the final receiving water limitations and WQBELs for trash that were expressly required by a prior order (Order No. R4-2009-0130, which amended the prior permit Order 01-182).

The claimants request reimbursement to comply with Attachment O, the Los Angeles River Trash TMDL.[340] Part VI.E.1.c. of the test claim permit requires the permittees to comply with the applicable water quality-based effluent limitations or receiving water limitations contained in Attachments L through R.[341] Attachment O requires the following:

- Permittees shall comply with the final water quality-based effluent limitation of zero trash discharged to the Los Angeles River no later than September 30, 2016, and every year thereafter.[342]
- Permittees shall comply with interim and final water quality-based effluent limitations for trash discharged to the Los Angeles River, pursuant to the schedule in Attachment O.[343]
- Permittees shall comply with the interim and final water quality-based effluent limitations for trash in A.2. and A.3. above per the provisions in Part VI.E.5.[344]

Part VI.E.5., referenced above, states that permittees "may comply with the trash effluent limitations using any lawful means. Such compliance options are broadly classified as *full capture*, *partial capture, institutional controls,* or *minimum frequency of assessment and collection,* . . . and any combination of these may be employed to achieve compliance."[345]

The Los Angeles River Trash TMDL (Attachment O) has a long history, largely described by the court in *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, and the requirements to comply with that TMDL are not new.

In 1994, the Regional Board adopted a revised water quality control plan, or basin plan (1994 Basin Plan), which includes narrative water quality objectives. It provides that "[w]aters shall not contain floating materials, including solids, liquids, foams, and scum, in concentrations that cause nuisance or adversely affect beneficial uses," and "[w]aters shall not contain suspended or settleable material in concentrations that cause nuisance

[340] Exhibit A, Test Claim 13-TC-01, pages 1129-1131 (Attachment O).

[341] Exhibit A, Test Claim 13-TC-01, page 742.

[342] Exhibit A, Test Claim 13-TC-01, page 1129.

[343] Exhibit A, Test Claim 13-TC-01, page 1129.

[344] Exhibit A, Test Claim 13-TC-01, page 1131.

[345] Exhibit A, Test Claim 13-TC-01, page 749.

or adversely affect beneficial uses."[346] Beneficial uses of the Los Angeles River and surrounds include wildlife and marine habitat, including habitat for endangered species, and recreational activities such as fishing, walking, hiking, jogging, bicycling, horseback riding, bird watching, and photography.[347]

In 1996 and 1998 the Regional Board identified certain reaches of the Los Angeles River on the state's "303(d) list" as being impaired by trash, primarily through stormwater runoff in thousands of municipal storm drains.[348]

On September 19, 2001, the Regional Board adopted Resolution 01-013 to amend its 1994 Basin Plan to incorporate a TMDL for trash in the Los Angeles River.[349] The Trash TMDL set a numeric target of zero trash as "even a single piece of trash can be detrimental, and no level of trash is acceptable in waters of the state."[350] "The numeric target is staff's interpretation of the narrative water quality objective [in the 1994 Basin Plan], including an implicit margin of safety."[351]

The reduction of trash is to be phased over a period of several years, including an optional two-year baseline monitoring period. In lieu of baseline monitoring, cities may accept a default baseline allocation of "640 gallons of uncompressed trash per square mile per year," a value based on data the City of Calabasas provided.[352] The Trash TMDL provides for a "review of the current target [of zero trash] ... once a reduction of 50% has been achieved and sustained," "based on the findings of future studies regarding the threshold levels needed for protecting beneficial uses."[353]

Under the Trash TMDL, permittees may use a variety of compliance methods, including "[e]nd-of-pipe full capture structural controls," "partial capture control systems" and "[i]nstitutional controls." Permittees using a full-capture system meeting certain criteria will be deemed in compliance with the zero target if the systems are properly

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[346] Exhibit L (1), Basin Plan 1994, page 89.

[347] *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1406.

[348] *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1406.

[349] *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1406; Exhibit L (13), Resolution 01-013, Trash TMDL Los Angeles River.

[350] *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1406.

[351] *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1406.

[352] *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1406; Exhibit L (13), Resolution 01-013, Trash TMDL Los Angeles River, page 7.

[353] *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1406.

maintained and maintenance records are available for the Regional Board's inspection.[354]

On December 21, 2001, the Regional Board issued an order under Water Code section 13267 to the County of Los Angeles and copermittees under the Municipal NPDES Permit (Order 01-182) to submit baseline monitoring plans by February 1, 2002, and to monitor trash in the Los Angeles River between January 2002 and December 2003, with a final report due February 2004. The Regional Board intended to use resulting data to "refine" the default baseline waste load allocations in the Trash TMDL.[355]

In February and July 2002, the State Water Board and the Office of Administrative Law, respectively, approved the trash TMDL.[356]

Twenty-two cities then filed a lawsuit challenging the TMDL, which led to the court's decision in *City of Arcadia*.[357] The court rejected most of the cities' claims, but did find that the Regional Board did not adequately complete the required environmental checklist. Thus, a writ was issued directing the Regional Board to set aside Resolution 01-013 and adopt a new Resolution.[358]

On June 8, 2006, the Regional Board set aside the trash TMDL and Resolution 01-013 which established it, pursuant to the writ of mandate.[359]

On August 9, 2007, the Regional Board adopted Resolution 07-012 to amend the TMDL for trash in the Los Angeles River to comply with the court's decision. That resolution also sets baseline wasteload allocations for each responsible jurisdiction based on trash generation per land use within its boundaries; and establishes a schedule for progressive reductions from the baseline, over a period of nine years, until the numeric target of 0 trash is reached (with a 40 percent baseline reduction compliance requirement in Year 1 [by September 30, 2008] followed by approximately 10 percent

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[354] *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1406-1407; Exhibit L (13), Resolution 01-013, Trash TMDL Los Angeles River, pages 6-7.

[355] *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1407.

[356] *City of Arcadia v. State Water Resources Control Bd*. (2006) 135 Cal.App.4th 1392, 1407.

[357] *City of Arcadia v. State Water Resources Control Bd*. (2006) 135 Cal.App.4th 1392, 1407.

[358] *City of Arcadia v. State Water Resources Control Bd*. (2006) 135 Cal.App.4th 1392, 1436; Exhibit L (16), Resolution 07-012, Amendment to Trash TMDL in Los Angeles River, page 5.

[359] Exhibit L (16), Resolution No. 07-012, Amendment to Trash TMDL in Los Angeles River, page 5.

reductions each year thereafter until the numeric target of zero trash discharged from the MS4 is achieved by September 30, 2016).[360] The TMDL is summarized as follows:

> The Los Angeles River Watershed Trash TMDL identifies discharges from the municipal separate storm sewer system as the principal source of trash to the Los Angeles River and its tributaries. As such, WLAs were assigned to MS4 Permittees that discharge to the MS4 in the watershed. The WLAs are expressed as progressively decreasing allowable amounts of trash discharges from jurisdictional areas within the watershed. The Trash TMDL requires MS4 Permittees to make annual reductions of their discharges of trash to the Los Angeles River Watershed over a 9-year period, until the numeric target of zero trash discharged from the MS4 is achieved for the 2013-2014 storm year. The Basin Plan assigns MS4 Permittees within the Los Angeles River Watershed baseline Waste Load Allocations from which annual reductions are to be made. (See Basin Plan, Table 7-2.2.) The Basin Plan also specifies interim and final Waste Load Allocations as decreasing percentages of the Table 7-2.2 baseline WLAs, and specifies the corresponding "Compliance Points". (See Basin Plan, Table 7-2.3.)[361]

The Resolution further states that the TMDL implements existing narrative water quality objectives.[362]

This TMDL was subsequently approved by the State Water Board, the Office of Administrative Law (OAL), and U.S. EPA, and it became effective on September 23, 2008.[363] It is codified at California Code of Regulations, title 23, section 3935, which states in relevant part the following:

> Regional Board Resolution No. 2007-012 adopted on August 9, 2007 by the Los Angeles Regional Water Quality Control Board, modified the Regulatory provisions of the Water Quality Plan for the Los Angeles Region (Basin Plan) by (1) revising the Table of Contents and the List of Figures, Tables, and Inserts, (2) adding text to Chapter 3 (Water Quality Objectives) to reference specific guidelines for the Los Angeles River, and (3) adding text to Chapter 7 (Total Maximum Daily Loads Summaries) which establishes a Total Maximum Daily Load (TMDL) for Trash for the Los Angeles River Watershed. This TMDL addresses the impairment of water quality due to trash being discharged to the river via municipal storm

[360] Exhibit L (16), Resolution No. 07-012, Amendment to Trash TMDL in Los Angeles River, pages 13, 17.

[361] Exhibit A, Test Claim 13-TC-01, pages 1182-1183.

[362] Exhibit L (16), Resolution No. 07-012, Amendment to Trash TMDL in Los Angeles River, page 6.

[363] Exhibit A, Test Claim 13-TC-01, page 1182.

drains; and will be implemented primarily through the National Pollutant Discharge Elimination System storm-water permits.

The numeric target of zero trash in the river implicitly incorporates a margin of safety, based on a conservative interpretation of narrative water quality objectives. The TMDL sets baseline waste load allocations for each responsible jurisdiction based on trash generation per land use within its boundaries; and establishes a schedule for progressive reductions from the baseline, over a period of nine years, until the numeric target is reached. California Department of Transportation and the Los Angeles County Department of Public Works and its municipal storm water co-permittees are the responsible jurisdictions under this TMDL. To the extent nonpoint source implementation of load allocations is necessary, it will be accomplished, consistent with the *Plan for Nonprofit Source Pollution Control Policy.*

Responsible jurisdictions have the option of installing Executive Officer certified full capture systems, or implementing a combination of partial-capture trash best management practices and institutional controls in order to meet compliance requirements. An implementation report, outlining how responsible agencies intend to comply with the TMDL, will be prepared six months after the effective date of the TMDL. The implementation phase of the TMDL is scheduled to begin on September 30, 2008. Compliance with the TMDL numeric target must be demonstrated no later than September 30, 2016.[364]

On December 10, 2009, the Regional Board adopted Order No. R4-2009-0130 to amend Order 01-182 to incorporate the provisions of the Los Angeles River Trash TMDL, including the monitoring and reporting requirements.[365] These requirements are in Part 7 of the 01-182 permit, as amended by the 2009 Order, as follows:

- The compliance dates and effluent limitations are the same as what was included in the Basin Plan Amendment from Resolution No. 07-012 ("The interim and final effluent limitations set forth in Appendix 7-1 are equivalent to the Compliance Points identified in Table 7-2.3 of the Basin Plan."[366] Table 7-2.3 was adopted in Resolution 07-012 and established interim and final effluent limitations reducing

[364] California Code of Regulations, title 23, section 3935.

[365] Exhibit A, Test Claim 13-TC-01, page 615 (test claim permit, Part II.B., Permit History).

[366] Exhibit A, Test Claim 13-TC-01, page 1246, footnote 13 (Order No, 01-182, as amended by Order R4-2009-0130).

trash discharged to the Los Angeles River to zero no later than September 30, 2016.)[367]

- Permittees may comply with the effluent limitations using any lawful means. Such compliance options are broadly classified as *full capture*, *partial capture*, or *institutional controls*.[368]
- A Permittee relying entirely on *full capture systems* adequately sized and maintained, with up-to-date maintenance records that are available for inspection by the Regional Board, shall be deemed in compliance with its final effluent limitation if it demonstrates that all drainage areas under its jurisdiction are serviced by appropriate certified full capture systems.[369]
- Trash discharges from areas serviced solely by partial capture devices may be estimated as follows: trash reduction is equivalent to the partial capture devices' trash removal efficiency multiplied by the percentage of drainage area serviced by the devices.[370]
- Trash discharges from areas addressed by institutional controls and partial capture devices (where site-specific performance data is not available) shall be calculated using a mass balance approach, based on the daily generation rate (DGR) for a representative area, which is calculated as the total amount of trash collected during this period divided by the length of the collection period. The DGR for the applicable area under the permittees' jurisdiction or authority shall be extrapolated from that of the representative drainage area.[371]
- The Executive Officer may approve alternative compliance monitoring approaches for calculating total storm year trash discharge, upon finding that the

[367] Exhibit L (16), Resolution 07-012, Amendment to Trash TMDL in Los Angeles River, page 17.

[368] Exhibit A, Test Claim 13-TC-01, pages 1246-1249, emphasis added, (Order No. 01-182, as amended by Order R4-2009-0130). Institutional controls are defined in the test claim permit as "Programmatic trash control measures that do not require construction or structural modifications to the MS4. Examples include street sweeping, public education, and clean out of catch basins that discharge to storm drains." Exhibit A, Test Claim 13-TC-01, page 765.

[369] Exhibit A, Test Claim 13-TC-01, pages 1246-1247 (Order No. 01-182, as amended by Order R4-2009-0130).

[370] Exhibit A, Test Claim 13-TC-01, page 1247 (Order No. 01-182, as amended by Order R4-2009-0130).

[371] Exhibit A, Test Claim 13-TC-01, pages 1247-1248 (Order No. 01-182, as amended by Order R4-2009-0130).

program will provide a scientifically-based estimate of the amount of trash discharged from the permittee's MS4.[372]

- Where a permittee relies on a combination of approaches, it shall demonstrate compliance with the interim and final effluent limitations as specified above in areas where full capture systems are installed and as specified above in areas where partial capture devices and institutional controls are applied.[373]
- Permittees in the Los Angeles River Watershed were also required under the Monitoring and Reporting Program to implement a trash monitoring program to capture and quantify trash over a certain percentage of their total land area in wet and dry weather.[374]

The test claim permit does not impose any new activities on the claimants with respect to the Los Angeles River Trash TMDL and, thus, does not mandate a new program or higher level of service for the following reasons:

- The Fact Sheet states that "This Order carries over the final receiving water limitations and WQBELs that were included to implement the … Los Angeles River Trash TMDL … in the … 2009 amendments to Order No. 01-182.[375]
- Attachment O addresses the Los Angeles River Watershed Trash TMDL, and states that "Permittees shall comply with the final water quality-based effluent limitation of zero trash discharged to the Los Angeles River no later than September 30, 2016 and every year thereafter."[376] This is the same requirement imposed by Resolution No. 07-012 and Order No. 01-182 as amended by R4-2009-0130.[377]
- Part VI.E.5. identifies the same compliance options for trash that were contained in Order No. 01-182 as amended by R4-2009-0130 (*full capture*, *partial capture, institutional controls*) and adds another option to use a *minimum frequency of assessment and collection (MFAC)* approach for compliance with the effluent limitations.[378] The MFAC option is required to include monitoring, collection, and disposal of trash found in the receiving waters, implementation of BMPs based

[372] Exhibit A, Test Claim 13-TC-01, page 1248 (Order No. 01-182, as amended by Order R4-2009-0130).

[373] Exhibit A, Test Claim 13-TC-01, pages 1248-1249 (Order No. 01-182, as amended by Order R4-2009-0130).

[374] Exhibit L (7), Monitoring and Reporting Program for Order No. 01-182, pages 12-13.

[375] Exhibit A, Test Claim 13-TC-01, page 912 (Fact Sheet).

[376] Exhibit A, Test Claim 13-TC-01, page 1129.

[377] Exhibit A, Test Claim 13-TC-01, page 1246; Exhibit L (16), Resolution No. 07-012, Amendment to Trash TMDL in Los Angeles River, page 17.

[378] Exhibit A, Test Claim 13-TC-01, pages 748-753.

on current trash management practices in areas found to be sources of trash to the water body, and an assessment of the approach.[379] This option is similar to the trash monitoring conducted in the Los Angeles River Watershed under the prior permit.[380]

The claimants concede that the Los Angeles River Trash TMDL is not new, but argue that the compliance requirements in the test claim permit create a higher level of service since, the claimant alleges as stated below, the prior permit only required a reduction of trash by 30 percent and the test claim permit requires a reduction to zero:

> A mandate is "new" if the local government entity had not previously been required to institute it. *County of Los Angeles, supra,* 110 Cal. 4th at 1189. A "higher level of service" exists where the mandate results in an increase in the actual level or quality of governmental services provided. *San Diego Unified School Dist., supra,* 33 Cal. 4th at 877. These determinations are made by comparing the mandate with pre-existing requirements. *Id.* at 878.
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> Here, with the exception of the LA River Trash and Marina del Rey dry weather bacteria TMDLs, none of the TMDL requirement was present in the 2001 Permit. The other TMDL requirements are therefore a new mandate or a higher level of service. And with respect to the Los Angeles River Trash TMDL, under the 2001 Permit, permittees were required to be in compliance with the applicable interim or final effluent limitations for that TMDL as identified in 2001 Permit. 2001 Permit, Part 7.1.B.2. Those interim or final effluent limitations required a reduction of trash to 30 percent of the baseline load calculated as a rolling 3-year annual average. See LARWQCB Resolution No. 2007-012, Attachment A, Table 7.2.3. The 2012 Permit has amended those implementation requirements; permittees must now reduce trash to zero percent of the baseline allocation. Permit Attachment O, Part A.3. These implementation requirements are thus also new.[381]

The claimants reiterate they "were not legally obligated to reduce trash to zero. It was not until adoption of the test claim permit that Claimants were legally obligated to reduce trash to zero. An increase in reduction of trash from 30% to 100% is clearly an increase in the actual level of governmental services provided."[382]

The Water Boards argue that compliance with the Los Angeles River Trash TMDL is not new, asserting that "the 2001 Permit as amended in 2009, not the 2012 Permit, that first

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[379] Exhibit A, Test Claim 13-TC-01, page 752.

[380] Exhibit A, Test Claim 13-TC-01, page 749.

[381] Exhibit G, Claimants' Rebuttal Comments, pages 39-40.

[382] Exhibit I, Claimants' Comments on the Draft Proposed Decision, page 20.

required Claimants to reduce trash to zero percent of the baseline allocation."[383] The Water Boards further argue and explain the following:

> Claimants' reference to a "rolling 3-year average" in the 2007 TMDL is not applicable to the 2001 or 2012 Permits as the average was already taken into account when the Los Angeles Water Board calculated the interim and effluent limitations in 2009. In other words, the interim and final effluent limitations in Appendix 7-1 of the 2001 Permit already reflect a calculation of a "rolling 3- year average." The 2007 TMDL required that the wasteload allocation of 0% trash be achieved by September 30, 2014, with a compliance point of "3.3% of the baseline load calculated as a rolling 3-year annual average." [Fn, citing to Los Angeles Water Board Resolution No. 2007-012, Attachment A, Table 7.2.3.] Using a 3-year rolling average, a final effluent limitation of zero trash discharged by September 30, 2016 was included in the 2001 Permit.
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> It is also imperative to note that the 2001 Permit did not only require a reduction of trash to 30%. It clearly required a reduction to 0%. Claimants appear to make this illogical leap as the compliance schedule for the LAR Trash TMDL in the 2001 Permit required a 30% reduction be achieved by 2012 and the Los Angeles Water Board reissued the permit in 2012, before the final compliance deadline in 2016. As noted above, the 2001 Permit clearly established both interim and final effluent limitations from 2010 to 2016, with a final compliance deadline of September 30, 2016 and every year thereafter. The fact that the Los Angeles Water Board reissued the permit in 2012 and continued to include the previously established schedule does not in any way make inclusion of the previously established schedule a new program or higher level of service. The requirement for Claimants to comply with the interim and final effluent limitations related to the LAR Trash TMDL was first required in 2009, period. Claimants' untimely challenge to requirements that were first established in 2009 fails as a matter of law.[384]

Based on a plain reading of the record, the claimants' interpretation of Attachment A to Order No. 2007-0012 is not correct. That order required phased reductions over a period of nine years, from existing baseline loads to zero trash in 2016 — and does not require a reduction to just 30 percent of the baseline as suggested by the claimants.[385] It did require a reduction to 30 percent in 2012 when the test claim permit was adopted, but as indicated above both the prior permit and the test claim permit require a phased reduction to zero trash by 2016. Moreover, as explained by the Water Boards, the interim and final effluent limitations in the 2001 Permit, which were taken directly from

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[383] Exhibit F, Water Boards' Comments on the Test Claims, page 53.

[384] Exhibit F, Water Boards' Comments on the Test Claims, pages 53-54.

[385] Exhibit L (16), Resolution No. 07-012, Amendment to Trash TMDL in Los Angeles River, page 17.

the Basin Plan amendment, already reflect a calculation of a rolling three-year average, and are identical to those identified in Attachment O.[386]

Further, the TMDL simply implements the water quality standards in the 1994 Basin Plan, which prohibited the discharge of trash: "[w]aters shall not contain floating materials, including solids, liquids, foams, and scum, in concentrations that cause nuisance or adversely affect beneficial uses," and "[w]aters shall not contain suspended or settleable material in concentrations that cause nuisance or adversely affect beneficial uses."[387] The prior permit prohibited any discharges that cause or contribute to the violation of water quality standards or objectives in the Basin Plan.[388] In addition, permittees were required to effectively prohibit non-stormwater discharges into the MS4s and watercourses, unless they had a permit to discharge or the discharge was conditionally exempt, but trash was not exempted from the prohibition.[389] Rather, as stated above, permittees were required to reduce trash to zero under the prior permit and had the same options they have under the test claim permit: full capture, partial capture, institutional controls, or the use a minimum frequency of assessment and collection (MFAC) approach (i.e., monitoring, collection, and disposal of trash found in the receiving waters).[390] The activities required by the test claim permit (Attachment O, which requires compliance with Part VI.E.5.)[391] to achieve the same effluent limitations of zero trash discharged by 2016 are the same as prior law, and do not mandate a new program or higher level of service.

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[386] Exhibit L (16), Resolution No. 07-012, Amendment to Trash TMDL in Los Angeles River, pages 16, 17; Exhibit A, Test Claim 13-TC-01, page 1129.

[387] Exhibit L (1), Basin Plan 1994, page 89.

[388] Exhibit A, Test Claim 13-TC-01, page 1191 (Order No. 01-182, Part 2, Receiving Water Limitations.)

[389] Exhibit A, Test Claim 13-TC-01, pages 1190-1191 (Order No. 01-182, Part 1, Discharge Prohibitions).

[390] Exhibit A, Test Claim 13-TC-01, pages 748-753, 1246-1249.

[391] Exhibit A, Test Claim 13-TC-01, pages 748-753, 1129-1131 (test claim permit, Part VI.E.5., and Attachment O, the Los Angeles River Trash TMDL).

d. The test claim permit, in Part VI.E.1.c. and Attachment M, does not mandate a new program or higher level of service with respect to the Marina del Rey Harbor Mother's Beach and Back Basins Bacteria TMDL, Summer Dry Weather only (Attachment M), but carries over the final receiving water limitations and WQBELs that were expressly included to implement the TMDL in the prior permit (Order R4-2007-0042, which amended the prior permit, Order No. 01-182).

The claimants are requesting reimbursement to comply with the Marina del Rey Harbor Mother's Beach and Back Basins Bacteria TMDL, Summer Dry Weather, located in Attachment M of the test claim permit.[392]

Part VI.E.1.c. of the test claim permit requires the permittees to comply with the applicable water quality-based effluent limitations or receiving water limitations contained in Attachments L through R.[393] Part VI.E.1.d. states, "A Permittee may comply with water quality-based effluent limitations and receiving water limitations in Attachments L through R using any lawful means." Attachment M has receiving water limitations of zero allowable exceedance days during summer dry weather measured by daily or weekly monitoring, and requires compliance "as of the effective date of this Order."[394]

As explained below, compliance with this TMDL is not new.

On August 7, 2003, the Regional Board adopted the Marina Del Rey Harbor Mother's Beach and Back Basins Bacteria TMDL for dry weather discharges from the MS4 to the MDR Harbor in Resolution 2003-012.[395] The County of Los Angeles, City of Los Angeles, and Culver City "are jointly responsible for complying with the waste load allocation at monitoring locations impacted by MS4 discharges."[396]

Under the TMDL, the wasteload allocations for summer dry-weather are zero days of allowable exceedances. Footnote 3 of Resolution 2003-012 states the following:

> In order to fully protect public health, no exceedances are permitted at any monitoring location during summer dry-weather (April 1 to October 31). In addition to being consistent with the two criteria, waste load allocations of zero (0) days of allowable exceedances are further supported by the fact that the California Department of Health Services has established minimum protective bacteriological standards — the same as the numeric

[392] Exhibit A, Test Claim 13-TC-01, pages 1115-1118 (Attachment M).

[393] Exhibit A, Test Claim 13-TC-01, page 742.

[394] Exhibit A, Test Claim 13-TC-01, pages 1115-1116.

[395] Exhibit L (20), Resolution 2003-012, Attachment A.

[396] Exhibit L (20), Resolution 2003-012, Attachment A, page 4.

> targets in this TMDL — which, when exceeded during the period April 1 to October 31, result in posting a beach with a health hazard warning (California Code of Regulations, Title 17, Section 7958).[397]

Within three years of the effective date of the TMDL, there shall be no allowable exceedances of the single sample limits at any location during summer dry-weather (April 1 to October 31), and the rolling 30-day geometric mean targets must be achieved.[398] Thus, this TMDL requires compliance with the summer dry weather TMDL by March 18, 2007, before the effective date of the test claim permit (December 28, 2012).[399]

The TMDL further provides that "responsible jurisdictions and agencies" shall conduct daily or systematic weekly sampling at the initial point of mixing with the receiving water at all major drains, at existing monitoring stations, and at other designated monitoring stations to determine compliance. For Mothers' Beach the targets will also apply at existing or new monitoring sites, with samples taken at ankle depth. For Basins D, E, and F the targets will also apply at existing or new monitoring sites with samples collected at surface and at depth. Samples collected at ankle depth shall be taken on an incoming wave. If the number of exceedance days is greater than the allowable number of exceedance days, the responsible jurisdictions and agencies shall be considered out of compliance with the TMDL.[400]

If a single sample shows the discharge or contributing area to be out of compliance, the Regional Board may require, through permit requirements or the authority contained in Water Code Section 13267, daily sampling where the effluent from the storm drain initially mixes with the receiving water or at the existing monitoring location (if it is not already) until all single sample events meet bacteria water quality objectives. Furthermore, if a location is out-of-compliance as determined in the previous paragraph, the Regional Board shall require responsible agencies to initiate an investigation, which at a minimum shall include daily sampling where the effluent from the storm drain initially mixes with the receiving water or at the existing monitoring location until all single sample events meet bacteria water quality objectives. If bacteriological water quality objectives are exceeded in any three weeks of a four-week period when weekly sampling is performed, or, for areas where testing is done more than once a week, 75% of testing days produce an exceedance of bacteria water quality objectives, the responsible agencies shall conduct a source investigation of the sub-watersheds pursuant to protocols established under Water Code Section 13178.[401]

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[397] Exhibit L (20), Resolution 2003-012, Attachment A, page 5.

[398] Exhibit L (20), Resolution 2003-012, Attachment A, page 6.

[399] Exhibit A, Test Claim 13-TC-01, page 610.

[400] Exhibit L (20), Resolution 2003-012, Attachment A, page 8.

[401] Exhibit L (20), Resolution 2003-012, Attachment A, pages 8-9.

The TMDL became effective on March 18, 2004, and is codified at California Code of Regulations, title 23, section 3939.4 (Register 2004, No. 5), which states in relevant part the following:

> On August 7, 2003, the Los Angeles Regional Water Quality Control Board (Regional Board), adopted Resolution No. 2003-012 amending the Water Quality Control Plan for the Los Angeles Region (Basin Plan). The amendment revised the Basin Plan by incorporating a total maximum daily load for bacteria at Marina del Rey Mothers' Beach and back basins. The regulatory provisions are added to Chapter 7 of the Water Quality Control Plan.
>
> Numeric targets for the TMDL are expressed as days of exceedance of bacteria objectives. The implementation plan for this TMDL stipulates that: No days of exceedance are permitted at any monitoring location during the summer dry-weather season (April 1 to October 31) and the geometric mean limits must be met at all times; a maximum of three days of exceedance is permitted for the winter dry-weather season (November 1 to March 31), and the geometric mean limits must be met at all times . . . .

On August 9, 2007, the prior permit (Order 01-182) was amended by Order R4-2007-0042 to expressly incorporate the TMDL.[402] Finding 30 states the following:

> The Waste Load Allocations (WLAs) in the Dry Weather Bacteria TMDL and the MDR Bacteria TMDL are expressed as the number of allowable days that the Santa Monica Bay beaches, Mothers' Beach and Basins D, E, and F in Marina del Rey Harbor may exceed the Basin Plan water quality objectives for protection of Water Contact Recreation (REC-1) in marine waters, specifically the water quality objectives for bacteria. Appropriate modifications to this order are therefore included in Parts 1 (Discharge Prohibitions) and 2 (Receiving Water Limitations), pursuant to 40 CFR 122.41(f) and 122.62, and Part 6.I.1 of this Order. Additionally, 40 CFR 122.44(d)(1)(vii)(B) requires that NPDES permits be consistent with the assumptions and requirements of any available waste load allocation. Tables 7-4.1, 7-4.2a, and 7-4.3 of the Basin Plan set forth the pertinent provisions of the Dry Weather Bacteria TMDL. Tables 7-5.1, 7-5.2, and 7-5.3 of the Basin Plan set forth the pertinent provisions of the MDR Bacteria TMDL. They require that *during Summer Dry Weather there shall be no exceedances* in the Wave Wash of the single sample or the geometric mean bacteria objectives set to protect the Water Contact Recreation (REC-1) beneficial use in marine waters. *Accordingly, a prohibition is included in this Order barring discharges from a MS4 to Santa Monica Bay or Marina del Rey Harbor that result in exceedance of*

[402] Exhibit L (10), Order No. 01-182 As Amended by R4-2007-0042.

these objectives. Since the TMDL and the WLAs contained therein are expressed as receiving water conditions, Receiving Water Limitations have been included in this Order that are consistent with and implement the zero exceedance day WLAs."[403]

Part 1.B. of the prior permit addressing "Discharge Prohibitions" states "Discharges of Summer Dry Weather flows from MS4s into Santa Monica Bay 2 or into Marina del Rey Harbor Basins D, E, or F, including Mothers' Beach, that cause or contribute to exceedances of the bacteria Receiving Water Limitations in Part 2.5 and 2.6 below, are prohibited."[404] Footnote 3 further states, "All Permittees within a subwatershed of the Santa Monica Bay Watershed Management Area are jointly responsible for compliance with the limitations . . . ."[405]

Part 2.6. of the prior permit addressing "Receiving Water Limitations" states, "During Summer Dry Weather there shall be no discharges of bacteria from MS4s into Marina del Rey Harbor Basins D, E, or F, including Mothers' Beach that cause or contribute to exceedances of the applicable bacteria objectives. The applicable bacteria objectives include both the single sample and geometric mean bacteria objectives set to protect the Water Contact Recreation (REC-1) beneficial use, as set forth in the Basin Plan."[406]

The test claim permit does not impose any new activities on the claimants with respect to the Marina del Rey Harbor Mother's Beach and Back Basins Bacteria *Summer Dry Weather* TMDL. The Fact Sheet for the test claim permit states "This Order carries over the final receiving water limitations and WQBELs that were included to implement the Marina del Rey Harbor Back Basins and Mothers' Beach Bacteria TMDL . . . in the 2007 . . . amendments to Order No. 01-182."[407] Attachment M (Section F) of the test claim permit addresses this TMDL.[408] It contains the same receiving water limitations of zero allowable exceedance days during summer dry weather measured by daily or weekly monitoring, and requires compliance "as of the effective date of this Order."[409] Attachment M also refers to an amended bacteria TMDL adopted by Resolution 12-007, and the Fact Sheet to the permit states that "the method of calculating the geometric mean was changed from the existing methods in the current Bacteria TMDLs and the allowable winter dry weather exceedance days was redefined."[410] However, the

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[403] Exhibit L (10), Order No. 01-182 as amended by R4-2007-0042, page 17, emphasis added.

[404] Exhibit L (10), Order No. 01-182 as amended by R4-2007-0042, page 24.

[405] Exhibit L (10), Order No. 01-182 as amended by R4-2007-0042, page 24, footnote 3.

[406] Exhibit L (10), Order No. 01-182 as amended by R4-2007-0042, page 26.

[407] Exhibit A, Test Claim 13-TC-01, page 912 (Fact Sheet).

[408] Exhibit A, Test Claim 13-TC-01, pages 1115 et seq.

[409] Exhibit A, Test Claim 13-TC-01, pages 1115-1116.

[410] Exhibit A, Test Claim 13-TC-01, pages 969-970 (Fact Sheet), 1116-1117.

amended TMDL still contains the same limitation of zero allowable exceedance days during summer dry weather measured by daily or weekly monitoring, and continues to state that "By March 18, 2007, there shall be no allowable exceedances of the single sample limits at any location during summer dry-weather (April 1 to October 31) . . . ."[411]

The requirements to implement the TMDL are the same under the prior permit as they are under the test claim permit. Under the prior permit, the permittees had to implement the TMDL through control measures and other actions to reduce the pollutants in the discharge and effectively prohibit non-stormwater discharges in accordance with the Stormwater Quality Management Program (SQMP).[412] The SQMP was an enforceable component of the prior permit and was required, at a minimum, to comply with federal regulations:

> The SQMP, shall, at a minimum, comply with the applicable storm water program elements in 40 CFR 122.26(d)(2). The SQMP and its components shall be implemented so as to reduce the discharges of pollutants in storm water to the MEP.[413]

The prior permit further states, "The Permittees shall implement or require the implementation of the most effective combination of BMPs for storm water/urban runoff pollution control. When implemented, BMPs are intended to result in the reduction of pollutants in storm water to the MEP."[414]

The test claim permit similarly leaves the planning and implementation of the TMDL to the local government permittees. Part VI.E.1.d. of the test claim permit states, "A Permittee may comply with water quality based effluent limitations and receiving water limitations in Attachments L through R using any lawful means."[415] The test claim permit authorizes the permittees to submit a customized Watershed Management Program (WMP) or Enhanced Watershed Management Program (EWMP) to comply with the TMDLs, which at a minimum "shall include management programs consistent with 40 CFR section 122.26(d)(2)(iv)(A)-(D)."[416]

Moreover, the monitoring requirements for this TMDL are the same. As indicated above, Attachment M (Section F) requires daily or weekly monitoring.[417] Resolution 2003-012 required "responsible agencies" (defined to include the County of Los Angeles, the City of Los Angeles, and Culver City) to conduct daily or systematic weekly

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[411] Exhibit A, Test Claim 13-TC-01, page 1116 (test claim permit, Attachment M, section F.d.1.); Exhibit L (17), Resolution 12-007, Attachment B, pages 4, 6.

[412] Exhibit L (10), Order No. 01-182 as amended by R4-2007-0042, page 25 (Part 2.).

[413] Exhibit L (10), Order No. 01-182 as amended by R4-2007-0042, page 26 (Part 3.A.).

[414] Exhibit L (10), Order No. 01-182 as amended by R4-2007-0042, page 27 (Part 3.B.).

[415] Exhibit A, Test Claim 13-TC-01, page 742 (test claim permit), emphasis added.

[416] Exhibit A, Test Claim 13-TC-01, pages 663, 743 (test claim permit).

[417] Exhibit A, Test Claim 13-TC-01, pages 1115-1116.

sampling at the initial point of mixing with the receiving water at all major drains, at existing monitoring stations and at other designated monitoring stations to determine compliance. Samples collected at ankle depth shall be taken on an incoming wave.[418] If the number of exceedance days is greater than the allowable number of exceedance days, the "responsible jurisdictions and agencies" shall be considered out of compliance with the TMDL.[419]

The County of Los Angeles and the County of Los Angeles Flood Control District agree that compliance with the *summer dry weather* TMDL is not new.

> With respect to the Marina del Rey Bacteria TMDL, *under the 2001 Permit, permittees were required to be in compliance with only the summer dry weather provisions. 2001 Permit, Part 2.6*. The 2012 Permit has different, additional requirements. Under the Permit, the County and District are *now required* to comply with the Marina del Rey Bacteria *wet weather TMDL requirements in addition to dry weather*. Permit Attachment M, Part F.1. These new requirements are new programs or higher levels of service. . . .
>
> [§]
>
> Accordingly, *with the exception of the dry weather requirements of the Marina del Rey Bacteria TMDL*, all TMDL requirements in the Permit, including monitoring requirements with respect thereto, are new programs or higher levels of service.[420]

Therefore, the test claim permit does not mandate a new program or higher level of service to comply with the Marina del Rey Harbor Mother's Beach and Back Basins Bacteria TMDL, Summer Dry Weather in accordance with Attachment M (Section F) and Part VI.E.1.d. of the test claim permit.[421]

> e. Compliance with the numeric WQBELS and receiving water limitations for the remaining Regional Board-adopted TMDLs, as required by Part VI.E.1.c. of the test claim permit and Attachments L through Q, was expressly required by the prior permit and, thus, compliance with the TMDLs to meet water quality standards is not new and does not mandate a new program or higher level of service.

The claimants request reimbursement to comply with the remaining TMDLs in accordance with Part VI.E.1.c. and the requirements in Attachments L through Q. Part VI.E.1.c. states, "The Permittees shall comply with the applicable water quality-based effluent limitations and/or receiving water limitations contained in Attachments L through

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[418] Exhibit L (20), Resolution No. 2003-012, Attachment A, pages 4, 8.

[419] Exhibit L (20), Resolution No. 2003-012, Attachment A, page 8.

[420] Exhibit B, Test Claim 13-TC-02, pages 18-19.

[421] Exhibit A, Test Claim 13-TC-01, pages 742, 1115-1118.

R, consistent with the assumptions and requirements of the WLAs established in the TMDLs, including implementation plans and schedules, where provided for in the State adoption and approval of the TMDL."[422] Part VI.E.1.d. states, "A Permittee may comply with water quality-based effluent limitations and receiving water limitations in Attachments L through R using any lawful means."[423]

The test claim permit incorporates the wasteload allocations (WLAs) adopted in the remaining Regional Board TMDLs in Attachments L through Q for trash, bacteria, nitrogen compounds, chloride, toxics, metals, pesticides, and nutrients by establishing numeric water quality-based effluent limitations, or WQBELs, equivalent to the WLAs. "Final WQBELs are included in this Order based on the final WLAs assigned to discharges from the Los Angeles County MS4 in all available TMDLs."[424]

Where the discharge condition in the TMDL was expressed as a receiving water condition, such as an allowable number of exceedance days for bacteria, the test claim permit's effluent limitation is also expressed as a receiving water limitation.[425] In this respect, Part VI.E.2.c.i. states, "For receiving water limitations in Part V.A. associated with water body pollutant combinations addressed in a TMDL, Permittees shall achieve compliance with the receiving water limitations in Part V.A. as outlined in this Part VI.E. and Attachments L through R of this Order."[426] Part VI.E.2.c.ii. then states, "A Permittee's full compliance with the applicable TMDL requirement(s), including compliance schedules, of this Part VI.E. and Attachments L through R constitutes compliance with Part V.A. of this Order for the specific pollutant addressed in the TMDL."[427] In other words, as long as a permittee is complying with the requirements for the TMDL, the permittee is deemed to be in compliance with the receiving water limitations, even if a pollutant exceeds water quality standards at interim dates. For example, the test claim permit explains:

- "Bacteria WLAs assigned to MS4 discharges are expressed as the number of allowable exceedance days that a water body may exceed the Basin Plan water quality objectives for protection of the REC-1 beneficial use. Since the TMDLs and the WLAs contained therein are expressed as receiving water conditions, receiving water limitations have been included in this Order that are consistent with and implement the allowable exceedance day WLAs. Water quality-based effluent limitations are also included equivalent to the Basin Plan water quality objectives to allow the opportunity for Permittees to individually demonstrate compliance at an outfall or jurisdictional boundary, thus isolating the Permittee's

[422] Exhibit A, Test Claim 13-TC-01, page 742.

[423] Exhibit A, Test Claim 13-TC-01, page 742.

[424] Exhibit A, Test Claim 13-TC-01, page 912 (Fact Sheet).

[425] Exhibit A, Test Claim 13-TC-01, page 976 (Fact Sheet).

[426] Exhibit A, Test Claim 13-TC-01, page 744.

[427] Exhibit A, Test Claim 13-TC-01, page 744.

pollutant contributions from those of other Permittees and from other pollutant sources to the receiving water."[428]

- "WLAs for trash are expressed as progressively decreasing allowable amounts of trash discharges from a Permittee's jurisdictional area within the drainage area to the impaired water body. The Trash TMDLs require each Permittee to make annual reductions of its discharges of trash over a set period, until the numeric target of zero trash discharged from the MS4 is achieved. The Trash TMDLs specify a specific formula for calculating and allocating annual reductions in trash discharges from each jurisdictional area within a watershed. The formula results in specified annual amounts of trash that may be discharged from each jurisdiction into the receiving waters."[429]
- The "TMDL WLAs for other pollutants (e.g., metals and toxics) are expressed as concentration and/or mass and water quality-based effluent limitations have been specified consistent with the expression of the WLA, including any applicable averaging periods. Some TMDLs specify that, if certain receiving water conditions are achieved, such achievement constitutes attainment of the WLA. In these cases, receiving water limitations and/or provisions outlining these alternate means of demonstrating compliance are included in the TMDL provisions in Part VI.E of this Order."[430]

Finally, where a TMDL implementation plan and schedule was established through a Basin Plan Amendment for a TMDL, it is incorporated into the test claim permit as a compliance schedule to achieve interim and final WQBELs and corresponding receiving water limitations.

> In California, TMDL implementation plans [fn. omitted] are typically adopted through Basin Plan Amendments. The TMDL implementation plan, which is part of the Basin Plan Amendment, becomes a regulation upon approval by the State of California Office of Administrative Law (OAL). [Fn,. omitted.] Pursuant to California Water Code sections 13240 and 13242, TMDL implementation plans adopted by the Regional Water Board "shall include … a time schedule for the actions to be taken [for achieving water quality objectives]," which allows for compliance schedules in future permits. This Basin Plan Amendment becomes the applicable regulation that authorizes an MS4 permit to include a compliance schedule to achieve effluent limitations derived from wasteload allocations.
>
> Where a TMDL implementation schedule has been established through a Basin Plan Amendment, it is incorporated into this Order as a compliance

[428] Exhibit A, Test Claim 13-TC-01, page 623 (test claim permit).

[429] Exhibit A, Test Claim 13-TC-01, page 623 (test claim permit).

[430] Exhibit A, Test Claim 13-TC-01, page 624 (test claim permit).

schedule to achieve interim and final WQBELs and corresponding receiving water limitations, in accordance with 40 CFR section 122.47.

[¶¶]

The compliance schedules established in this Order are consistent with the implementation plans established in the individual TMDLs.[431]

Thus, the requirements adopted in the Basin Plan Amendments incorporating the adopted TMDLs are included in the test claim permit. However, as explained below, compliance with the TMDLs is not new.

i. The prior permit (Order 01-182, Part 3.C.) expressly required permittees to revise their stormwater management plans to comply with the requirements and WLAs adopted in the TMDLs.

These TMDLs were adopted and amended into the Basin Plan before the test claim permit became effective on December 28, 2012, and during the term of the prior permit (Order No. 01-182).[432] The prior permit (Order No. 01-182) expressly required the permittees to comply with the requirements and WLAs developed and approved under the Regional Board-adopted TMDLs and, thus, compliance with the Regional Board-adopted TMDLs is not new and does not constitute a new program or higher level of service.

Part 3.C. of the prior permit expressly required permittees to *revise* the Stormwater Quality Management Plan (SQMP) to incorporate program implementation amendments to comply with the WLAs developed and approved under the TMDLs:

The Permittees shall revise the SQMP, at the direction of the Regional Board Executive Officer, to incorporate program implementation amendments so as to comply with regional, watershed specific requirements, and/or waste load allocations developed and approved pursuant to the process for the designation and implementation of Total Maximum Daily Loads (TMDLs) for impaired water bodies.[433]

The "Stormwater Quality Management Program" or SQMP "means the Los Angeles Countywide Stormwater Quality Management Program, which includes descriptions of programs, *collectively developed by the Permittees* in accordance with provisions of the NPDES Permit, to comply with applicable federal and state law, as the same is

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[431] Exhibit A, Test Claim 13-TC-01, pages 980-981 (Fact Sheet).

[432] The TMDLs became effective from July 15, 2003 through March 23, 2012. Exhibit A, Test Claim 13-TC-01, pages 963-965, 976 (Fact Sheet, including Table of TMDLs with Resolution Numbers, Adoption Dates and Effective Dates).

[433] Exhibit A, Test Claim 13-TC-01, page 1193. WLAs are described in the test claim permit Fact Sheet as "a discharge condition that must be achieved in order to ensure that water quality standards are attained in the receiving water." (Exhibit A, Test Claim 13-TC-01, page 976 (Fact Sheet).)

amended from time to time."[434] The SQMP "shall, at a minimum, comply with the applicable storm water program requirements of 40 CFR 122.26(d)(2)," which specifies the minimum federal requirements for a permittee's proposed management and monitoring programs.[435] The programs in the countywide SQMP may be modified by an individual permittee when a permittee implements additional controls, different controls, or determines that certain BMPs are not applicable, and under those circumstances, the permittee "shall develop a local SQMP."[436] In any event, the prior permit requires that the "Permittees "shall implement or require the implementation of the most effective combination of BMPs for storm water/urban runoff pollution control. When implemented, BMPs are intended to result in the reduction of pollutants in storm water to the MEP."[437]

The prior permit's Fact Sheet explains:

> Part 3, Section C. of the proposed permit specifies that the Permittees shall amend the SQMP to comply with load allocations approved pursuant to adoption and approval of Total Maximum Daily Loads (TMDLs). The addition of this provision represents a significant difference from the existing permit, which does not contain a provision for implementation of TMDLs. In addition, the Special Provisions for the Permittees' Program for Public Agencies (Part 4, Sections F.7. and F.8.) specifies performance measures for watersheds subject to a trash TMDL.
>
> TMDLs are one of the Regional Board's highest priorities. In view of the Region's highly urbanized environment, it is likely that pollutants in storm water will be allocated significant load reductions. While specific load reductions can't be forecast at this time, the Board does envision that storm water permits will be an important mechanism for implementing pollutant load reductions. An early example of the relationship between TMDLs and storm water permits is the trash TMDL adopted for the Los Angeles River and Ballona Creek on September 13, 2001, which directs municipalities to monitor for baseline trash levels for 2-4 years, and then to start implementing trash prevention and/ or control measures to reduce trash to "zero" by the year 2013. This 5-year permit incorporates the monitoring requirements of the TMDL and, based on the results of the monitoring requirements, specified load reductions of 60% by 2006. Permits that are adopted subsequent to this MS4 permit are expected to incorporate the remaining load allocation reductions to achieve "zero" trash in the Los Angeles River and Ballona Creek by 2013.

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[434] Exhibit A, Test Claim 13-TC-01, page 1237 (Order No. 01-182, Definitions), emphasis added.

[435] Exhibit A, Test Claim 13-TC-01, page 1193 (Order No. 01-182, Part 3.A.2.).

[436] Exhibit A, Test Claim 13-TC-01, page 1193 (Order No. 01-182, Part 3.A.4.)

[437] Exhibit A, Test Claim 13-TC-01, page 1193 (Order No. 01-182, Part 3.B.)

> *Public review of the Regional Board's TMDLs, will occur during the TMDL adoption process (there need not be an additional public process for TMDL implementation and Basin Plan amendment). Upon approval of a TMDL, the waste load allocations and load allocations (specified in that TMDL) will become effective and enforceable under this permit.* This TMDL provision is consistent with TMDL provisions in the Long Beach and Ventura County MS4 permits.[438]

The permit record gives more detail on the incorporation of the Regional Board-adopted TMDLs under the prior permit. The Regional Board's agenda for a July 26, 2001 workshop, Item 5, discussed the requirement to implement the load allocations approved in a TMDL *without reopening the permit*:

> Receiving Water Limitations (Part 2, page 16): Clarifies that discharges must meet narrative water quality objectives, including that they must not cause nuisance (in addition to the existing requirement to reduce pollutants to the maximum extent practicable). Additionally, Part 3, Section 2 (page 18) adds a requirement to implement load allocations approved by the Board in a TMDL, without reopening the permit.[439]

The Regional Board's July 26, 2001, workshop agenda also stated:

> Total Maximum Daily Loads (TMDLs): Should the Board include a provision requiring implementation of TMDL load reductions, without reopening the permit?
>
> TMDLs are one of the Board's highest priorities. In view of the Region's highly urbanized environment, it is likely that pollutants in storm water will be allocated significant load reductions. While specific load reductions can't be forecast at this time, staff has structured the permit as a vehicle for achieving load reductions (Part 3, Section C).
>
> Public review of TMDLs, which will typically be in the form of an amendment to the Basin Plan, will occur during the TMDL adoption process; and staff does not anticipate that there will be a need for an additional public process for TMDL implementation measures. Therefore, upon approval of a TMDL, implementation of municipal storm water requirements (specified in that TMDL) will become effective and enforceable under the permit. *In other words, municipal storm water requirements will be automatically included in this proposed permit upon adoption of a TMDL by the Board, without reopening this permit.* This

[438] Exhibit L (5), Fact Sheet for Order No. 01-182, pages 14-15, emphasis added.

[439] Exhibit L (12), Regional Board Notice of Public Meeting and Workshop, July 26, 2001, page 9.

TMDL requirement and structure is consistent with TMDL provisions in the City of Long Beach and County of Ventura permits.[440]

The court in *County of Los Angeles v. State Water Resources Control Board*, which addressed legal challenges to the adoption of the prior permit, further explains that the prior permit required compliance with the TDMLs as follows:

> The permittees were to implement the Storm Water Quality Management Program which meet the standards of 40 Code of Federal Regulations, part 122.26(d)(2) (2000) and reduce the pollutants in storm waters to the maximum extent possible with the use of best management practices. *Further, the permittees were required to revise the Storm Water Quality Management Program to comply with specified total daily maximum load allocations. If a permittee modified the countywide Storm Water Quality Management Program, it was required to implement a local management program.* Each permittee was required by November 1, 2002, to adopt a storm water and urban runoff ordinance. By December 2, 2002, each permittee was required to certify that it had the requisite legal authority to comply with the permit through adoption of ordinances or municipal code modifications.[441]

This conclusion is further evidenced by Part VI.E.4. of the test claim permit, which addresses TMDLs where the *final compliance deadlines have passed* pursuant to the implementation schedules adopted in the Basin Plan amendments for the TMDLs. These include the following TMDLs:

- Santa Clara River Nitrogen Compounds TMDL, final compliance date of March 23, 2004.
- Upper Santa Clara River Chloride TMDL, final compliance date of April 6, 2010.
- Santa Monica Bay Beaches Bacteria TMDL *Summer Dry Weather only,* final compliance date of July 15, 2006.
- Santa Monica Bay Beaches Bacteria TMDL *Winter Dry Weather only,* final compliance date of July 15, 2009.
- Malibu Creek and Lagoon Bacteria TMDL *Summer Dry Weather only,* final compliance date of January 24, 2009.
- Malibu Creek and Lagoon Bacteria TMDL *Winter Dry Weather only,* final compliance date of January 24, 2012.

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[440] Exhibit L (12), Regional Board Notice of Public Meeting and Workshop, July 26, 2001, page 19.

[441] *County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985, 993, emphasis added.

- Marina del Rey Harbor Mothers' Beach and Back Basins Bacteria TMDL *Dry Weather Year-round only,* final compliance date of March 18, 2007.
- Los Angeles Harbor Bacteria TMDL, final compliance date of March 10, 2010.
- Los Angeles River Nitrogen Compounds and Related Effects TMDL, final compliance date of March 23, 2004.[442]

Where the final compliance deadlines have passed, Part VI.E.4.a. requires that permittees "*shall comply immediately* with water quality-based effluent limitations and/or receiving water limitations to implement WLAs in state-adopted TMDLs for which final compliance deadlines have passed pursuant to the TMDL implementation schedule."[443] Part VI.E.4.b. states that where a Permittee believes that additional time to comply with the final water quality-based effluent limitations and/or receiving water limitations is necessary, a Permittee may within 45 days request a time schedule order pursuant to California Water Code section 13300 for the Regional Water Board's consideration.[444]

Nevertheless, the claimants contend that Part 3.C. of the prior permit is unlawful and should not be applied for the following reasons:

- Part 3.C. is unlawful since it purports to incorporate the TMDLs into the permit without notice or hearing.[445] The claimants state the following:

> Here, 2001 Permit Part 3.C is not in compliance with either the federal or California regulations or California Government Code Section 11425.10(a)(1). Part 3.C, which calls for the revision of the SQMP and the automatic incorporation of the TMDLs, without notice or hearing, could not (and did not, see Section II.D below) operate to incorporate by reference TMDLS as they were adopted in the future because Permit Part 3.C did not provide for notice or hearing before the permit was modified.
>
> Nor were the issues addressed at the TMDL hearings the same as those that would need to be addressed at a permit modification hearing. The criteria for adopting TMDLs is significantly different than the criteria for MS4 permit requirements. TMDLs are a planning device, and WLAs must be set at the level that will result in compliance with water quality standards. 40 CFR Section 130.7(c)(1) ("TMDLs shall be established at levels necessary to attain the applicable narrative and numeric [water quality standard] with seasonal variations and margin of safety.") In contrast, as discussed above (see Section II.C above), MS4 permits are not required to comply with water quality standards.

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[442] Exhibit A, Test Claim 13-TC-01, page 985 (Fact Sheet).

[443] Exhibit A, Test Claim 13-TC-01, page 747, emphasis added.

[444] Exhibit A, Test Claim 13-TC-01, pages 747-748.

[445] Exhibit I, Claimants' Comments on the Draft Proposed Decision, pages 13-16.

> Instead, the MS4 permit terms are "to reduce the discharge to the maximum extent practicable . . . ." 33 U.S.C.1342(p)(3)(B)(iii). Thus the issues addressed at a TMDL hearing are significantly different than the issues addressed when adopting a MS4 permit.[446]

- It is an error of fact to find that Part 3.C. of the 2001 permit incorporated the TMDLs into the 2001 permit. The claimants state the following:

> There is no evidence that the stormwater quality management plan was ever amended to reflect the adoption of the TMDLs.
>
> Indeed, the conduct of the Regional Board proves this point. When the Regional Board wanted to enforce the TMDLs, it amended the permit and complied with notice and hearing requirements. To incorporate the first portion of the Trash TMDL and the dry weather portion of the Marina del Rey Bacteria TMDL, the Regional Board formally noticed a hearing and formally amended the permit to include those provisions. See DPD at 96 ("On December 10, 2009, the Regional Board adopted Order No. R4-2009-0130 to amend Order 01-182 to incorporate the provisions of the Los Angeles River Trash TMDL . . . ."); DPD at 103 ("On August 9, 2007, the prior permit (Order 01-182) was amended by Order R4-2007-0042 to expressly incorporate the [the Marina Del Rey Dry Weather Bacteria TMDL.") There would have been no need for the Regional Board to hold those hearings and expressly amend the 2001 Permit if these TMDLs would have been otherwise automatically been incorporated in the stormwater quality management plan. The Regional Board itself recognized that it must hold a hearing in order to incorporate the provisions of a TMDL into a permit.[447]

The Commission disagrees with these points. First, the prior permit is a quasi-judicial executive order, which was upheld by the court in *County of Los Angeles v. State Water Resources Control Board*.[448] Once quasi-judicial decisions are final, whether after judicial review or without judicial review, they are binding, just as are judicial decisions.[449] Moreover, the Commission has no authority to set aside the prior permit or determine that it is unlawful. The Fact Sheet to the prior permit identifies all the

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[446] Exhibit I, Claimants' Comments on the Draft Proposed Decision, pages 14-15.

[447] Exhibit I, Claimants' Comments on the Draft Proposed Decision, page 16.

[448] *County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985, 1008; *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377, 1385 ("Permit issuance is a quasi-judicial, not a quasi-legislative, rule-making proceeding: 'The exercise of discretion to grant or deny a license, permit or other type of application is a quasi-judicial function.' [Citations omitted.]").

[449] *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

notices and hearings conducted before the adoption of the prior permit,[450] explains that public review of the TMDLs occurred during the TMDL adoption process, and "there need not be an additional public process for TMDL implementation and Basin Plan amendment."[451] Thus, Part 3.C. of the prior permit is binding on the parties as prior law in this case.

Moreover, the claimant had to comply with the TMDLs identified above in which the *final compliance deadlines have passed*.[452] The expired TMDLs included interim compliance deadlines, which the permittees were required to comply with under the prior permit using the BMPs and control measures the permittees select.[453] As the courts have explained, "Whether a program is new or provides a 'higher level of service' is determined by comparing the *legal requirements* before and after the issuance of the executive order or the change in law."[454] Thus, as a matter of law, compliance with the wasteload allocations adopted in the TMDLs was required by the prior permit and is not new.[455]

Accordingly, compliance with the wasteload allocations and receiving water limitations for the Regional Board-adopted TMDLs is not new. Moreover, as described below, the activities required to comply with the TMDLs are the same as the prior permit and do not mandate a new program or higher level of service.

ii. Even without Part 3.C. of the prior permit, the claimants were required by the receiving water limitations and discharge prohibitions in the prior permit to comply with existing numeric and narrative water quality standards for these pollutants identified in the Basin Plan, the CTR, and other state laws, which the TMDLs implement, and BMPs and monitoring was required to control and reduce the discharge of those

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[450] Exhibit L (5), Fact Sheet for Order No. 01-182, pages 8-10.

[451] Exhibit L (5), Fact Sheet for Order No. 01-182, pages 14-15.

[452] Exhibit A, Test Claim 13-TC-01, pages 747, 985 (Fact Sheet).

[453] See, for example, Commission on State Mandates, Statement of Decision adopted January 24, 2014, *Upper Santa Clara River Chloride Requirements*, 10-TC-09, https://www.csm.ca.gov/decisions/013114.pdf (accessed on July 17, 2025), pages 28 et seq., for the discussion of the interim WLAs established in the TMDL for chloride in the Upper Santa Clara River. See also, Exhibit A, Test Claim 13-TC-01, page 1193; *County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985, 993.

[454] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557, emphasis added.

[455] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law. *(County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.)

pollutants, which are the same requirements imposed by the test claim permit.

Federal regulations require that TMDLs be set at "levels necessary to attain and maintain the applicable narrative and numeric water quality standards with seasonal variations and a margin of safety that takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality."[456] Before the adoption of the TMDLs, numeric and narrative water quality standards were identified in the 1994 and 2001 Basin Plan, the CTR, and other preexisting laws and the TMDLs implement these existing standards.

For example, with respect to trash, the 1994 Basin Plan included narrative limitations for trash, which prohibited "floating materials, including solids, liquids, foams, and scum, in concentrations that cause nuisance or adversely affect beneficial uses," and "suspended or settleable material in concentrations that cause nuisance or adversely affect beneficial uses."[457]

The Basin Plan, as amended in 2001, also contained numeric bacterial water quality objectives for waters designated for recreational use.[458] The Regional Board updated the bacteria objectives for waters designated as REC-I in 2001 to be consistent with U.S. EPA's criteria, which recommended the use of E. coli criteria for freshwater and enterococcus criteria for marine waters.[459] The revised objectives include geometric

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[456] Code of Federal Regulations, title 40, section 130.7(c)(1).

[457] Exhibit L (1), Basin Plan 1994, page 89.

[458] California Code of Regulations, title 23, section 3937 (Register 2002, No. 38); Exhibit L (15), Resolution 01-108, Staff Report, page 1, footnotes 1 and 2, which state the following:

> REC-1 is defined in the Basin Plan as "[U]ses of water for recreational activities involving body contact with water, where ingestion of water is reasonably possible. These uses include, but are not limited to, swimming, wading, water-skiing, skin and scuba diving, surfing, white water activities, fishing, or use of natural hot springs" (p. 2-2).
>
> REC-2 (non-contact water recreation) is defined in the Basin Plan as "[U]ses of water for recreational activities involving proximity to water, but not normally involving body contact with water, where ingestion of water is reasonably possible. These uses include, but are not limited to, picnicking, sunbathing, hiking, beachcombing, camping, boating, tidepool and marine life study, hunting, sightseeing, or aesthetic enjoyment in conjunction with the above activities" (p. 2.2).

[459] Exhibit L (14), Resolution 01-018, page 1; Exhibit L (15), Resolution 01-018, Staff Report, pages 1-2 (amendment based on *U.S. EPA. 1986. Ambient Water Quality Criteria for Bacteria-1986. Report No. EPA 330/5-84-002. January 1986)*.

mean limits and single sample limits for total coliform, fecal coliform, E. coli, and enterococcus in marine and fresh waters as follow:

In Marine Waters Designated for Water Contact Recreation (REC-1)

1. Geometric Mean Limits
   a. Total coliform density shall not exceed 1,000/100 ml.
   b. Fecal coliform density shall not exceed 200/100 ml.
   c. Enterococcus density shall not exceed 35/100 ml.
2. Single Sample Limits
   a. Total coliform density shall not exceed 10,000/100 ml.
   b. Fecal coliform density shall not exceed 400/100 ml.
   c. Enterococcus density shall not exceed 104/100 ml.
   d. Total coliform density shall not exceed 1,000/100 ml, if the ratio of fecal-to-total coliform exceeds 0.1.

In Fresh Waters Designated for Water Contact Recreation (REC-1)

1. Geometric Mean Limits
   a. E. coli density shall not exceed 126/100 ml.
2. Single Sample Limits
   a. E. coli density shall not exceed 235/100 ml.

In Fresh Waters Designated for Limited Contact Recreation (LREC-1)

1. Geometric Mean Limits
   a. E. coli density shall not exceed 126/100 ml.
2. Single Sample Limits
   a. E. coli density shall not exceed 576/100 ml.[460]

The numeric limits for bacteria in marine waters designated for recreational use are also consistent with state law enacted in 1997 with respect to waters adjacent to public beaches.[461] After beach closures in Southern California due to high concentrations of fecal indicator bacteria, the Legislature enacted Statutes 1997, chapter 765 (AB 411), which required the Department of Health Services to amend their regulations to require (1) the testing of waters adjacent to public beaches for microbiological contaminants, including total coliform, fecal coliform, and Enterococci bacteria; (2) weekly monitoring of beaches with storm drains that discharge during dry weather and visited by more

[460] California Code of Regulations, title 23, section 3937; Exhibit L (15), Resolution 01-018, Staff Report, pages 4-5.

[461] Exhibit L (15), Resolution 01-018, Staff Report, page 6.

than 50,000 people per year from April 1 through October 31 by the local health officer or environmental health agency; and (3) a requirement to establish protective minimum standards for total coliform, fecal coliform and Enterococci bacteria.[462] The Department of Health Services adopted minimum protective bacteriological standards for receiving waters adjacent to public beaches and public water contact sport areas in California Code of Regulations, title 17, section 7958, consistent with the Basin Plan numeric standards for marine waters.[463]

The regulations further provide that "[i]n order to determine that the bacteriological standards specified in 7958 above are being met in a water-contact sports area designated by a Regional Water Quality Control Board in waters affected by a waste discharge, water samples shall be collected at such sampling stations and at such frequencies as may be specified by said board in its waste discharge requirements."[464] When a public beach fails to meet these standards, the local health officer or the Department of Health Services may close, post warning signs, or otherwise restrict the use of the beach until such time as corrective action has been taken.[465]

In addition, the 1994 Basin Plan contained numeric and narrative water quality objectives for nitrogen compounds, chloride, toxics, metals, pesticides, and nutrients as follows:

- Waters shall not contain biostimulatory substances (i.e., nutrients including nitrogen, phosphorus, and other compounds that stimulate aquatic growth) in concentrations that promote aquatic growth to the extent that such growth causes nuisance or adversely affects beneficial uses.[466]
- Surface waters shall not contain concentrations of chemical constituents in amounts that adversely affect any designated beneficial use.[467]
- Numeric water quality objectives for several constituents, including chloride and nitrogen, in inland surface waters are also identified.[468]
- No individual pesticide or combination of pesticides shall be present in concentrations that adversely affect beneficial sues. There shall be no increase in pesticide concentrations found in bottom sediments or aquatic life.[469]

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[462] Health and Safety Code section 115880 (Stats. 1997, ch. 765 (AB 411)).

[463] California Code of Regulations, title 17, section 7958 (Register 99, Nos. 31, 49).

[464] California Code of Regulations, title 17, former section 7959(a).

[465] California Code of Regulations, title 17, section 7960.

[466] Exhibit L (1), Basin Plan 1994, page 88.

[467] Exhibit L (1), Basin Plan 1994, page 88.

[468] Exhibit L (1), Basin Plan 1994, pages 92-94.

[469] Exhibit L (1), Basin Plan 1994, page 95.

- Polychlorinated Biphenyls (PCBs). Pass-through or uncontrollable discharges to waters of the Region, or at locations where the waste can subsequently reach water of the Region, are limited to 70 pg/L (30-day average) for protection of human health and 14 ng/L and 30 ng/L (daily average) to protect aquatic life in inland fresh waters and estuarine waters respectively.[470]
- All waters shall be maintained free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in, human, plant, animal, or aquatic life. Compliance with this objective will be determined by use of indicator organisms, analyses of species diversity, population density, growth anomalies, bioassays of appropriate duration or other appropriate methods as specified by the State or Regional Board.[471]

The California Ocean Plan in effect when the prior permit was adopted also included narrative and numeric criteria, including narrative objectives for trash and numeric objectives for bacterial objectives and many other priority pollutants listed in Table B.[472] Numeric objectives for toxics and metals were also identified in the California Toxics Rule (CTR).[473]

The claimants were required by the prior permit (Order 01-182) to comply with the numeric and narrative limits identified in the Basin Plan, the CTR, and other statewide plans to meet water quality standards for these pollutants and if there was an exceedance determined with monitoring, the claimants were required to identify the source and implement additional BMPs and monitoring to reduce the discharge of those pollutants. Specifically, Part 1.A. of the prior permit required the permittees to effectively prohibit non-stormwater discharges into the MS4 and watercourses.[474]

Part 2 of the prior permit addresses the Receiving Water Limitations and Part 2.1 states: "Discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited."[475] The prior permit defined "Water Quality Standards and Water Quality Objectives" to include the standards and criteria in the Basin Plan and the California Toxics Rule (CTR):

> Water Quality Standards and Water Quality Objectives" means water quality criteria contained in the *Basin Plan*, the California Ocean Plan, the National Toxics Rule, the California Toxics Rule, and other state or federally approved surface water quality plans. Such plans are used by

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[470] Exhibit L (1), Basin Plan 1994, page 95.

[471] Exhibit L (1), Basin Plan 1994, page 96.

[472] Exhibit L (2), California Ocean Plan 2001, pages 12, 14, 16-18.

[473] Exhibit A, Test Claim 13-TC-01, pages 1191, 1238 (Order No. 01-182); Code of Federal Regulations, title 40, section 131.38.

[474] Exhibit A, Test Claim 13-TC-01, page 1190 (Order No. 01-182).

[475] Exhibit A, Test Claim 13-TC-01, page 1191 (Order No. 01-182).

the Regional Board to regulate all discharges, including storm water discharges.[476]

Part 2.2. of the prior permit stated that: "Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible for, shall not cause or contribute to a condition of nuisance."[477]

Part 2.3. of the prior permit required compliance with the discharge prohibitions and receiving water limitations through timely implementation of control measures and other actions identified in their local Stormwater Quality Management Program (SQMP), which was made enforceable by the prior permit,[478] to reduce the pollutants and further required *additional BMPs and monitoring* when a permittee determined its discharges exceeded water quality standards:

> The Permittees shall comply with Part 2.1. and 2.2. through timely implementation of control measures and other actions to reduce pollutants in the discharges in accordance with the SQMP and its components and other requirements of this Order including any modifications. The SQMP and its components shall be designed to achieve compliance with receiving water limitations. If exceedances of Water Quality Objectives or Water Quality Standards (collectively, Water Quality Standards) persist, notwithstanding implementation of the SQMP and its components and other requirements of this permit, the Permittee *shall assure compliance with discharge prohibitions and receiving water limitations by complying with the following procedure*:
>
> a) Upon a determination by either the Permittee or the Regional Board that discharges are causing or contributing to an exceedance of an applicable Water Quality Standard, the Permittee shall promptly notify and thereafter submit a Receiving Water Limitations (RWL) Compliance Report (as described in the Program Reporting Requirements, Section I of the Monitoring and Reporting Program) to the Regional Board that describes BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce

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[476] Exhibit A, Test Claim 13-TC-01, page 1238 (Order No. 01-182), emphasis added.

[477] Exhibit A, Test Claim 13-TC-01, page 1191 (Order No. 01-182.)

[478] Exhibit A, Test Claim 13-TC-01, page 1193 (Order No. 01-182, Part 3.A.1.). The SQMP is defined in the prior permit as follows: "Stormwater Quality Management Program" means the Los Angeles Countywide Stormwater Quality Management Program, which includes descriptions of programs, collectively developed by the Permittees in accordance with provisions of the NPDES Permit, to comply with applicable federal and state law, as the same is amended from time to time. Exhibit A, Test Claim 13-TC-01, page 1237.

any pollutants that are causing or contributing to the exceedances of Water Quality Standards.

b) Submit any modifications to the RWL Compliance Report required by the Regional Board within 30 days of notification.

c) Within 30 days following the approval of the RWL Compliance Report, the Permittee shall revise the SQMP and its components and monitoring program to incorporate the approved *modified BMPs* that have been and will be implemented, an implementation schedule, *and any additional monitoring required*.

d) Implement the revised SQMP and its components and monitoring program according to the approved schedule.[479]

Part 2.4. of the prior permit then states "So long as the Permittee has complied with the procedures set forth above and is implementing the revised SQMP and its components, the Permittee does not have to repeat the same procedure for continuing or recurring exceedances of the same receiving water limitations unless directed by the Regional Board to develop additional BMPs."[480]

Part 3.B. of the prior permit states, "The Permittees shall implement or require the implementation of the most effective combination of BMPs for storm water/urban runoff pollution control. When implemented, BMPs are intended to result in the reduction of pollutants in storm water to the MEP."[481]

> [T]his Order requires that the SQMP specify BMPs that will be implemented to reduce the discharge of pollutants in storm water to the maximum extent practicable. Further, Permittees are to assure that storm water discharges from the MS4 shall neither cause nor contribute to the exceedance of water quality standards and objectives nor create conditions of nuisance in the receiving waters, and that the discharge of non-storm water to the MS4 has been effectively prohibited.[482]

"Succinctly put, the [prior] Permit incorporates the pollution standards promulgated in other agency documents such as the Basin Plan, and prohibits

[479] Exhibit A, Test Claim 13-TC-01, pages 1191-1192 (Order 01-182, Part 2.3.A.), emphasis added.

[480] Exhibit A, Test Claim 13-TC-01, page 1192.

[481] Exhibit A, Test Claim 13-TC-01, page 1193.

[482] Exhibit L (11), Order No. 01-182 as amended by R4-2009-0130, page 25.

stormwater discharges that 'cause or contribute to the violation' of those incorporated standards."[483]

The prior permit further provided, "Each Permittee must comply with all of the terms, requirements, and conditions of this Order. Any violation of this order constitutes a violation of the Clean Water Act, its regulations and the California Water Code, and is grounds for enforcement action . . . ."[484]

The discharge prohibitions and receiving water limitations contained in Parts 2.1 and 2.2 of the prior permit were directed by precedential orders of the State Water Board and were binding on the permittees. As explained by the State Water Board below, the iterative process for achieving water quality standards does not provide a safe harbor to permittees from being charged with a violation of a permit if the permittee's discharges are shown to be causing or contributing to an exceedance of water quality standards:

> We have directed, in precedential orders, that MS4 permits require discharges to be controlled so as not to cause or contribute to exceedances of water quality standards in receiving waters, [Fn. omitted] but have prescribed an iterative process whereby an exceedance of a water quality standard triggers a process of BMP improvements. That iterative process involves reporting of the violation, submission of a report describing proposed improvements to BMPs expected to better meet water quality standards, and implementation of these new BMPs. [Fn. omitted.] The current language of the existing receiving waters limitations provisions was actually developed by USEPA when it vetoed two regional water board MS4 permits that utilized a prior version of the State Water Board's receiving water limitations provisions. [Fn. omitted.] In State Water Board Order WQ 99-05, we directed that all regional boards use USEPA's receiving water limitations provisions.
>
> There has been significant confusion within the regulated MS4 community regarding the relationship between the receiving water limitations and the iterative process, in part because the water boards have commonly directed dischargers to achieve compliance with water quality standards by improving control measures through the iterative process. *But the iterative process, as established in our precedential orders and as generally written into MS4 permits adopted by the water boards, does not provide a "safe harbor" to MS4 dischargers. When a discharger is shown to be causing or contributing to an exceedance of water quality standards, that discharger is in violation of the permit's receiving water limitations and potentially subject to enforcement by the water boards or through a citizen*

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[483] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199.

[484] Exhibit A, Test Claim 13-TC-01, page 1240 (Order No. 01-182).

suit, regardless of whether or not the discharger is actively engaged in the iterative process. [Fn. omitted.][485]

The State Water Board has also ruled that "[w]e will not reverse our precedential determination in State Water Board Order WQ 99-05 that established the receiving water limitations provisions for MS4 permits statewide and reiterate that we will continue to read those provisions consistent with how the courts have: engagement in the iterative process does not excuse exceedances of water quality standards."[486] This interpretation is supported by case law, with one court finding the County of Los Angeles liable as a matter of law for permit violations under the prior permit (Order 01-182) based on monitoring reports that identified "140 separate exceedances of the Permit's water quality standards, including excessive levels of aluminum, copper, cyanide, zinc, and fecal coliform bacteria in both the Los Angeles and San Gabriel Rivers."[487]

Thus, based on the plain language of the discharge prohibitions and receiving water limitations of the prior permit, the claimants were already required to comply with the numeric and narrative limits identified in the Basin Plan, the CTR, and other statewide plans by implementing BMPs and control measures to meet water quality standards for these pollutants. And if there was an exceedance determined with monitoring, the claimants were required by the prior permit to identify the source and implement *additional* BMPs and monitoring to control and reduce the discharge of those pollutants. These are the same requirements imposed by the test claim permit. As more fully explained in the sections below, the test claim permit provides flexibility to implement and develop BMPs and control measures to comply with the TMDLs. Part VI.E.1.d. states, "A Permittee may comply with water quality-based effluent limitations and receiving water limitations in Attachments L through R using any lawful means."[488] The Fact Sheet also states "it is up to the permittees to determine the effective BMPs and measures needed to comply with this Order. Permittees can choose to implement the least expensive measures that are effective in meeting the requirements of this Order."[489] The claimants contend, however, that the receiving water limitations and discharge prohibitions in Parts 2.1 and 2.2 of the prior permit– specifically, the language that says "Discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited" and "Discharges from the

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[485] Exhibit L (24), State Water Resources Control Board Order WQ 2015-0075, pages 11-12, emphasis added.

[486] Exhibit L (24), State Water Resources Control Board Order WQ 2015-0075, page 15.

[487] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1200, 1210; see also, *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866; and *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377, 1388.

[488] Exhibit A, Test Claim 13-TC-01, page 742.

[489] Exhibit A, Test Claim 13-TC-01, page 1021-1022 (Fact Sheet), emphasis added.

MS4 of storm water, or non-storm water, for which a Permittee is responsible for, shall not cause or contribute to a condition of nuisance" – is unlawful "because those prohibitions have specifically been found to be unlawful under the Clean Water Act" in the recent U.S. Supreme Court case, *City and County of San Francisco v. Environmental Protection Agency*.[490]

In *City and County of San Francisco*, the city petitioned for review of an order issued by U.S. EPA denying review of an NPDES permit for a combined stormwater and wastewater treatment facility, challenging two "end result" requirements contained the permit.[491] The first "end result" requirement prohibits the facility from making any discharge that "contribute[s] to a violation of any applicable water quality standard" for receiving waters. The second provides that the city cannot perform any treatment or make any discharge that "create[s] pollution, contamination, or nuisance as defined by California Water Code section 13050.[492] The U.S. Supreme Court agreed with the city and held that that the two challenged provisions exceed EPA's authority,[493] and concluded as follows:

> §1311(b)(1)(C) [of the U.S. Code, the Clean Water Act] does not authorize the EPA to include "end-result" provisions in NPDES permits. Determining what steps a permittee must take to ensure that water quality standards are met is the EPA's responsibility, and Congress has given it the tools needed to make that determination. If the EPA does what the CWA demands, water quality will not suffer.[494]

The court came to the conclusion, in part, by recognizing that the Clean Water Act's permit shield provision, under which a permittee is deemed to be in compliance with the Clean Water Act if it follows all the terms of the permit, would be eviscerated "if the EPA could impose a permit provision making the permittee responsible for any drop in water quality below the accepted standard. A permittee could do everything required by all the other permit terms. It could devise a careful plan for protecting water quality, and it could diligently implement that plan. But if, in the end, the quality of the water in its receiving waters dropped below the applicable water quality levels, it would face dire potential consequences. It is therefore exceedingly hard to reconcile the Government's

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[490] Exhibit I, Claimants' Comments on the Draft Proposed Decision, page 16, relying on *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334.

[491] *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334, 338.

[492] *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334, 343.

[493] *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334, 339.

[494] *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334, 355.

interpretation of § 1311(b)(1)(C) with the permit shield."[495] The court also stated that "EPA possesses the expertise (which it regularly touts in litigation) and the resources necessary to determine what a permittee should do" to meet water quality standards.[496]

However, the court also clarified that its holding "does not rule out 'narrative limitations'"[497]; "provisions demanding compliance with 'best management practices' and 'operational requirements and prohibitions.' Our decision allows such requirements."[498]

Before the *City and County of San Francisco* decision was issued, the State Water Board took the position that it's precedential orders requiring compliance with water quality standards did not provide a "safe harbor" even if the iterative process was followed and, as indicated above, several courts agreed.[499] The State Water Board said,

> But the iterative process, as established in our precedential orders and as generally written into MS4 permits adopted by the water boards, does not provide a "safe harbor" to MS4 dischargers. When a discharger is shown to be causing or contributing to an exceedance of water quality standards, that discharger is in violation of the permit's receiving water limitations and potentially subject to enforcement by the water boards or through a citizen suit, regardless of whether or not the discharger is actively engaged in the iterative process.
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> The position that the receiving water limitations are independent from the provisions that establish the iterative process has been judicially upheld on several occasions.[500]

However, while the *City and County of San Francisco* may impact the interpretation of permits still open for review, the decision does not invalidate Parts 2.1 and 2.2 of the prior permit in this case because the prior permit is final and no longer subject to review.

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[495] *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334, 351.

[496] *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334, 353.

[497] *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334, 354.

[498] *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334, 355.

[499] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1200, 1210; see also, *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866; and *City of Rancho Cucamonga v. Regional Water Quality Control Bd.* (2006) 135 Cal.App.4th 1377, 1388.

[500] Exhibit L (24), State Water Resources Control Board Order WQ 2015-0075, page 12.

The courts have been clear that "[w]hen the Supreme Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases *still open on direct review."*[501] The prior permit was adopted as a quasi-judicial order in 2001, was last amended on April 14, 2011 following a court review and remand,[502] and is no longer open on direct review.[503] As explained by the State Water Board, the receiving water limitation provisions outlined in the prior permit were litigated twice and, in both cases, upheld.

> The receiving water limitations provisions of the 2001 Los Angeles MS4 Order specifically have been litigated twice, and in both cases, the courts upheld the provisions and the Los Angeles Water Board's interpretation of the provisions. In a decision resolving a challenge to the 2001 Los Angeles MS4 Order, the Los Angeles County Superior Court stated: "[T]he Regional [Water] Board acted within its authority when it included [water quality standards compliance] in the Permit without a 'safe harbor,' whether or not compliance therewith requires efforts that exceed the 'MEP' standard." [Fn. omitted.] The lack of a safe harbor in the iterative process of the 2001 Los Angeles MS4 Order was again acknowledged in 2011 and 2013, this time by the Ninth Circuit Court of Appeal. In these instances, the Ninth Circuit was considering a citizen suit brought by the Natural Resources Defense Council against the County of Los Angeles and the Los Angeles County Flood Control District for alleged violations of the receiving water limitations of that order. The Ninth Circuit held that, as the receiving water limitations of the 2001 Los Angeles MS4 Order (and accordingly as the precedential language in State Water Board Order WQ 99-05) was drafted, engagement in the iterative process does not excuse liability for violations of water quality standards. [Fn. omitted.] The California Court of Appeal has come to the same conclusion in interpreting

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[501] *Harper v. Virginia Dep't of Taxation* (1993) 509 U.S. 86, 97; *Citicorp North America, Inc. v. Franchise Tax Board* (2000) 83 Cal.App.4th 1403, 1422-1423.

[502] Exhibit A, Test Claim 13-TC-01, page 1166; *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377, 1385 ("Permit issuance is a quasi-judicial, not a quasi-legislative, rule-making proceeding: 'The exercise of discretion to grant or deny a license, permit or other type of application is a quasi-judicial function.' [Citations omitted.]").

[503] Pursuant to Water Code section 13320, any aggrieved party may petition the State Water Board for review of the permit within 30 days of the action by the Regional Board. Water Code section 13330 then provides that "A party aggrieved by a final decision or order of a regional board subject to review under Section 13320 may obtain review of the decision or order of the regional board in the superior court by filing in the court a petition for writ of mandate not later than 30 days from the date on which the state board denies review." The petition for review is governed by Code of Civil Procedure section 1094.5. (Wat. Code, § 13330(e).)

> similar receiving water limitations provisions in MS4 Orders issued by the San Diego Regional Water Quality Control Board in 2001 and the Santa Ana Regional Water Quality Control Board in 2002. [Fn. omitted.][¶]
>
> Although it would be inconsistent with USEPA's general practice of requiring compliance with water quality standards over time through an iterative process, [fn. omitted] we may even have the flexibility to reverse [our own precedent regarding receiving water limitations and receiving water limitations provisions and make a policy determination that, going forward, we will either no longer require compliance with water quality standards in MS4 permits, or will deem good faith engagement in the iterative process to constitute such compliance. [Fn. omitted.][504]

Once quasi-judicial decisions are final, whether after judicial review or without judicial review, they are binding, just as are judicial decisions.[505] Thus, the prior permit is binding, and the Commission has no authority to invalidate its provisions.

Finally, the claimants contend that it is erroneous to compare the test claim TMDL provisions to the prior permit's receiving water limitations because the requirements are imposed on different water bodies and require different actions.[506] The claimants assert that the receiving water limitations relate to the quality of the receiving waters, but the TMDL provisions relate to the permittee's discharge from its MS4, before it goes into the receiving water.[507] This argument is misplaced.

The water bodies subject to the TMDLs were at issue in the prior permit, and the permittees were required to meet the water quality standards for those water bodies under the prior permit. The water bodies had been 303(d)-listed as impaired since 1996

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[504] Exhibit L (24), State Water Resources Control Board Order WQ 2015-0075, pages 12-14. The first footnote in the quoted paragraph states the following: "*In re Los Angeles County Municipal Storm Water Permit Litigation* (L.A. Super. Ct., No. BS 080548, Mar. 24, 2005) Statement of Decision from Phase I Trial on Petitions for Writ of Mandate, pp. 4-5, 7. The decision was affirmed on appeal (*County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985); however, this particular issue was not discussed in the court of appeal's decision."

The second footnote in the quoted paragraph states the following: "*Natural Resources Defense Council v. County of Los Angeles* (9th Cir. 2011) 673 F.3d. 880*,* rev'd on other grounds sub nom. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2013) 133 S.Ct. 710, mod. by *Natural Resources Defense Council v. County of Los Angeles* (9 Cir. 2013) 725 F.3d 1194, cert. den. *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council* (2014) 134 S.Ct. 2135."

[505] *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

[506] Exhibit A, Test Claim 13-TC-01, page 18.

[507] Exhibit A, Test Claim 13-TC-01, page 18.

and 1998, which the prior permit acknowledged.[508] The prior permit required compliance with receiving water limitations (i.e., compliance with the water quality standards in the Basin Plan, the Ocean Plan, the SIP, and the CTR); and directed permittees to achieve those limitations through the iterative process.[509]

The TMDLs adopted by the Regional Board specify the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards identified in the statewide plans for receiving waters.[510] The test claim permit explains that wasteload allocations, which have been assigned to the permittees by the TMDL orders, are "discharge condition[s] that must be achieved in order to ensure that water quality standards *are attained in the receiving water*."[511] Thus, contrary to the claimants' argument, the TMDLs are concerned with receiving waters even if compliance is measured at the point of discharge. The whole point of the Clean Water Act "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" with the "goal that the discharge of pollutants into the navigable waters be eliminated."[512] The phrase "discharge of a pollutant" means "any addition of any pollutant *to navigable waters from any point source*."[513]

The test claim permit requires compliance with receiving water limitations identified in the statewide water quality plans through the iterative process just like the prior permit.[514] As stated above, Part VI.E.1.d. of the test claim permit states, "A Permittee may comply with water quality-based effluent limitations and receiving water limitations in Attachments L through R using any lawful means," and the Fact Sheet explains that "it is up to the permittees to determine the effective BMPs and measures needed to comply with this Order."[515] "The approaches under the prior and current orders are designed to achieve the same results – compliance with receiving water limitations."[516]

Thus, both the prior permit and the test claim permit address the same impaired water bodies and require permittees to control the discharge of the pollutants entering the MS4, traveling through the MS4, and then leaving the MS4 into the receiving waters that

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[508] *City of Arcadia v. U.S. EPA* (2003) 265 F.Supp.2d 1142, 1146; Exhibit A, Test Claim 13-TC-01, page 1176 (Order No. 01-182, Findings 8, 10, 11).

[509] Exhibit A, Test Claim 13-TC-01, pages 1191-1192 (Order No. 01-182, Parts 2 and 3).

[510] United States Code, title 33, section 1313(d); Code of Federal Regulations, title 40, section 130.7(c); Exhibit A, Test Claim 13-TC-01, pages 960-961 (Fact Sheet).

[511] Exhibit A, Test Claim 13-TC-01, page 976 (Fact Sheet).

[512] United States Code, title 33, section 1251.

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

[514] Exhibit A, Test Claim 13-TC-01, page 639.

[515] Exhibit A, Test Claim 13-TC-01, pages 742, 1021-1022.

[516] Exhibit L (24), State Water Resources Control Board Order WQ 2015-0075, page 19.

were designated as impaired in order to maintain water quality standards of the protected receiving waters.[517]

Accordingly, even without Part 3.C. of the prior permit (which expressly required the permittees to amend their stormwater plans to comply with the Regional Board-adopted TMDLs), the prior permit required the permittees to comply with the numeric and narrative limits identified in the Basin Plan, the CTR, and other statewide plans to meet water quality standards for these pollutants and if there was an exceedance determined with monitoring, the claimants were required to identify the source and implement additional BMPs and monitoring to reduce the discharge of those pollutants. Implementing BMPs of the permittee's choosing and monitoring are the same requirements imposed by the test claim permit, as explained in the sections below. The only difference between the prior permit and the test claim permit is that the test claim permit now identifies the wasteload allocations for the pollutants calculated in the TMDLs so that claimants know the percentage of pollutant loads that need to be reduced to meet the existing water quality standards in the affected water bodies. The test claim permit gives claimants a schedule, options for compliance (as discussed below) and, thus, more time to meet those objectives. Under the test claim permit, as long as the permittee is complying with the requirements for the TMDL, "the permittee is deemed in compliance with the receiving water limitation."[518]

The California Supreme Court has made clear that "simply because a state law or order may *increase the costs* borne by local government *in providing services*, this does not necessarily establish that the law or order constitutes an *increased or higher level* of the resulting 'service to the public' under article XIII B, section 6, and Government Code section 17514."[519] Rather, the new program or higher level of service must "increase the actual level or quality of governmental services provided."[520] Thus, even though the claimants may experience additional or increased costs to actually meet the water quality standards, there is no new program or higher level of service to comply with the numeric WLAs and receiving water limitations in the Regional Board-adopted TMDLs.

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[517] The prior permit prohibited non-stormwater discharges "into the MS4 *and* watercourses," and "Discharges *from* the MS4 that cause or contribute to the violation of Water Quality Standards." (Exhibit A, Test Claim 13-TC-01, pages 1190, 1191.)

The test claim permit prohibits non-stormwater discharges "*through* the MS4 *to* receiving waters" and "Discharges *from* the MS4 that cause or contribute to the violation of receiving water limitations." (Exhibit A, Test Claim 13-TC-01, pages 628, 639.)

[518] Exhibit A, Test Claim 13-TC-01, page 744 (test claim permit, Part VI.E.2.c.ii.); Exhibit L (24), State Water Resources Control Board Order WQ 2015-0075, page 143.

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

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

f. The development of a Watershed Management Program (WMP) or an Enhanced Watershed Management Program (EWMP) to comply with the Regional Board-adopted TMDL effluent limits and receiving water limitations, pursuant to Part VI.E.2.a., is not mandated by the state, and the requirements to implement BMPs and control measures of the claimants' choosing to meet the water quality standards for these pollutants are the same as what was required by prior law and do not mandate a new program or higher level of service.

As indicated above, the claimants state they can meet their TMDL compliance requirements through participation in a Watershed Management Program (WMP) or Enhanced Watershed Management Program (EWMP) pursuant to Part VI.E.2.a. and have alleged costs to participate in the WMP and EWMP process.[521] The development and implementation of a WMP or EWMP, however, is not mandated by the state and implementation of BMPs and control measures of the claimants' choosing does not constitute a state-mandated new program or higher level of service.

The test claim permit provides flexibility to implement and develop best management practices (BMPs) and control measures to comply with the Regional-Board adopted

[521] Exhibit A, Test Claim 13-TC-01, pages 71, 74; page 100 (Declaration of Gregory Ramirez, City Manager for the City of Agoura Hills); page 119 (Declaration of Jeffery L. Stewart, City Manager for the City of Bellflower); page 141 (Declaration of Patricia Rhay, Director of Public Works for the City of Beverly Hills); page 167 (Declaration of Julio Gonzalez, Acting Water Program Manager for the City of Carson; page 187 (Declaration of Michael O'Grady, Environmental Services Manager for the City of Cerritos); page 208 (Declaration of Maryam Babaki, Director of Public Works for the City of Commerce); page 240 (Declaration of Gilbert A. Livas, City Manager for the City of Downey); page 262 (Declaration of Daniel Hernandez, Director of Public Works for the City of Huntington Park); page 294 (Declaration of Lisa Rapp, Director of Public Works for the City of Lakewood); page 314 (Declaration of Stephanie Katsouleas, Director of Public Works for the City of Manhattan Beach); page 333 (Declaration of Adriana Figueroa, employee for the City of Norwalk); page 352 (Declaration of Douglas Willmore, City Manager for the City of Rancho Palos Verdes); page 371 (Declaration of Joe Hoefgen, City Manager for the City of Redondo Beach); page 390 (Declaration of Michael W. Throne, Public Works Director and City Engineer for the City of San Marino); page 409 (Declaration of Noe Negrete, employee of City of Santa Fe Springs); page 427 (Declaration of Charlie Honeycutt, City Manager for the City of Signal Hill); page 464 (Declaration of Jennifer E. Vasquez, Interim City Manager for the City of South El Monte); page 492 (Declaration of Carlos R. Fandino Jr., employee of the City of Vernon); page 523 (Declaration of Ray Taylor, City Manager for the City of Westlake Village); page 543 (Declaration of Jeff Collier, City Manager for the City of Whittier); page 562 (Declaration of Rene Bobadilla, City Manager for the City of Pico Rivera); and page 581 (Declaration of Kenneth W. Striplin, City Manager for the City of Santa Clarita). Exhibit B, Test Claim 13-TC-02, pages 49-50 (Declaration of Paul Alva, P.E., Principal Engineer for the County of Los Angeles Public Works Department).

TMDLs. Part VI.E.1.d. of the test claim permit states, "A Permittee may comply with water quality-based effluent limitations and receiving water limitations in Attachments L through R using any lawful means."[522] The Fact Sheet also states "it is up to the permittees to determine the effective BMPs and measures needed to comply with this Order. Permittees can choose to implement the least expensive measures that are effective in meeting the requirements of this Order."[523]

> The Regional Water Board recognizes that Permittees will incur costs in implementing this Order above and beyond the costs from the Permittees' prior permit. Such costs will be incurred in complying with the post-construction, hydromodification, Low Impact Development, TMDL, and monitoring and reporting requirements of this Order. The Regional Water Board also recognizes that, due to California's current economic condition, many Permittees currently have limited staff and resources to implement actions to address its MS4 discharges. Based on the economic considerations below, the Board has provided permittees a significant amount of flexibility to choose how to implement the permit. This Order allows Permittees the flexibility to address critical water quality priorities, namely discharges to waters subject to TMDLs, but aims to do so in a focused and cost-effective manner while maintaining the level of water quality protection mandated by the Clean Water Act and other applicable requirements. For example, the inclusion of a watershed management program option allows Permittees to submit a plan, either individually or in collaboration with other Permittees, for Regional Water Board Executive Officer approval that would allow for actions to be prioritized based on specific watershed needs. The Order also allows Permittees to customize monitoring requirements, which they may do individually, or in collaboration with other Permittees. ***In the end, it is up to the permittees to determine the effective BMPs and measures needed to comply with this Order. Permittees can choose to implement the least expensive measures that are effective in meeting the requirements of this Order.*** This Order also does not require permittees to fully implement all requirements within a single permit term. Where appropriate, the Board has provided permittees with additional time outside of the permit term to implement control measures to achieve final WQBELs and/or water quality standards.[524]

Thus, except for the trash TMDLs, the test claim permit authorizes the permittees to submit a Watershed Management Program (WMP) or Enhanced Watershed Management Program (EWMP) to comply with the Regional Board-adopted TMDLs. "The Los Angeles MS4 Order establishes separate requirements for trash TMDLs and

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[522] Exhibit A, Test Claim 13-TC-01, page 742.

[523] Exhibit A, Test Claim 13-TC-01, page 1021-1022 (Fact Sheet), emphasis added.

[524] Exhibit A, Test Claim 13-TC-01, page 1021-1022 (Fact Sheet), emphasis added.

the WMP/EWMP are not a means of achieving compliance with the Trash TMDL Provisions."[525]

Part VI.E.2.a.iii. states, "Pursuant to Part VI.C, a Permittee *may*, individually or as part of a watershed-based group, develop and submit for approval by the Regional Water Board Executive Officer a Watershed Management Program that addresses all water quality-based effluent limitations and receiving water limitations to which the Permittee is subject pursuant to established TMDLs."[526] Part VI.C.1.b. states, "Participation in a Watershed Management Program is *voluntary* and allows a Permittee to address the highest watershed priorities, including complying with the requirements of Part V.A. (Receiving Water Limitations), Part VI.E (Total Maximum Daily Load Provisions) and Attachments L through R, by customizing the control measures in Parts III.A.4 (Prohibitions — Non-Storm Water Discharges) and VI.D (Minimum Control Measures)."[527] Part VI.C.1.c. states "Customized strategies, control measures, and BMPs shall be implemented on a watershed basis, where applicable, through each Permittee's storm water management program and/or collectively by all participating Permittees through a Watershed Management Program."[528] Part VI.C.g. also allows the permittees to develop an Enhanced Watershed Management Program (EWMP) to comply with the permit, including the TMDLs, which is described as follows:

> Permittees may elect to develop an enhanced Watershed Management Program (EWMP). An EWMP is one that comprehensively evaluates opportunities, within the participating Permittees' collective jurisdictional area in a Watershed Management Area, for collaboration among Permittees and other partners on multi-benefit regional projects that, wherever feasible, retain (i) all non-storm water runoff and (ii) all storm water runoff from the 85th percentile, 24-hour storm event for the drainage areas tributary to the projects, while also achieving other benefits including flood control and water supply, among others. In drainage areas within the EWMP area where retention of the 85th percentile, 24-hour storm event is not feasible, the EWMP shall include a Reasonable Assurance Analysis to demonstrate that applicable water quality based effluent limitations and receiving water limitations shall be achieved through implementation of other watershed control measures.[529]

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[525] Exhibit L (24), State Water Resources Control Board Order WQ 2015-0075, page 17; see Exhibit A, Test Claim 13-TC-01, pages 748-755 (test claim permit, Part VI.E.5., trash provisions).

[526] Exhibit A, Test Claim 13-TC-01, page 743.

[527] Exhibit A, Test Claim 13-TC-01, page 648, emphasis added.

[528] Exhibit A, Test Claim 13-TC-01, page 648.

[529] Exhibit A, Test Claim 13-TC-01, page 649.

Part VI.C.5.b.iv. states that the WMPs shall identify control measures identified in the TMDLs and implementing plans and identify any control measures to be modified to address the TMDL requirements:

> Permittees shall compile control measures that have been identified in TMDLs and corresponding implementation plans. Permittees shall identify those control measures to be modified, if any, to most effectively address TMDL requirements within the watershed. If not sufficiently identified in previous documents, or if implementation plans have not yet been developed (e.g., USEPA established TMDLs), the Permittees shall evaluate and identify control measures to achieve water quality-based effluent limitations and receiving water limitations. The plan shall address both stormwater and non-stormwater discharges from the MS4.[530]

In addition, Part VI.C.5.c. provides, "Permittees shall incorporate compliance schedules in Attachments L through R into the plan and, where necessary develop interim milestones and dates for their achievement. Compliance schedules and interim milestones and dates for their achievement shall be used to measure progress towards addressing the highest water quality priorities and achieving applicable water quality-based effluent limitations and/or receiving water limitations."[531]

Finally, Part VI.C.4.d.i.-iii. of the test claim permit requires permittees electing to develop a WMP or EWMP to continue implementing their existing stormwater management programs under the 2001 prior permit until approval of their WMP or EWMP including: (i) the six Minimum Control Measures required by 40 CFR section 122.26(d)(2)(iv); (ii) watershed control to eliminate non-stormwater discharges through the MS4 that are a source of pollutants to receiving waters pursuant to section 402(p)(3)(B)(ii) of the Clean Water Act; and (iii) watershed control measures from existing TMDL implementation plans to ensure compliance with receiving water limitations and water quality-based effluent limitations.[532]

The purpose of Part VI.C. "is to allow Permittees the flexibility to develop Watershed Management Programs to implement the requirements of this Order on a watershed scale through customized strategies, control measures, and BMPs."[533] At a minimum, the WMP shall include management programs consistent with "40 CFR section 122.26(d)(2)(iv)(A)-(D)."[534]

The Fact Sheet explains that the watershed-based structure of the WMP or EWMP is consistent with the adopted TMDLs, which were already established at a watershed or sub-watershed scale, and consistent with provisions of the Los Angeles County Flood

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[530] Exhibit A, Test Claim 13-TC-01, pages 663-664.

[531] Exhibit A, Test Claim 13-TC-01, page 665.

[532] Exhibit A, Test Claim 13-TC-01, page 659.

[533] Exhibit A, Test Claim 13-TC-01, page 648.

[534] Exhibit A, Test Claim 13-TC-01, page 663.

Control Act, which allowed a parcel tax for stormwater and clean water programs for "watershed authority groups."

> There are several reasons for this shift in emphasis from Order No. 01-182. A watershed based structure for permit implementation is consistent with TMDLs developed by the Los Angeles Water Board and USEPA, which are established at a watershed or subwatershed scale and are a prominent new part of this Order. Many of the Permittees regulated by this Order have already begun collaborating on a watershed scale to develop monitoring and implementation plans required by TMDLs. Additionally, a watershed based structure comports with the recent amendment to the Los Angeles County Flood Control Act (Assembly Bill 2554 in 2010), which allows the LACFCD to assess a parcel tax for storm water and clean water programs. Funding is subject to voter approval in accordance with Proposition 218. Fifty percent of funding is allocated to nine "watershed authority groups" to implement collaborative water quality improvement plans.[535]

The test claim permit provides that permittees with a WMP or EWMP may be deemed in compliance with the receiving water limitations and TMDLs, even though the WQBEL or receiving water limitation has not actually been achieved:

- Part VI.C.2.b. provides that permittees that develop and implement a WMP or EWMP and fully comply with all requirements and dates of achievement for the WMP or EWMP are deemed to be in compliance with the receiving water limitations in Part V.A. for the water body-pollutant combinations addressed by the WMP or EWMP.[536]
- Parts VI.C.3.a. and VI.E.2.d.i. provide that a permittee shall be considered in compliance with an applicable interim water quality-based effluent limitation and interim receiving water limitation for a pollutant associated with a specific TMDL if it has submitted and is fully implementing an approved WMP or EWMP pursuant to Part VI.C.[537]
- Permittees implementing an EWMP and utilizing the storm water retention approach in a drainage area tributary to the applicable water body are deemed in compliance with the *final* WQBELs and other TMDL-specific limitations in Attachments L-R for the water body-pollutant combinations addressed by the storm water retention approach.[538]

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[535] Exhibit A, Test Claim 13-TC-01, page 917 (Fact Sheet).

[536] Exhibit A, Test Claim 13-TC-01, page 653.

[537] Exhibit A, Test Claim 13-TC-01, pages 654, 744-745.

[538] Exhibit A, Test Claim 13-TC-01, page 746 (test claim permit, Part VI.E.2.e.i.4.).

A permittee with a WMP or EWMP may also request a time schedule order to request additional time to comply with interim compliance dates of a TMDL if necessary.[539]

In addition, permittees that have timely declared their intention to develop a WMP or EWMP may be deemed in compliance with interim WQBELs with deadlines and interim receiving water limitations before the plan is approved if the permittees meet the following conditions during the development stage; timely providing notice of its intent to develop a plan, meeting all deadlines in the development of their plan, having watershed control measures in its existing stormwater plan to eliminate non-stormwater discharges and address discharges that are causing or contributing to the impairments of water quality standards, and receiving final approval of the plan within 28 or 40 months.[540]

However, if a permittee has *not* submitted a WMP or EWMP or provided notice of its intent to do so, the permittee "shall demonstrate compliance with the receiving water limitations pursuant to Part V.A. and with the applicable interim water quality-based effluent limitations in Part VI.E. pursuant to subparts VI.E.2.d.i.(1)-(3)."[541]

For purposes of a TMDL, however, "compliance with the receiving water limitations pursuant to Part V.A." means the permittee is complying with the TMDL requirements of the Order in Part E. and Attachments L through R, including compliance schedules, which constitutes compliance with the receiving water limitations in Part V.A.[542] "In other words, if there is an exceedance for a pollutant in a water body that has a TMDL addressing that pollutant, as long as the Permittee is complying with the requirements for the TMDL, the Permittee is deemed in compliance with the receiving water limitation."[543]

The Water Boards indicate that all claimants opted to participate in the WMP or EWMP program.[544]

The Commission finds that the development of a WMP or EWMP to comply with the Regional Board-adopted TMDLs is not legally compelled or mandated by the state based on the plain language of the test claim permit.[545] Part VI.C.1.b. states that

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[539] Exhibit A, Test Claim 13-TC-01, page 666 (test claim permit, Part VI.C.6.); Exhibit L (24), State Water Resources Control Board Order WQ 2015-0075, page 37.

[540] Exhibit A, Test Claim 13-TC-01, page 745.

[541] Exhibit A, Test Claim 13-TC-01, page 659 (test claim permit, Part VI.C.4.e.).

[542] Exhibit A, Test Claim 13-TC-01, page 744 (test claim permit, Part VI.E.2.c.ii.).

[543] Exhibit L (24), State Water Resources Control Board Order WQ 2015-0075, page 143.

[544] Exhibit F, Water Boards' Comments on the Test Claims, page 41.

[545] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815 ("Legal compulsion occurs when a statute or executive action uses mandatory

"Participation in a Watershed Management Program is *voluntary* and allows a Permittee to address the highest watershed priorities, including . . . Part VI.E (Total Maximum Daily Load Provisions) and Attachments L through R, by customizing the control measures in Parts III.A.4 (Prohibitions – Non-Storm Water Discharges) and VI.D (Minimum Control Measures)".[546] As indicated above, implementation plans and schedules were included in the Regional Board-adopted TMDLs, and Parts VI.C. and VI.E. simply allow the claimants to customize those plans.

The claimants contend, however, they are practically compelled by the test claim permit to develop a WMP or EWMP because, otherwise, they would "immediately" be in violation of the receiving water limitations:

> Immediate compliance with receiving water limitations, however, was not a real option. As evidenced by the need for each of the TMDLs which are developed only when the water bodies are impaired, the permittees as a practical matter, could not immediately comply with the requirement that the discharges would not cause or contribute to an exceedance of a water quality standard. Yet, if they did not develop a WMP or EWMP, they would be required to meet that standard and failure to do so would expose the Claimant to substantial daily penalties under the CWA and the Porter-Cologne Act. *See* 33 U.S.C. 1319(c) (criminal penalties), (d) (civil penalties) and (g) (administrative penalties); Cal. Water Code 13350(d) and (e). Thus, Claimants had no real choice but to develop and submit a WMP or EWMP to control or reduce the pollutants.[547]

In the absence of legal compulsion, the courts have acknowledged the possibility that a state mandate can be found if local government can show that it faces "certain and severe penalties, such as double taxation or other draconian consequences," leaving local government no choice but to comply with the conditions established by the state.[548] Contrary to the claimants' arguments, however, the claimants are not "immediately" in violation of the receiving water limitations if they fail to develop a WMP or EWMP for the Regional Board-adopted TMDLs.

The test claim permit incorporates the TMDL implementation schedules adopted in the Basin Plan Amendments as compliance schedules to achieve interim and final WQBELs and corresponding receiving water limitations.[549]

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language that require[s] or command[s] a local entity to participate in a program or service.").

[546] Exhibit A, Test Claim 13-TC-01, page 648, emphasis added.

[547] Exhibit I, Claimants' Comments on the Draft Proposed Decision, page 21.

[548] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816-817.

[549] Exhibit A, Test Claim 13-TC-01, page 980 (Fact Sheet).

> In determining the compliance schedules, the Regional Water Board considered numerous factors to ensure that the schedules are as short as possible. Factors examined include, but are not limited to, the size and complexity of the watershed; the pollutants being addressed; the number of responsible agencies involved; time for Co-Permittees to negotiate memorandum of agreements; development of water quality management plans; identification of funding sources; determination of an implementation strategy based on the recommendations of water quality management plans and/or special studies; and time for the implementation strategies to yield measurable results. Compliance schedules may be altered based on the monitoring and reporting results as set forth in the individual TMDLs.[550]

As stated above, as long as the permittee is complying with the implementation requirements for the TMDL, including meeting the compliance schedules, the permittee is deemed in compliance with the receiving water limitations pursuant to Part V.A.[551] And none of the Regional Board-adopted TMDLs require immediate compliance with the WQBELs, except as stated in the sections above for the TMDLs where the final compliance dates have passed.[552] Thus, even "if there is an exceedance for a pollutant in a water body that has a TMDL addressing that pollutant, as long as the Permittee is complying with the requirements for the TMDL, the Permittee is deemed in compliance with the receiving water limitation."[553] In addition, the claimants were required to comply with the pollution standards in the Basin Plan and other water quality plans under the prior permit and were prohibited from causing or contributing to a violation of those standards.[554] The prior permit further provided, "Each Permittee must comply with all of the terms, requirements, and conditions of this Order" and that "Any violation of this order constitutes a violation of the Clean Water Act, its regulations and the California Water Code, and is grounds for enforcement action . . . ."[555] The Regional Board -adopted TMDLs, however, give the claimants more time to comply with water quality standards. Therefore, the test claim permit does not establish a penalty for failing to develop a WMP or EWMP by requiring immediate compliance with water quality standards for the water bodies subject to the TMDLs as alleged by the claimants.

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[550] Exhibit A, Test Claim 13-TC-01, page 981 (Fact Sheet).

[551] Exhibit A, Test Claim 13-TC-01, page 744 (test claim permit, Part VI.E.2.c.ii.); Exhibit L (24), State Water Resources Control Board Order WQ 2015-0075, page 143.

[552] Exhibit A, Test Claim 13-TC-01, page 985 (Fact Sheet).

[553] Exhibit L (24), State Water Resources Control Board Order WQ 2015-0075, page 143.

[554] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1199.

[555] Exhibit A, Test Claim 13-TC-01, page 1240 (Order No. 01-182).

Moreover, the language in the test claim permit for failing to develop a WMP or EWMP for Regional Board-adopted TMDLs is materially different than the language in the test claim permit for failing to develop a WMP or EWMP for the U.S. EPA-adopted TMDLs. U.S. EPA-adopted TMDLs have no implementation plans or interim compliance requirements but are effective immediately. If a permittee does not submit a WMP or EWMP for a U.S. EPA-adopted TMDL, "the Permittee shall be required to demonstrate compliance with the [final] numeric WLAs *immediately* based on monitoring data collected under the MRP [Monitoring and Reporting Program] (Attachment E) for this Order."[556] Under the rules of statutory construction, where the Legislature (or, in this case, the Regional Board) uses materially different language in provisions addressing the same or related subjects, the normal inference is that the Regional Board intended a difference in meaning.[557]

Therefore, the Commission finds that the claimants are not mandated by the state based on legal or practical compulsion theories to develop a customized WMP or EWMP for the Regional Board-adopted TMDLs.

Moreover, as stated above, Part VI.E.1.d. of the test claim permit states, "A Permittee may comply with water quality-based effluent limitations and receiving water limitations in Attachments L through R using any lawful means."[558] Thus, under both the test claim permit and the prior permit, the permittees are charged with developing and proposing their management programs, BMPs, and control measures to implement the TMDLs to comply with water quality standards, and under both permits, if there is an exceedance, the permittees are required to report that information to the Regional Board and implement any *additional* monitoring and BMPs required to reduce the discharge of the pollutant.[559] Federal law has long required claimants to meet water quality standards by proposing and implementing BMPs and reporting progress and exceedances to the Water Boards.[560]

Therefore, the costs to develop a Watershed Management Program (WMP) or an Enhanced Watershed Management Program (EWMP) to comply with the TMDL effluent limits and receiving water limitations pursuant to Part VI.E.2.a. are not mandated by the state, and the requirements to implement BMPs and control measures of the claimants' choosing to meet the water quality standards for these pollutants are the same as what was required by prior state and federal law and do not mandate a new program or higher level of service. "It is up to the permittees to determine the effective BMPs and

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[556] Exhibit A, Test Claim 13-TC-01, page 747, emphasis added.

[557] *People v. Trevino* (2001) 26 Cal.4th 237, 241.

[558] Exhibit A, Test Claim 13-TC-01, page 742.

[559] Exhibit A, Test Claim 13-TC-01, pages 639-640, 1191-1193.

[560] United States Code, title 33, section 1342(p)(3)(B)(iii); Code of Federal Regulations, title 40, section 122.26(d)(2); Code of Federal Regulations, title 40, section 122.44(d)(1), (i); Code of Federal Regulations, title 40, section 122.48; Code of Federal Regulations, title 40, Part 127 (electronic reporting).

measures needed to comply with this Order. Permittees can choose to implement the least expensive measures that are effective in meeting the requirements of this Order."[561]

g. Compliance with the nine trash TMDLs, as required by Part VI.E.1. and Attachments L, M, N, and O, using "any lawful means" as required by Part VI.E.5., does not mandate a new program or higher level of service.[562]

Part VI.E.1.c. states "The Permittees shall comply with the applicable water quality-based effluent limitations and/or receiving water limitations contained in Attachments L through R, consistent with the assumptions and requirements of the WLAs established in the TMDLs, including implementation plans and schedules, where provided for in the State adoption and approval of the TMDL."[563] Attachments L, M, N, and O, contain TMDLs for trash and compliance with the trash TMDLs can be achieved "using any lawful means."[564] Part VI.E.5.a. requires the permittees to meet the interim and final water quality-based effluent limitations for the following nine trash TMDLs:

- Lake Elizabeth Trash TMDL (Attachment L)
- Santa Monica Bay Nearshore and Offshore Debris TMDL (Attachment M)
- Malibu Creek Watershed Trash TMDL (Attachment M)
- Ballona Creek Trash TMDL (Attachment M)
- Machado Lake Trash TMDL (Attachment N)
- Los Angeles River Trash TMDL (Attachment O)
- Peck Road Park Lake Trash TMDL (Attachment O)
- Echo Park Lake Trash TMDL (Attachment O, U.S. EPA-adopted)
- Legg Lake Trash TMDL (Attachment O, U.S. EPA-adopted)[565]

[561] Exhibit A, Test Claim 13-TC-01, page 1021-1022 (Fact Sheet).

[562] Exhibit A, Test Claim 13-TC-01, pages 748-753 (Part VI.E.5.) and pages 1083 (Lake Elizabeth Trash TMDL), 1100 (Santa Monica Bay Nearshore and Offshore Debris TMDL), 1105 (Malibu Creek Watershed Trash TMDL), 1106 (Ballona Creek Trash TMDL), 1122 (Machado Lake Trash TMDL), 1142 (Legg Lake Trash TMDL), which incorporate by reference Part VI.E.5.

[563] Exhibit A, Test Claim 13-TC-01, page 742.

[564] Exhibit A, Test Claim 13-TC-01, page 749 (test claim permit, Part VI.E.5.b.i.).

[565] Exhibit A, Test Claim 13-TC-01, pages 748-753.

The claimants did not plead Part VI.E.5. of the permit. However, the claimants pled the permit attachments that contained the trash TMDLs, which incorporate Part VI.E.5. by reference.[566]

As indicated in the Attachments, the state-adopted trash TMDLs require a zero trash discharge by the final compliance deadline and impose interim effluent limits requiring the permittees to reduce the discharge of trash by specified amounts by the interim compliance dates until a zero trash discharge is ultimately achieved, giving the claimants more time to comply with the water quality standards for trash established in the 1994 Basin Plan.[567] The two U.S. EPA-adopted trash TMDLs require zero trash upon the adoption of the test claim permit and do not have interim compliance requirements.[568]

Part VI.A.13.h. states that trash is a Group 1 pollutant as defined in federal law and identifies the enforcement requirements for the trash TMDLs as follows:

> i. Consistent with the 2009 amendments to Order No. 01-182 to incorporate the Los Angeles River Trash TMDL, the water quality-based effluent limitations in Attachments L through R of this Order for trash are expressed as annual effluent limitations. Therefore, for such limitations, there can be no more than one violation of each interim or final effluent limitation per year. Trash is considered a Group I pollutant, as specified in Appendix A to 40 CFR section 123.45. Therefore, each annual violation of a trash effluent limitation in Attachments L through R of this Order by forty percent or more would be considered a "serious violation" under California Water Code section 13385(h). With respect to the final effluent limitation of zero trash, any detectable discharge of trash necessarily is a serious violation, in accordance with the State Water Board's Enforcement Policy. Violations of the effluent limitations in Attachments L through R of this Order would not constitute "chronic" violations that would give rise to mandatory liability under California Water Code section 13385(i) because four or more violations of the effluent limitations subject to a mandatory penalty cannot occur in a period of six consecutive months.

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[566] Exhibit A, Test Claim 13-TC-01, pages 1083 (Lake Elizabeth Trash TMDL), 1100 (Santa Monica Bay Nearshore and Offshore Debris TMDL), 1105 (Malibu Creek Watershed Trash TMDL), 1106 (Ballona Creek Trash TMDL), 1122 (Machado Lake Trash TMDL), 1142 (Legg Lake Trash TMDL).

[567] Exhibit A, Test Claim 13-TC-01, pages 1083, 1100, 1105, 1106, 1121-1122, 1129-1131, 1141, 1147. The 1994 Basin Plan provided that "[w]aters shall not contain floating materials, including solids, liquids, foams, and scum, in concentrations that cause nuisance or adversely affect beneficial uses," and "[w]aters shall not contain suspended or settleable material in concentrations that cause nuisance or adversely affect beneficial uses." Exhibit L (1), Basin Plan 1994, page 89.

[568] Exhibit A, Test Claim 13-TC-01, pages 1147, 1154.

ii. For the purposes of enforcement under California Water Code section 13385, subdivisions (a), (b), and (c), not every storm event may result in trash discharges. In trash TMDLs adopted by the Regional Water Board, the Regional Water Board states that improperly deposited trash is mobilized during storm events of greater than 0.25 inches of precipitation. Therefore, violations of the effluent limitations are limited to the days of a storm event of greater than 0.25 inches. Once a Permittee has violated the annual effluent limitation, any subsequent discharges of trash during any day of a storm event of greater than 0.25 inches during the same storm year constitutes an additional "day in which the violation [of the effluent limitation] occurs".[569]

Part VI.E.5.b.i. states that permittees may comply with the trash effluent limitations "using any lawful means."[570] "Such compliance options are broadly classified" as full capture, partial capture, institutional controls, or a program for minimum frequency of assessment and collection (MFAC), as described below, and any combination of these may be employed to achieve compliance:[571]

- Full trash capture systems. The test claim permit defines a "full capture system" as "[a]ny single device or series of devices, certified by the Executive Officer, that traps all particles retained by a 5 mm mesh screen and has a design treatment capacity of not less than the peak flow rate Q resulting from a one-year, one-hour storm in the sub-drainage area."[572]

  "[A]ttainment of the effluent limitations shall be conclusively presumed for any drainage area to Lake Elizabeth, Santa Monica Bay, Malibu Creek (and its tributaries), Ballona Creek (and its tributaries), Machado Lake, the Los Angeles River (and its tributaries), Legg Lake, Peck Road Park Lake, and/or Echo Park Lake where certified *full capture systems* treat all drainage from the area, provided that the *full capture systems* are adequately sized and maintained, and that maintenance records are up-to-date and available for inspection by the Regional Water Board."[573]

  A permittee shall be deemed in compliance with its interim effluent limitations by demonstrating that full capture systems treat the percentage of drainage areas in the watershed that corresponds to the required trash abatement. Thus, a

[569] Exhibit A, Test Claim 13-TC-01, page 647; see also page 753 (test claim permit, Part VI.E.5.b.ii.), which states "If a permittee is not in compliance with its applicable interim or final effluent limitation as identified in Attachments L through R, then it shall be in violation of the test claim permit."

[570] Exhibit A, Test Claim 13-TC-01, page 749.

[571] Exhibit A, Test Claim 13-TC-01, page 749.

[572] Exhibit A, Test Claim 13-TC-01, page 763.

[573] Exhibit A, Test Claim 13-TC-01, page 749, emphasis in original.

permittee that is deemed in compliance thru the use of a certified full capture system would not be in violation of the effluent limitations even if some trash is discharged in excess of the annual limitations.

Alternatively, a permittee may propose a schedule for installation of full capture systems in areas under its jurisdiction and authority within a given watershed, targeting first the areas of greatest trash generation, for the Executive Officer's approval. A permittee shall be deemed in compliance with its interim effluent limitations provided it is fully in compliance with any such approved schedule.[574]

- Partial capture devices and institutional controls. Under this approach, the reduction of trash will be measured as follows:
    - Trash discharges from areas serviced solely by partial capture devices may be estimated as follows: trash reduction is equivalent to the partial capture devices' trash removal efficiency multiplied by the percentage of drainage area serviced by the devices.
    - Trash discharges from areas addressed by institutional controls and partial capture devices (where site-specific performance data is not available) shall be calculated using a mass balance approach, based on the daily generation rate (DGR) for a representative area, which is calculated as the total amount of trash collected during this period divided by the length of the collection period. The DGR for the applicable area under the permittees' jurisdiction or authority shall be extrapolated from that of the representative drainage area(s).
    - The Executive Officer may approve alternative compliance monitoring approaches for calculating total storm year trash discharge, upon finding that the program will provide a scientifically-based estimate of the amount of trash discharged from the permittee's MS4.[575]
- Combined compliance approaches. Where a permittee relies on a combination of approaches, it shall demonstrate compliance with the interim and final effluent limitations as specified above in areas where full capture systems are installed and as specified above in areas where partial capture devices and institutional controls are applied.[576]
- Minimum Frequency of Assessment and Collection Approach (MFAC). Under this approach, a permittee develops a program to regularly monitor for and assess trash at specific locations, followed by collection events at intervals based on the amount of debris found. This program is required to include collection and disposal of all trash found in the receiving water and shoreline, and an implementation of BMPs based on current trash management practices in land

[574] Exhibit A, Test Claim 13-TC-01, page 750.

[575] Exhibit A, Test Claim 13-TC-01, pages 750-751.

[576] Exhibit A, Test Claim 13-TC-01, page 751.

areas found to be sources of trash to the water body. The program is also required to include reasonable assurances that it will be implemented and the protocols may be based on SWAMP protocols for rapid trash assessment.[577]

Compliance with the trash TMDLs as stated above does not mandate a new program or higher level of service. Federal law requires the claimants to effectively prohibit non-stormwater discharges, including the discharge of trash, to comply with water quality standards.[578] To "effectively prohibit" non-stormwater discharges, including trash, means the claimants are required to implement a program to detect and remove illicit discharges, including trash, which under federal law includes inspections, on-going field screening activities, investigations, and procedures and controls to prevent the discharge.[579] And here, the test claim permit does not direct the claimants on how to address the trash TMDLs, but allows the claimants to use "any lawful means" to comply with the trash TMDLs, which may include full capture devices; partial capture devices and institutional controls; a combination of approaches; or monitoring, assessing, and collecting trash, and the implementation of BMPs using the MFAC approach.

Moreover, the claimants were required by the prior permit to effectively prohibit non-stormwater discharges and comply with the water quality standards in the Basin Plan, which as stated above required controls to prohibit the discharge of trash. Part 2.3. of the prior permit required compliance with the discharge prohibitions and receiving water limitations through timely implementation of control measures and other actions identified in their local Stormwater Quality Management Program (SQMP), which was made enforceable by the prior permit.[580] The prior permit also required permittees that were subject to a trash TMDL which had not yet been adopted to implement programs to inspect and clean catch basins between May 1 and September 30 each year, and to conduct additional cleaning of any catch basin that was at least 40 percent full of trash or debris.[581] The claimants had to keep records of the catch basins cleaned and report the amount of trash collected.[582] Once the TMDLs and implementation plans became effective, they were required to amend their stormwater quality management plans in

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[577] Exhibit A, Test Claim 13-TC-01, pages 751-753.

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

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

[580] Exhibit A, Test Claim 13-TC-01, page 1193 (Order No. 01-182, Part 3.A.1.). The SQMP is defined in the prior permit as follows: "Stormwater Quality Management Program" means the Los Angeles Countywide Stormwater Quality Management Program, which includes descriptions of programs, collectively developed by the Permittees in accordance with provisions of the NPDES Permit, to comply with applicable federal and state law, as the same is amended from time to time. (Exhibit A, Test Claim 13-TC-01, page 1237.)

[581] Exhibit A, Test Claim 13-TC-01, page 1223.

[582] Exhibit A, Test Claim 13-TC-01, page 1223.

accordance with Part 3.C., which had to include "effective combination of measures such as street sweeping, catch basin cleaning, installation of treatment devices and trash receptacles, or other BMPs," much like the requirements and flexibility provided by the test claim permit.[583] The claimants were also required to implement BMPs for storm drain maintenance and removal of trash and debris from open channel storms drains, and had requirements to sweep streets identified as high priority for trash at least twice per month.[584] *Additional BMPs and monitoring* were required by the prior permit if discharges continued to exceed the water quality standards in the Basin Plan.[585]

Thus, compliance with the trash TMDLs pursuant to Part VI.E.c.1. and Attachments L, M, N, and O, using any lawful means, does not mandate a new program or higher level of service.

h. Developing and submitting a plan to achieve the WLAs contained in *some* of the U.S. EPA-established TMDLs, as required by Part VI.E.1.c. and Attachments M, O, P, and Q of the test claim permit (which incorporates by reference Part VI.E.3.), mandates a new program or higher level of service, but implementing BMPs and control measures to comply with the U.S. EPA-adopted TMDLs does not mandate a new program or higher level of service.

The test claim permit, in Part VI.E.1.c. requires compliance with the effluent limitations contained in Attachments L through R, which include the following TMDLs adopted by U.S. EPA:[586]

- Santa Monica Bay TMDL for DDTs and PCBs, effective March 26, 2012 (Attachment M).[587]

[583] Exhibit A, Test Claim 13-TC-01, pages 1193, 1223.

[584] Exhibit A, Test Claim 13-TC-01, pages 1224-1225.

[585] Exhibit A, Test Claim 13-TC-01, pages 1191-1192.

[586] Exhibit A, Test Claim 13-TC-01, pages 742, 986 (Fact Sheet), identifying the U.S. EPA-adopted TMDLs.

[587] Exhibit A, Test Claim 13-TC-01, page 1100. The following permittees are required to comply with the Santa Monica Bay TMDL for DDTs and PCBs: Agoura Hills, Beverly Hills, Calabasas, Culver City, El Segundo, Hermosa Beach, Hidden Hills, Inglewood, City of Los Angeles, County of Los Angeles, Los Angeles County Flood Control District, Malibu, Manhattan Beach, Palos Verdes Estates, Rancho Palos Verdes, Redondo Beach, Rolling Hills, Rolling Hills Estates, Santa Monica, Torrance, West Hollywood, and Westlake Village. (Exhibit A, Test Claim 13-TC-01, pages 1065-1066 (test claim permit, Attachment K).)

- Ballona Creek Wetlands TMDL for Sediment and Invasive Exotic Vegetation, effective March 26, 2012 (Attachment M).[588]
- Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL (effective March 26, 2012 (Attachment O).[589]
- Los Angeles Area Lakes TMDLs, effective March 26, 2012 (Attachment O for in the TMDLs Los Angeles River Watershed Management Area, which include the following: Lake Calabasas Nutrient; Echo Park Lake Nutrient, PCBs, Chlordane, and Dieldrin; and Legg Lake Nutrient Peck Road Park Lake Nutrient, PCBs, Chlordane, DDT, and Dieldrin; and Attachment P for the TMDLs in the San Gabriel River Watershed Management Area, which include the Puddingstone Reservoir Nutrient, Mercury, PCBs, Chlordane, Dieldrin, DDT TMDLs.)[590]
- Los Cerritos Channel Metals TMDL, effective March 17, 2010 (Attachment Q).[591]

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[588] Exhibit A, Test Claim 13-TC-01, page 1115. The following permittees are required to comply with the Ballona Creek Wetlands TMDL for Sediment and Invasive Exotic Vegetation: Beverly Hills, Culver City, Inglewood, City of Los Angeles, County of Los Angeles, Los Angeles County Flood Control District, Santa Monica, and West Hollywood. (Exhibit A, Test Claim 13-TC-01, pages 1067-1068 (test claim permit, Attachment K).)

[589] Exhibit A, Test Claim 13-TC-01, page 1142. The following permittees are required to comply with the Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL: Los Angeles County Flood Control District and Signal Hill. (Exhibit A, Test Claim 13-TC-01, pages 1070-1071 (test claim permit, Attachment K).)

[590] Exhibit A, Test Claim 13-TC-01, pages 1143-1154, 1155-1160, 1071 et seq. The trash TMDLs adopted by U.S. EPA are not included in this list since they are addressed with the other trash TMDLs and are not subject to the WMP or EWMP provisions of the test claim permit. (Exhibit L (24), State Water Resources Control Board Order WQ 2015-0075, page 17; see Exhibit A, Test Claim 13-TC-01, pages 748-755 (test claim permit, Part VI.E.5., trash provisions).)

The following permittees are required to comply with the Los Angeles Area Lakes TMDLs: Los Angeles County Flood Control District, County of Los Angeles, and the Cities of Los Angeles, Arcadia, Bradbury, Calabasas, Duarte, El Monte, Irwindale, Monrovia, Sierra Madra, and South El Monte. (Exhibit A, Test Claim 13-TC-01, pages 1169-1171 (test claim permit, Attachment K).)

The permittees in the San Gabriel River Management Area include the Cities of Azusa, Claremont, Irwindale, La Verne, Pomona, San Dimas, the County of Los Angeles, and Los Angeles County Flood Control District. (Exhibit A, Test Claim 13-TC-01, pages 1072-1073 (test claim permit, Attachment K).)

[591] Exhibit A, Test Claim 13-TC-01, page 1161. The following permittees are required to comply with the Los Cerritos Channel Metals TMDL: Bellflower, Cerritos, Downey, Lakewood, County of Los Angeles, Los Angeles County Flood Control District,

- San Gabriel River and Impaired Tributaries Metals and Selenium TMDL, effective March 26, 2007 (Attachment P).[592]
- Malibu Creek Watershed Nutrients TMDL, effective March 21, 2003 (Attachment M).[593]

*i. Developing and submitting a WMP or EWMP to achieve the WLAs contained in each U.S. EPA-adopted TMDL, as required by Part VI.E.1.c. and Attachments M, O, P, and Q, which incorporate by reference Part VI.E.3., imposes a **partial** state-mandated new program or higher level of service.*

Unlike the Regional Board-adopted TMDLs in this case, the U.S. EPA-adopted TMDLs do not contain an implementation plan for achievement of the WLAs. "Such decisions are generally left with the States."[594] The Fact Sheet explains that the Regional Board could have either adopted a separate implementation plan as a Basin Plan Amendment for each U.S. EPA-adopted TMDL or issued a schedule leading to full compliance in a separate enforcement order. However, at the time the test claim permit was adopted in 2012, the Regional Board had not done either of these. "As such, the final WLAs in the seven USEPA established TMDLs identified above become effective immediately upon establishment by USEPA and placement in a NPDES permit."[595]

The U.S. EPA-adopted TMDLs addressed in Attachments M, O, P, and Q require the permittees to comply with the WLAs by complying with Part VI.E.3. of the test claim permit.[596] Part VI.E.3. of the test claim permit states the following: "In lieu of inclusion

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Paramount, and Signal Hill. (Exhibit A, Test Claim 13-TC-01, page 1074 (test claim permit, Attachment K).)

[592] Exhibit A, Test Claim 13-TC-01, page 1161. The following permittees are required to comply with the San Gabriel River and Impaired Tributaries Metals and Selenium TMDL: Arcadia, Artesia, Azusa, Baldwin Park, Bellflower, Bradbury, Cerritos, Claremont, Covina, Diamond Bar, Downey, Duarte, El Monte, Glendora, Hawaiian Gardens, Industry, Irwindale, La Habra Heights, La Mirada, La Puente, La Verne, Lakewood, County of Los Angeles, and Los Angeles County Flood Control District, Monrovia, Norwalk, Pico Rivera, Pomona, San Dimas, Santa Fe Springs, South El Monte, Walnut, West Covina, and Whittier. (Exhibit A, Test Claim 13-TC-01, pages 1072-1073 (test claim permit, Attachment K).)

[593] Exhibit A, Test Claim 13-TC-01, page 1105. The following permittees are required to comply with the Malibu Creek Watershed Nutrients TMDL: Agoura Hills, Calabasas, Hidden Hills, County of Los Angeles, Los Angeles County Flood Control District, Malibu, and Westlake Village. (Exhibit A, Test Claim 13-TC-01, pages 1065-1066 (test claim permit, Attachment K).)

[594] Exhibit A, Test Claim 13-TC-01, page 986 (Fact Sheet).

[595] Exhibit A, Test Claim 13-TC-01, pages 986-987 (Fact Sheet).

[596] Exhibit A, Test Claim 13-TC-01, pages 1100, 1105, 1115, 1142, 1144, 1155, 1161.

of numeric water quality based effluent limitations at this time, this Order requires Permittees subject to WLAs in USEPA established TMDLs to propose and implement best management practices (BMPs) [in a Watershed Management Program (WMP) or Enhanced Watershed Management Program (EWMP)] that will be effective in achieving compliance with USEPA established numeric WLAs."[597] The requirements are as follows:

a. Each Permittee shall propose BMPs to achieve the WLAs contained in the applicable U.S. EPA-established TMDL, and a schedule for implementing the BMPs that is as short as possible, in a WMP or EWMP.

b. Each Permittee may either individually submit a WMP or may jointly submit a WMP or EWMP with other Permittees subject to the WLAs contained in the U.S. EPA-established TMDL.

c. At a minimum, each Permittee shall include the following information in its WMP or EWMP, relevant to each applicable U.S. EPA-established TMDL:

   - Available data demonstrating the current quality of the Permittee's MS4 discharge(s) in terms of concentration and/or load of the target pollutant(s) to the receiving waters subject to the TMDL;
   - A detailed description of BMPs that have been implemented, and/or are currently being implemented by the Permittee to achieve the WLA(s), if any;
   - A detailed time schedule of specific actions the Permittee will take in order to achieve compliance with the applicable WLA(s);
   - A demonstration that the time schedule requested is as short as possible, taking into account the time since USEPA establishment of the TMDL, and technological, operation, and economic factors that affect the design, development, and implementation of the control measures that are necessary to comply with the WLA(s); and
   - If the requested time schedule exceeds one year, the proposed schedule shall include interim requirements and numeric milestones and the date(s) for their achievement.

d. Each Permittee subject to a WLA in a TMDL established by U.S. EPA shall submit a draft of a WMP or EWMP to the Regional Water Board Executive Officer for approval per the schedule Part VI.C.4.[598]

As noted above, Part VI.E.3.d. refers to Part VI.C.4. (which establishes the process for developing a WMP or EWMP), and Part VI.C.4.b. of the test claim permit gives the

[597] Exhibit A, Test Claim 13-TC-01, page 746.

[598] Exhibit A, Test Claim 13-TC-01, pages 746-747.

permittees six months to notify the Regional Board of the intent to develop a WMP or EWMP.[599]

However, "[i]f a Permittee does *not* submit a WMP, or the plan is determined to be inadequate by the Regional Water Board Executive Officer and the Permittee does not make the necessary revisions within 90 days of written notification that plan is inadequate, the Permittee *shall be required to demonstrate compliance with the numeric WLAs immediately based on monitoring data collected under the MRP [Monitoring and Reporting Program] (Attachment E) for this Order*."[600]

The Fact Sheet states, "The Regional Water Board does not intend to take enforcement action against a Permittee for violations of specific WLAs and corresponding receiving water limitations for USEPA established TMDLs *if* a Permittee has developed and is implementing an approved Watershed Management Program to achieve the WLAs in the USEPA TMDL and the associated receiving water limitations."[601]

The claimants contend that the requirement to develop and submit a WMP or EWMP for the U.S. EPA-adopted TMDLs mandate a new program or higher level of service.[602]

The Water Boards contend that the activities of developing and submitting a plan to achieve the WLAs contained in each U.S. EPA-adopted TMDL are not new and do not impose a state-mandated program under either legal or practical compulsion theories. The Water Boards make the following arguments:

1. The Regional Board does not have a mandatory duty to develop implementation plans for U.S. EPA-adopted TMDLs.[603]
2. The requirement to develop and submit a plan to achieve wasteload allocations is not new and does not impose a new program or higher level of service for the following reasons:
    - The prior permit required the permittees to have a countywide stormwater quality management program (SQMP). Part 3.C. of the prior permit required the permittees to revise the SQMP to comply with the wasteload allocations adopted in all the TMDLs at issue, and not just the Regional Board-adopted TMDLs. On this point, the Water Boards state the following:

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[599] Exhibit A, Test Claim 13-TC-01, pages 655, 656.

[600] Exhibit A, Test Claim 13-TC-01, page 747 (test claim permit, Part VI.E.3.e.), emphasis added.

[601] Exhibit A, Test Claim 13-TC-01, page 988 (Fact Sheet), emphasis added.

[602] Exhibit A, Test Claim 13-TC-01, pages 70 et seq.; Exhibit B, Test Claim 13-TC-02, pages 17 et seq.; Exhibit I, Claimants' Comments on the Draft Proposed Decision, page 22.

[603] Exhibit J, Water Boards' Comments on the Draft Proposed Decision, pages 2-4.

The Water Boards acknowledge the excerpts from the 2001 Permit administrative record quoted on page 110 of the Draft Proposed Decision appear to focus on TMDLs adopted by the Los Angeles Water Board. However, this merely reflects the timing of the establishment of TMDLs by USEPA in the Los Angeles Region (the first of which was established by USEPA in 2002). As there were no USEPA established TMDLs in the Los Angeles Region when the 2001 Permit was issued, it was not a purposeful omission to not discuss USEPA-established TMDLs and only reference Los Angeles Water Board adopted TMDLs.[604]

- Even if Part 3.C. of the prior permit is interpreted to exclude U.S. EPA-established TMDLs, the result is the same. Part 2.1 of the prior permit stated "Discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited." Part 2.3 of the prior permit required the submission of a report when discharges were found to be causing or contributing to an exceedance of an applicable water quality standard. The report was required to describe additional BMPs to be implemented to meet water quality standards and to update their SQMPs to reflect receiving water compliance. The requirements to develop a WMP or EWMP to address USEPA-established TMDLs are merely a change in form, not function.[605]

[604] Exhibit J, Water Boards' Comments on the Draft Proposed Decision, page 6, footnote 24, which references the Fact Sheet to the prior permit discussing Part 3.C., stating "Public review of the *Regional Board's TMDLs*, will occur during the TMDL adoption process (there need not be an additional public process for TMDL implementation and Basin Plan amendment). Upon approval of a TMDL, the waste load allocations and load allocations (specified in that TMDL) will become effective and enforceable under this permit." (Exhibit L (5), Fact Sheet for Order No. 01-182, pages 14-15, emphasis added.)

That footnote also references a Regional Board notice of a public meeting, which states the following: "Receiving Water Limitations (Part 2, page 16): Clarifies that discharges must meet narrative water quality objectives, including that they must not cause nuisance (in addition to the existing requirement to reduce pollutants to the maximum extent practicable). Additionally, Part 3, Section 2 (page 18) adds a requirement to implement load allocations *approved by the Board* in a TMDL, without reopening the permit." (Exhibit L (12), Regional Board Notice of Public Meeting and Workshop, July 26, 2001, page 9, emphasis added.)

[605] Exhibit J, Water Boards' Comments on the Draft Proposed Decision, pages 5-6.

3. Even if the WMP/EWMP is considered new for the U.S. EPA TMDLs, the development of those plans is not mandated by the state, for the following reasons:[606]

   - Just because claimants or other permittees had not met the requirements of prior permits (i.e., achieving compliance with water quality standards), does not transform an expressly optional compliance path into "practical compulsion."[607]
   - Several of the USEPA-established TMDLs specifically state that compliance is measured at the point of discharge and not in the receiving water. As such, it cannot be automatically presumed that an exceedance in the receiving water is *ipso facto* an exceedance attributable to one or all of the MS4 permittees subject to a wasteload allocation in an USEPA-established TMDL.[608]

     In fact, three USEPA-established TMDLs incorporated into the test claim permit assigned MS4 permittees wasteload allocations equal to their current loading, meaning that MS4 permittees likely would not need to do anything additional to comply. (See e.g., Santa Monica Bay TMDL for DDTs and PCBs, Ballona Creek Wetlands TMDL for Sediments and Invasive Exotic Vegetation, and Los Angeles Area Lakes TMDLs: Echo Park Lake Nutrients.)[609]
   - The Water Boards "acknowledge[] that it did not assess whether permittees could comply with the USEPA-established wasteload allocations at the time of permit development due to its own timing constraints."[610] However, permittees that did not want to develop a WMP or EWMP had six months from the effective date of the Test Claim permit to determine if they wanted to develop a WMP or EWMP and could request a Time Schedule Order at any time.[611] They state the following:

     > Note, the Test Claim permit includes [a] specific provision relating to Time Schedules Order in Part VI.E.4 for state adopted TMDLs. (Exhibit A, Test Claim 13-TC-01, p. 747-748.) While the Los Angeles Water acknowledges that there is not a similar provision for USEPA established TMDLs, Time Schedule Orders are issued under independent state law authority in sections

[606] Exhibit J, Water Boards' Comments on the Draft Proposed Decision, pages 6-10.

[607] Exhibit J, Water Boards' Comments on the Draft Proposed Decision, page 7.

[608] Exhibit J, Water Boards' Comments on the Draft Proposed Decision, pages 7-8.

[609] Exhibit J, Water Boards' Comments on the Draft Proposed Decision, page 8.

[610] Exhibit J, Water Boards' Comments on the Draft Proposed Decision, page 8.

[611] Exhibit J, Water Boards' Comments on the Draft Proposed Decision, page 8.

13300 and 13385(j)(3) of the Water Code. (Wat. Code, §§ 13300 & 13385(j)(3).)[612]

- To the extent the Commission is concerned that claimants and other permittees were at risk of immediate enforcement actions, these concerns are unfounded. The vast majority of USEPA-established wasteload allocations were expressed annually. Therefore, compliance determinations for the above TMDLs and any associated enforcement could not have occurred immediately even if a permittee elected to forgo development of a WMP or EWMP.[613]

4. If the Commission finds that developing a WMP or EWMP for the U.S. EPA-adopted TMDLs mandates a new program or higher level of service, "the Water Boards request language that makes it abundantly clear that claimants are not entitled to reimbursement for the costs to develop a WMP or EWMP in its entirety and that any claimed costs would be limited only to the costs to develop the portion(s) of the WMP or EWMP related to a USEPA-established TMDL and not for development of the plan related to Regional Board-adopted TMDLs."[614]

Based on this record and the plain language of the test claim permit, the Commission finds that developing and submitting a WMP or EWMP to achieve the WLAs contained in *some* of the U.S. EPA-established TMDLs impose a state-mandated new program or higher level of service.

The plain language of Part VI.E.3. provides the claimants with a choice of developing and submitting a WMP or EWMP to comply with the U.S. EPA-adopted TMDLs or demonstrating immediate compliance with the numeric WLAs. Thus, there is no legal compulsion to comply with the requirements to develop and submit a watershed plan since legal compulsion "is present when the local entity has a mandatory, legally enforceable duty to obey."[615]

Nevertheless, the courts have recognized that practical compulsion can be a basis for a state mandate finding when local government faces certain and severe penalties or other draconian consequences for not complying with a technically optional program, leaving local government no real choice.[616]

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[612] Exhibit J, Water Boards' Comments on the Draft Proposed Decision, page 8, footnote 41.

[613] Exhibit J, Water Boards' Comments on the Draft Proposed Decision, page 8.

[614] Exhibit J, Water Boards' Comments on the Draft Proposed Decision, pages 10-11.

[615] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.

[616] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 817, 822; *Department of Finance v. Commission on State Mandates (Kern High*

For example, in *City of Sacramento*, the California Supreme Court determined that a state statute that required state and local governments to provide unemployment insurance benefits to their employees for the first time was a federal mandate and not a reimbursable state mandate.[617] The case is instructive for describing how a local government could be mandated or compelled as a practical matter to provide a service. The federal government had not required the state to enact the statute, but if the state did not enact it, state private employers would lose a federal tax credit and would face double unemployment taxation by the state and federal governments.[618] California could have terminated its own unemployment insurance system to eliminate the double taxation, but the Supreme Court could not imagine that the drafters and adopters of article XIII B and section 6 intended to force the state "to such draconian ends."[619] The alternatives to not adopting the statute "were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards."[620]

Similarly, the 2022 stormwater case decided by the Third District Court of Appeal held that while permittees at some point in the past chose to provide a stormwater drainage system, the drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised and that in urbanized cities and counties, deciding not to provide a stormwater drainage system is no alternative at all. "It is 'so far beyond the realm of practical reality' that it left permittees 'without discretion' not to obtain a permit."[621]

In this case, Part VI.E.3.e. of the test claim permit states that "[i]f a Permittee does *not* submit a WMP, or the plan is determined to be inadequate by the Regional Water Board Executive Officer and the Permittee does not make the necessary revisions within 90 days of written notification that plan is inadequate, the Permittee *shall be required to demonstrate compliance with the [final] numeric WLAs immediately based on monitoring data collected under the MRP [Monitoring and Reporting Program] (Attachment E) for this Order*."[622]

There are three U.S. EPA TMDLs with wasteload allocations *equal* to the permittees' current loading, which means the MS4s were individually meeting the numeric water quality standards before the adoption of the TMDL and can demonstrate immediate

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School Dist.) (2003) 30 Cal.4th 727, 749; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 74.

[617] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

[618] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 74.

[619] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 74.

[620] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 74.

[621] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 558.

[622] Exhibit A, Test Claim 13-TC-01, page 747, emphasis added.

compliance with the numeric wasteload allocations without further load reductions. These include the following:

1. The TMDL for DDT and PCBs, which states the following: "Because existing stormwater loads from the watersheds are lower than the calculated total allowable loads to achieve sediment targets, *the wasteload allocations for stormwater in this TMDL are based on existing load estimates* of 28 g/yr for DDT and 145 g/yr for PCBs.").[623]
2. U.S. EPA TMDLs for Los Angeles Lakes, Echo Park Lake Nutrients, which states the following: "Note that WLAs are *equal to existing loading rates* because no reductions in loading are required."[624] That TMDL further states "To prevent degradation of this waterbody, nutrient TMDLs will be allocated *based on existing loading*."[625]
3. U.S. EPA TMDL Ballona Creek Wetlands TMDL for Sediments and Invasive Exotic Vegetation, which states "Since the current existing discharge of sediment load is not contributing to the listed impairments or otherwise causing a negative impact to Ballona Creek Wetlands, this TMDL *establishes WLAs based on existing conditions*. The allowable WLA is set at 58,354 yd3/yr (or 44,615 m3/yr)."[626]

Thus, if the permittees subject to these three TMDLs choose not to develop a WMP or EWMP, substantial evidence in the record shows they could likely demonstrate immediate compliance with the numeric wasteload allocations, and thus penalties are *not* certain to occur. Accordingly, the permittees assigned wasteload allocations in the U.S. EPA-adopted TMDLs for DDT and PCBs, Echo Park Lake Nutrients, and Ballona Creek Wetlands TMDL for Sediments and Invasive Exotic Vegetation are not practically compelled by certain and severe consequences to develop a WMP or EWMP to comply with these U.S. EPA-adopted TMDLs, and the requirements in Part VI.E.3. are not mandated by the state to develop a WMP or EWMP to comply with these three U.S. EPA-adopted TMDLs.

However, the Water Boards have not presented any evidence to support the finding that the permittees subject to the remaining U.S. EPA-adopted TMDLs could immediately

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[623] Exhibit L (32), U.S. EPA TMDL for DDT and PCBs, page 56; Exhibit A, Test Claim 13-TC-01, Exhibit A, Test Claim 13-TC-01, page 1100-1101 (test claim permit, Attachment M), emphasis added.

[624] Exhibit L (33), U.S. EPA TMDL for Los Angeles Lakes, Excerpts, page 213.

[625] Exhibit L (33), U.S. EPA TMDL for Los Angeles Lakes, Excerpts, page 212; see also Exhibit A, Test Claim 13-TC-01, page 1144-1145 (test claim permit, Attachment O, Echo Park Lake Nutrient TMDL), emphasis added.

[626] Exhibit L (31), U.S. EPA TMDL for Ballona Creek Wetlands Sediment and Invasive Exotic Vegetation, page 82; Exhibit A, Test Claim 13-TC-01, page 1115 (test claim permit, Attachment M), emphasis added.

demonstrate compliance with the final numeric wasteload allocations and not face civil and criminal penalties for failing to develop a WMP or EWMP. The water bodies at issue had been 303(d)-listed since 1996 and 1998, meaning the beneficial uses of the water bodies were impaired because of these pollutants, which were not reduced at the time the TMDLs were developed.[627] The U.S. EPA TMDL reports in the record show that reductions by MS4 dischargers were still required in the remaining TMDLs.[628] The Fact Sheet states that "given the lack of an evaluation, the Regional Water Board is not able to adequately assess whether Permittees will be able to immediately comply with the WLAs at this time."

> The Regional Water Board's decision as to how to express permit conditions for USEPA established TMDLs is based on an analysis of several specific facts and circumstances surrounding these TMDLs and their incorporation into this Order. First, since these TMDLs do not include implementation plans, none of these TMDLs have undergone a comprehensive evaluation of implementation strategies or an evaluation of the time required to fully implement control measures to achieve the final WLAs. Second, given the lack of an evaluation, the Regional Water Board is not able to adequately assess whether Permittees will be able to immediately comply with the WLAs at this time. Third, the majority of these TMDLs were established by USEPA recently (i.e., since 2010) and permittees have had limited time to plan for and implement control measures to achieve compliance with the WLAs. Lastly, while federal regulations do not allow USEPA to establish implementation plans and schedules for achieving these WLAs, USEPA has nevertheless included

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[627] *City of Arcadia v. U.S. EPA* (2003) 265 F.Supp.2d 1142, 1146.

[628] See, for example, Exhibit L (27) U.S. EPA Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL, page 17 ("The bacterial impairment in the LAR Estuary and the LBC beaches is of great concern as it poses a potential health risk to those recreating in these waterbodies.") and page 22 ("Exceedance rates [at City of Long Beach beaches] ranged from 36 to 81 percent during wet weather periods, 6 to 23 percent during summer dry periods, and 6 to 25 percent during winter dry periods when compared to the single sample maximum WQOs."); Exhibit L (29), U.S. EPA Malibu Creek Watershed Nutrients TMDL, page 40 (showing percent reductions in discharges of nitrogen and phosphorus for urban runoff); Exhibit L (28), U.S. EPA Los Cerritos Channel Metals TMDL, page 41 (Table 6-3. Average annual loads and percent reduction required for copper and zinc); and Exhibit L (33), U.S. EPA TMDL for Los Angeles Lakes, Excerpts, page 180 (Table 5.4 showing existing loads of nitrogen and phosphorus, and the reduced wasteload allocations for these pollutants); Exhibit L (30), U.S. EPA San Gabriel River and Impaired Tributaries Metals and Selenium TMDL, page 33 (". . . dry-weather runoff or nuisance flow and/or discharges from other NPDES permitted sources are a significant source of metals in the San Gabriel watershed.") and page 36 ("Wet-weather storm water runoff is thus the dominant source of annual metals loading,").

> implementation recommendations regarding MS4 discharges as part of six of the seven of these TMDLs. The Regional Water Board needs time to adequately evaluate USEPA's recommendations. For the reasons above, the Regional Water Board has determined that numeric water quality based effluent limitations for these USEPA established TMDLs are infeasible at the present time. The Regional Water Board may at its discretion revisit this decision within the term of the Order or in a future permit, as more information is developed to support the inclusion of numeric water quality based effluent limitations.
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> . . . The Regional Water Board finds that, at this time, it is reasonable to include permit conditions that *require* Permittees to develop specific Watershed Management Program plans that include interim milestones and schedules for actions to achieve the WLAs. These plans will facilitate a comprehensive planning process, including coordination among co-permittees where necessary, on a watershed basis to identify the most effective watershed control measures and implementation strategies to achieve the WLAs.[629]

The Fact Sheet further states, "The Regional Water Board does not intend to take enforcement action against a Permittee for violations of specific WLAs and corresponding receiving water limitations for USEPA established TMDLs *if* a Permittee has developed and is implementing an approved Watershed Management Program to achieve the WLAs in the USEPA TMDL and the associated receiving water limitations."[630] This language implies that the Regional Board *will take* an enforcement action against a permittee for violations of specific wasteload allocations and receiving water limitations if a permittee does *not* develop a WMP or EWMP and cannot demonstrate compliance with the final numeric wasteload allocations. The test claim permit explains that a violation of the permit may subject the permittee to civil and criminal liabilities as follows:

> Failure to comply with provisions or requirements of this Order, or violation of other applicable laws or regulations governing discharges through the MS4 to receiving waters, may subject a Permittee to administrative or civil liabilities, criminal penalties, and/or other enforcement remedies to ensure compliance. Additionally, certain violations may subject a Permittee to civil or criminal enforcement from appropriate local, state, or federal law enforcement entities.[631]

Monetary penalties are explained in the permit as follows:

> **c.** The California Water Code provides that any person who violates a waste discharge requirement or a provision of the California Water Code

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[629] Exhibit A, Test Claim 13-TC-01, page 987 (Fact Sheet), emphasis added.

[630] Exhibit A, Test Claim 13-TC-01, page 988 (Fact Sheet), emphasis added.

[631] Exhibit A, Test Claim 13-TC-01, page 645.

is subject to civil penalties of up to $5,000 per day, $10,000 per day, or $25,000 per day of violation, or when the violation involves the discharge of pollutants, is subject to civil penalties of up to $10 per gallon per day or $25 per gallon per day of violation; or some combination thereof, depending on the violation, or upon the combination of violations.

d. California Water Code section 13385(h)(1) requires the Regional Water Board to assess a mandatory minimum penalty of three-thousand dollars ($3,000) for each serious violation. Pursuant to California Water Code section 13385(h)(2), a "serious violation" is defined as any waste discharge that violates the effluent limitations contained in the applicable waste discharge requirements for a Group II pollutant by 20 percent or more, or for a Group I pollutant by 40 percent or more. Appendix A of 40 CFR section 123.45 specifies the Group I and II pollutants. Pursuant to California Water Code section 13385.1(a)(1), a "serious violation" is also defined as "a failure to file a discharge monitoring report required pursuant to Section 13383 for each complete period of 30 days following the deadline for submitting the report, if the report is designed to ensure compliance with limitations contained in waste discharge requirements that contain effluent limitations."

e. California Water Code section 13385(i) requires the Regional Water Board to assess a mandatory minimum penalty of three-thousand dollars ($3,000) for each violation whenever a person violates a waste discharge requirement effluent limitation in any period of six consecutive months, except that the requirement to assess the mandatory minimum penalty shall not be applicable to the first three violations within that time period.

f. Pursuant to California Water Code section 13385.1(d), for the purposes of section 13385.1 and subdivisions (h), (i), and (j) of section 13385, "effluent limitation" means a numeric restriction or a numerically expressed narrative restriction, on the quantity, discharge rate, concentration, or toxicity units of a pollutant or pollutants that may be discharged from an authorized location. An effluent limitation may be final or interim, and may be expressed as a prohibition. An effluent limitation, for these purposes, does not include a receiving water limitation, a compliance schedule, or a best management practice.

g. Unlike subdivision (c) of California Water Code section 13385, where violations of effluent limitations may be assessed administrative civil liability on a per day basis, the mandatory minimum penalties provisions identified above require the Regional Water Board to assess mandatory minimum penalties for "each violation" of an effluent limitation. Some water quality-based effluent limitations in Attachments L through R of this Order (e.g., trash, as described immediately below) are expressed as annual effluent limitations. Therefore, for such limitations, there can be no

more than one violation of each interim or final effluent limitation per year.[632]

Thus, strict compliance with the final numeric wasteload allocations is required to avoid a penalty if a permittee does not develop a watershed plan.

The Water Boards argue, however, that compliance with the wasteload allocations is not "immediate" despite the language in the permit because the permittees can request a time schedule order. Part VI.E.4. of the test claim permit allows a permittee to request a time schedule order for *State-adopted* TMDLs,[633] but there are no similar statements for U.S. EPA-adopted TMDLs. The Fact Sheet states that the Regional Board will consider issuing a time schedule order to provide the necessary time to fully implement the "watershed" control measures to achieve the wasteload allocation of a U.S. EPA TMDL.[634] Thus, the Regional Board's intent with this statement is that it will consider issuing a time schedule order only after a "watershed" plan (WMP or EWMP) is developed and approved. There is no indication in the record that the Regional Board will delay enforcing a final wasteload allocation of a U.S. EPA-adopted TMDL by approving a time schedule order for a permittee that does not develop a WMP or EWMP and cannot show compliance. The Water Boards admit that "even if an implementation plan is adopted, nothing in federal or state law requires a regional board to give responsible parties subject to a TMDL additional time to comply with the TMDL."[635] Thus, despite the argument, there is no evidence in the record that immediate compliance with the numeric wasteload allocations is not required if a permittee fails to develop a WMP or EWMP.

Thus, the Commission finds that the permittees have no real choice but to develop and submit a WMP or EWMP to control or reduce the pollutants to meet the WLAs set by the remaining U.S. EPA-adopted TMDLs in accordance with Part VI.E.1.c. (which incorporates by reference Part VI.E.3.), or otherwise face penalties for not complying with the final numeric wasteload allocations. Therefore, *except for* the U.S. EPA-adopted TMDLs for DDT and PCBs (Attachment M), Ballona Creek Wetlands TMDL for Sediments and Invasive Exotic Vegetation (Attachment M), and Echo Park Lake Nutrients (Attachment O), Part VI.E.1.c. and Attachments M, O, P, and Q (which incorporate by reference Part VI.E.3.) imposes a state-mandated program to develop a WMP or EWMP only as specified in Part VI.E.3.[636] to comply with the following U.S. EPA-adopted TMDLs:

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[632] Exhibit A, Test Claim 13-TC-01, pages 645-646.

[633] Exhibit A, Test Claim 13-TC-01, page 747 (test claim permit, Part VI.E.4.).

[634] Exhibit A, Test Claim 13-TC-01, page 988 (Fact Sheet).

[635] Exhibit J, Water Boards' Comments on the Draft Proposed Decision, pages 3-4.

[636] Exhibit A, Test Claim 13-TC-01, pages 746-747.

- Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL (effective March 26, 2012 (Attachment O).[637]
- Los Angeles Area Lakes TMDLs, effective March 26, 2012 (Attachment O for the TMDLs Los Angeles River Watershed Management Area, which include the following: Lake Calabasas Nutrient; Echo Park Lake PCBs, Chlordane, and Dieldrin; and Legg Lake Nutrient Peck Road Park Lake Nutrient, PCBs, Chlordane, DDT, and Dieldrin; and Attachment P for the TMDLs in the San Gabriel River Watershed Management Area, which include the Puddingstone Reservoir Nutrient, Mercury, PCBs, Chlordane, Dieldrin, DDT TMDLs.)[638]
- Los Cerritos Channel Metals TMDL, effective March 17, 2010 (Attachment Q).[639]
- San Gabriel River and Impaired Tributaries Metals and Selenium TMDL, effective March 26, 2007 (Attachment P).[640]

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[637] Exhibit A, Test Claim 13-TC-01, page 1142. The following permittees are required to comply with the Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL: Los Angeles County Flood Control District and Signal Hill. (Exhibit A, Test Claim 13-TC-01, pages 1070-1071 (test claim permit, Attachment K).)

[638] Exhibit A, Test Claim 13-TC-01, pages 1143-1154, 1155-1160, 1071 et seq. The following permittees are required to comply with the Los Angeles Area Lakes TMDLs: Los Angeles County Flood Control District, County of Los Angeles, and the Cities of Los Angeles, Arcadia, Bradbury, Calabasas, Duarte, El Monte, Irwindale, Monrovia, Sierra Madra, and South El Monte. (Exhibit A, Test Claim 13-TC-01, pages 1169-1171 (test claim permit, Attachment K).)

The permittees in the San Gabriel River Management Area include the Cities of Azusa, Claremont, Irwindale, La Verne, Pomona, San Dimas, the County of Los Angeles, and Los Angeles County Flood Control District. (Exhibit A, Test Claim 13-TC-01, pages 1072-1073 (test claim permit, Attachment K).)

[639] Exhibit A, Test Claim 13-TC-01, page 1161. The following permittees are required to comply with the Los Cerritos Channel Metals TMDL: Bellflower, Cerritos, Downey, Lakewood, County of Los Angeles, Los Angeles County Flood Control District, Paramount, and Signal Hill. (Exhibit A, Test Claim 13-TC-01, page 1074 (test claim permit, Attachment K).)

[640] Exhibit A, Test Claim 13-TC-01, page 1161. The following permittees are required to comply with the San Gabriel River and Impaired Tributaries Metals and Selenium TMDL: Arcadia, Artesia, Azusa, Baldwin Park, Bellflower, Bradbury, Cerritos, Claremont, Covina, Diamond Bar, Downey, Duarte, El Monte, Glendora, Hawaiian Gardens, Industry, Irwindale, La Habra Heights, La Mirada, La Puente, La Verne, Lakewood, County of Los Angeles, and Los Angeles County Flood Control District, Monrovia, Norwalk, Pico Rivera, Pomona, San Dimas, Santa Fe Springs, South El Monte, Walnut, West Covina, and Whittier. (Exhibit A, Test Claim 13-TC-01, pages 1072-1073 (test claim permit, Attachment K).)

- Malibu Creek Watershed Nutrients TMDL, effective March 21, 2003 (Attachment M).[641]

The Commission also finds that the requirement to develop a WMP or EWMP to comply with the remaining U.S. EPA-adopted TMDLs imposes a new program or higher level of service.

The Water Boards argue that the requirement to develop a watershed plan to comply with the U.S. EPA-adopted TMDLs is not new since the prior permit, in Part 3.C., required the permittees to revise their countywide SQMP to comply with the wasteload allocations adopted in all the TMDLs, and not just the Regional Board-adopted TMDLs, as follows:

> The Water Boards acknowledge the excerpts from the 2001 Permit administrative record quoted on page 110 of the Draft Proposed Decision appear to focus on TMDLs adopted by the Los Angeles Water Board. However, this merely reflects the timing of the establishment of TMDLs by USEPA in the Los Angeles Region (the first of which was established by USEPA in 2002). As there were no USEPA established TMDLs in the Los Angeles Region when the 2001 Permit was issued, it was not a purposeful omission to not discuss USEPA-established TMDLs and only reference Los Angeles Water Board adopted TMDLs.[642]

Part 3.C. of the prior permit required permittees to revise the Stormwater Quality Management Plan (SQMP) to incorporate program implementation amendments to comply with the WLAs developed and approved under the TMDLs, but did not specify if the requirement was imposed for all TMDLs. Part 3.C. of the prior permit states the following:

> The Permittees shall revise the SQMP, at the direction of the Regional Board Executive Officer, to incorporate program implementation amendments so as to comply with regional, watershed specific requirements, and/or waste load allocations developed and approved pursuant to the process for the designation and implementation of Total Maximum Daily Loads (TMDLs) for impaired water bodies.[643]

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[641] Exhibit A, Test Claim 13-TC-01, page 1105. The following permittees are required to comply with the Malibu Creek Watershed Nutrients TMDL: Agoura Hills, Calabasas, and Hidden Hills, County of Los Angeles, Los Angeles County Flood Control District, Malibu, and Westlake Village. (Exhibit A, Test Claim 13-TC-01, pages 1065-1066 (test claim permit, Attachment K).)

[642] Exhibit J, Water Boards' Comments on the Draft Proposed Decision, page 6, footnote 24.

[643] Exhibit A, Test Claim 13-TC-01, page 1193. WLAs are described in the test claim permit Fact Sheet as "a discharge condition that must be achieved in order to ensure

However, the record shows that Part 3.C. of the prior permit required the revision of the SQMP for the *Regional Board*-adopted TMDLs. There is no mention of the U.S. EPA-adopted TMDLs in the record. The Fact Sheet states the following:

> Part 3, Section C. of the proposed permit specifies that the Permittees shall amend the SQMP to comply with load allocations approved pursuant to adoption and approval of Total Maximum Daily Loads (TMDLs).
>
> [¶¶]
>
> Public review of the ***Regional Board's TMDLs****,* will occur during the TMDL adoption process (there need not be an additional public process for TMDL implementation and Basin Plan amendment). Upon approval of a TMDL, the waste load allocations and load allocations (specified in that TMDL) will become effective and enforceable under this permit. This TMDL provision is consistent with TMDL provisions in the Long Beach and Ventura County MS4 permits.[644]

A Regional Board notice of a public meeting for the prior claim permit further says the following: "Additionally, Part 3, Section 2 (page 18) adds a requirement to implement ***load allocations approved by the Board*** in a TMDL, without reopening the permit."[645]

While it is correct there were no U.S. EPA-adopted TMDLs in the Los Angeles Region when the prior permit was adopted in 2001,[646] a 13-year schedule for development of TMDLs in the Los Angeles Region was established in a consent decree approved by

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that water quality standards are attained in the receiving water." (Exhibit A, Test Claim 13-TC-01, page 976 (Fact Sheet).)

[644] Exhibit L (5), Fact Sheet for Order No. 01-182, pages 14-15, emphasis added.

[645] Exhibit L (12), Regional Board Notice of Public Meeting and Workshop, July 26, 2001, page 9, emphasis added.

[646] Exhibit A, Test Claim 13-TC-01, page 986 (Fact Sheet), identifying the dates of the U.S. EPA TMDLs as follows:

> Santa Monica Bay TMDL for DDTs and PCBs (USEPA established) March 26, 2012
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> Ballona Creek Wetlands TMDL for Sediment and Invasive Exotic Vegetation (USEPA established) March 26, 2012
>
> Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL (USEPA established) March 26, 2012
>
> Los Angeles Area Lakes TMDLs (USEPA established) March 26, 2012
>
> Los Cerritos Channel Metals TMDL (USEPA established) March 17, 2010
>
> San Gabriel River and Impaired Tributaries Metals and Selenium TMDL (USEPA established) March 26, 2007
>
> Malibu Creek Watershed Nutrients TMDL (USEPA established) March 21, 2003.

the court on March 22, 1999, *before* the adoption of the prior permit, in *Heal the Bay Inc., et al. v. Browner, et al*., which required U.S. EPA to develop the TMDLs if the State could not comply with the deadline:

> On March 23, 1999, the Court filed an Amended Consent Decree (the "Consent Decree") [fn. omitted] in which "EPA agree[d] to ensure that a TMDL [would] be completed for each and every pairing of a [Water Quality Limited Segment, as defined in 40 C.F.R. 130.2(j),] and an associated pollutant in the Los Angeles Region" set forth in an attachment to the Consent Decree by specified deadlines. (Consent Decree ¶¶ 2a, 2b, 3, 3c.) [fn. omitted.]
>
> Pursuant to the Consent Decree, for each pairing EPA was required either to approve a TMDL submitted by California by a specified deadline or, if it did not approve a TMDL by the date specified, to establish a TMDL within one year of the deadline, unless California submitted and EPA approved a TMDL prior to EPA's establishing the TMDL within the one-year period. (*Id.* ¶ 3a.).[647]

Thus, the Regional Board was aware that U.S. EPA was a party to the consent decree and that TMDLs could be adopted by U.S. EPA under the consent decree when the prior permit was adopted. However, the record on the prior permit only refers to the Regional Board-adopted TMDLs when discussing Part 3.C. of the prior permit.

More importantly, the TMDLs adopted by the Regional Board contained implementation plans that went through the public process during the adoption of those TMDLs and, thus, it made sense to require the permittees under Part 3.C. of the prior permit to simply revise their SQMP to implement the Regional Board-adopted TMDLs without further public review.[648] However, the U.S. EPA-adopted TMDLs did not contain implementation plans and, thus, none of these TMDLs had undergone a public review process for TMDL implementation when the test claim permit was adopted. Therefore,

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[647] *City of Arcadia v. U.S. EPA* (2003) 265 F.Supp.2d 1142, 1146.

[648] See for example, Exhibit L (12), Regional Board Notice of Public Meeting and Workshop, July 26, 2001, page 19, which said the following:

> Public review of TMDLs, which will typically be in the form of an amendment to the Basin Plan, will occur during the TMDL adoption process; *and staff does not anticipate that there will be a need for an additional public process for TMDL implementation measures*. Therefore, upon approval of a TMDL, implementation of municipal storm water requirements (specified in that TMDL) will become effective and enforceable under the permit. *In other words, municipal storm water requirements will be automatically included in this proposed permit upon* ***adoption of a TMDL by the Board****, without reopening this permit.* This TMDL requirement and structure is consistent with TMDL provisions in the City of Long Beach and County of Ventura permits. (Emphasis added.)

when developing a WMP or EWMP for these TMDLs, permittees are required to "[p]rovide appropriate opportunity for meaningful stakeholder input, including but not limited to, a permit-wide watershed management program technical advisory committee (TAC) that will advise and participate in the development of the Watershed Management Programs and enhanced Watershed Management Programs from month 6 through the date of program approval."[649] Given the lack of an evaluation of the U.S. EPA-adopted TMDLs, the Regional Board found that it was "reasonable to include permit conditions that *require* Permittees to develop specific Watershed Management Program plans that include interim milestones and schedules for actions to achieve the WLAs. These plans will facilitate a comprehensive planning process, including coordination among co-permittees where necessary, on a watershed basis to identify the most effective watershed control measures and implementation strategies to achieve the WLAs."[650]

The Water Boards further argue that if Part 3.C. of the prior permit is interpreted to exclude U.S. EPA-established TMDLs, the result is the same. They contend that Part 2.1 of the prior permit stated, "Discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited." Part 2.3 of the prior permit required the submission of a report when discharges were found to be causing or contributing to an exceedance of an applicable water quality standard. The report was required to describe additional BMPs to be implemented to meet water quality standards and to update their SQMPs to reflect receiving water compliance. They argue that the requirements to develop a WMP or EWMP to address USEPA-established TMDLs are merely a change in form, not function.[651]

However, the language referenced by the Water Boards in the prior permit is still required by the test claim permit.[652] *In addition* to those reports when an exceedance of water quality standards exists, the Regional Board is requiring a WMP or EWMP for the U.S. EPA-adopted TMDLs (except as stated above for the U.S. EPA-adopted TMDLs for DDT and PCBs (Attachment M), Ballona Creek Wetlands TMDL for Sediments and Invasive Exotic Vegetation (Attachment M), and Echo Park Lake Nutrients (Attachment O)).[653] The Regional Board could have of simply required the permittees to continue applying their stormwater quality management plans (SQMPs) developed under the prior permit to control the pollutants at issue while the TMDLs were being evaluated for appropriate

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[649] Exhibit A, Test Claim 13-TC-01, page 649 (test claim permit, Part VI.C.1.f.v.).

[650] Exhibit A, Test Claim 13-TC-01, page 987 (Fact Sheet), emphasis added.

[651] Exhibit J, Water Boards' Comments on the Draft Proposed Decision, pages 5-6, referring to Exhibit A, Test Claim 13-TC-01, pages 1191-1192 (Order No. 01-182, Part 2.).

[652] Exhibit A, Test Claim 13-TC-01, pages 639-640 (test claim permit, Part V.A.).

[653] Exhibit A, Test Claim 13-TC-01, pages 639-640, 746-747.

implementation, but instead required a new WMP or EWMP in addition to the exceedance reports referred to by the Water Boards.

In addition, the requirement to develop a WMP or EWMP for these U.S. EPA-adopted TMDLs imposes a new program or higher level of service. New requirements constitute a new program or higher level of service within the meaning of article XIII B, section 6, when the requirements carry out the governmental function of providing services to the public, or to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[654] Only one of these alternatives is required to establish a new program or higher level of service.[655] The requirement to develop and submit a WMP or EWMP for these TMDLs is uniquely imposed on the local government permittees. Moreover, "[t]he challenged requirements are not bans or limits on pollution levels, they are mandates to perform specific actions" designed to reduce pollution entering stormwater drainage systems and receiving waters.[656] Thus, the requirement to develop and submit a WMP or EWMP for each U.S. EPA-adopted TMDL provides a new program or higher level of service to the public.

Accordingly, Part VI.E.1.c. and Attachments M, O, P, and Q, which incorporate by reference Part VI.E.3. of the test claim permit, mandate a new program or higher level of service for the pro rata costs to develop and submit a WMP or EWMP for only the U.S. EPA-adopted TMDLs identified below and in accordance with Part VI.E.3. as follows:

a. Each Permittee subject to one of the U.S. EPA-adopted TMDLs identified below shall propose BMPs to achieve the WLAs contained in the applicable U.S. EPA-established TMDL, and a schedule for implementing the BMPs that is as short as possible, in a WMP or EWMP.

b. Each Permittee subject to one of the U.S. EPA-adopted TMDLs identified below may either individually submit a WMP or may jointly submit a WMP or EWMP with other Permittees subject to the WLAs contained in the U.S. EPA-established TMDL.

c. At a minimum, each Permittee subject to one of the U.S. EPA-adopted TMDLs identified below shall include the following information in its WMP or EWMP, relevant to each applicable U.S. EPA-established TMDL:

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

655 *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 557.

656 *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 560.

- Available data demonstrating the current quality of the Permittee's MS4 discharge(s) in terms of concentration and/or load of the target pollutant(s) to the receiving waters subject to the TMDL;
- A detailed description of BMPs that have been implemented, and/or are currently being implemented by the Permittee to achieve the WLA(s), if any;
- A detailed time schedule of specific actions the Permittee will take in order to achieve compliance with the applicable WLA(s);
- A demonstration that the time schedule requested is as short as possible, taking into account the time since USEPA establishment of the TMDL, and technological, operation, and economic factors that affect the design, development, and implementation of the control measures that are necessary to comply with the WLA(s); and
- If the requested time schedule exceeds one year, the proposed schedule shall include interim requirements and numeric milestones and the date(s) for their achievement.

d. Each Permittee subject to a WLA in a TMDL established by U.S. EPA identified below shall submit a draft of a WMP or EWMP to the Regional Water Board Executive Officer for approval per the schedule Part VI.C.4.[657]

These requirements apply only to the following U.S. EPA-adopted TMDLs:

- Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL, effective March 26, 2012 (Attachment O).[658]
- Los Angeles Area Lakes TMDLs, effective March 26, 2012 (Attachment O for the TMDLs Los Angeles River Watershed Management Area, which include the following: Lake Calabasas Nutrient; Echo Park Lake PCBs, Chlordane, and Dieldrin; and Legg Lake Nutrient Peck Road Park Lake Nutrient, PCBs, Chlordane, DDT, and Dieldrin; and Attachment P for the TMDLs in the San Gabriel River Watershed Management Area, which include the Puddingstone Reservoir Nutrient, Mercury, PCBs, Chlordane, Dieldrin, DDT TMDLs.)[659]

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[657] Exhibit A, Test Claim 13-TC-01, pages 742, 746-747, 1100, 1105, 1115, 1142, 1143-1154, 1155-1160, and 1161 (test claim permit, Parts VI.E.1.c., VI.E.3., and Attachments M, O, P, and Q, which incorporate by reference Part VI.E.3.).

[658] Exhibit A, Test Claim 13-TC-01, page 1142. The following permittees are required to comply with the Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL: Los Angeles County Flood Control District and Signal Hill. (Exhibit A, Test Claim 13-TC-01, pages 1070-1071 (test claim permit, Attachment K).)

[659] Exhibit A, Test Claim 13-TC-01, pages 1143-1154, 1155-1160, 1071 et seq. The following permittees are required to comply with the Los Angeles Area Lakes TMDLs: Los Angeles County Flood Control District, County of Los Angeles, and the Cities of Los Angeles, Arcadia, Bradbury, Calabasas, Duarte, El Monte, Irwindale, Monrovia, Sierra

- Los Cerritos Channel Metals TMDL, effective March 17, 2010 (Attachment Q).[660]
- San Gabriel River and Impaired Tributaries Metals and Selenium TMDL, effective March 26, 2007 (Attachment P).[661]
- Malibu Creek Watershed Nutrients TMDL, effective March 21, 2003 (Attachment M).[662]

ii. Implementing BMPs and control measures to comply with the U.S. EPA-adopted TMDLs, as required by Part VI.E.1.c. and Attachments M, O, P, and Q, does not mandate a new program or higher level of service.

However, implementing BMPs and control measures to comply with the U.S. EPA-adopted TMDLs does not mandate a new program or higher level of service.

The claimants were required by the prior permit (Order 01-182) to comply with the numeric and narrative limits identified in the Basin Plan, the CTR, and other statewide plans to meet water quality standards for the pollutants that are the subject of the U.S. EPA-adopted TMDLs and if there was an exceedance determined with monitoring, the

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Madra, and South El Monte. (Exhibit A, Test Claim 13-TC-01, pages 1169-1171 (test claim permit, Attachment K).)

The permittees in the San Gabriel River Management Area include the Cities of Azusa, Claremont, Irwindale, La Verne, Pomona, San Dimas, the County of Los Angeles, and Los Angeles County Flood Control District. (Exhibit A, Test Claim 13-TC-01, pages 1072-1073 (test claim permit, Attachment K).)

[660] Exhibit A, Test Claim 13-TC-01, page 1161. The following permittees are required to comply with the Los Cerritos Channel Metals TMDL: Bellflower, Cerritos, Downey, Lakewood, County of Los Angeles, Los Angeles County Flood Control District, Paramount, and Signal Hill. (Exhibit A, Test Claim 13-TC-01, page 1074 (test claim permit, Attachment K).)

[661] Exhibit A, Test Claim 13-TC-01, page 1161. The following permittees are required to comply with the San Gabriel River and Impaired Tributaries Metals and Selenium TMDL: Arcadia, Artesia, Azusa, Baldwin Park, Bellflower, Bradbury, Cerritos, Claremont, Covina, Diamond Bar, Downey, Duarte, El Monte, Glendora, Hawaiian Gardens, Industry, Irwindale, La Habra Heights, La Mirada, La Puente, La Verne, Lakewood, County of Los Angeles, and Los Angeles County Flood Control District, Monrovia, Norwalk, Pico Rivera, Pomona, San Dimas, Santa Fe Springs, South El Monte, Walnut, West Covina, and Whittier. (Exhibit A, Test Claim 13-TC-01, pages 1072-1073 (test claim permit, Attachment K).)

[662] Exhibit A, Test Claim 13-TC-01, page 1105. The following permittees are required to comply with the Malibu Creek Watershed Nutrients TMDL: Agoura Hills, Calabasas, and Hidden Hills, County of Los Angeles, Los Angeles County Flood Control District, Malibu, and Westlake Village. (Exhibit A, Test Claim 13-TC-01, pages 1065-1066 (test claim permit, Attachment K).)

claimants were required to identify the source and implement additional BMPs and monitoring to reduce the discharge of those pollutants. Specifically, Part 1.A. of the prior permit required the permittees to effectively prohibit non-stormwater discharges into the MS4 and watercourses.[663]

Part 2. of the prior permit addresses the Receiving Water Limitations and Part 2.1. states: "Discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited."[664] The prior permit defined "Water Quality Standards and Water Quality Objectives" to include the standards and criteria in the Basin Plan and the California Toxics Rule (CTR):

> Water Quality Standards and Water Quality Objectives" means water quality criteria contained in the *Basin Plan*, the California Ocean Plan, the National Toxics Rule, the California Toxics Rule, and other state or federally approved surface water quality plans. Such plans are used by the Regional Board to regulate all discharges, including storm water discharges.[665]

Part 2.2. of the prior permit stated that: "Discharges from the MS4 of storm water, or non-storm water, for which a Permittee is responsible for, shall not cause or contribute to a condition of nuisance."[666]

The claimant argues that the receiving water limitations of the prior permit are unlawful pursuant to the *City and County of San Francisco* case and, therefore, are not applicable, and the claimants' SQMP was never amended to reflect the U.S. EPA-adopted TMDLs after the adoption of the prior permit.[667]

As indicated in the sections above, the recent U.S. Supreme Court decision in *City and County of San Francisco* found language, similar to that in Parts 2.1 and 2.2 of the prior permit, unlawful.[668] However, that decision does not invalidate the prior permit in this case because the prior permit is final and no longer subject to review. The courts have been clear that "[w]hen the Supreme Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases *still open on direct review."*[669] The prior permit was adopted in 2001, was last amended on April 14, 2011 following a court review and

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[663] Exhibit A, Test Claim 13-TC-01, page 1190.

[664] Exhibit A, Test Claim 13-TC-01, page 1191.

[665] Exhibit A, Test Claim 13-TC-01, page 1238, emphasis added.

[666] Exhibit A, Test Claim, 13-TC-01, page 1191.

[667] Exhibit I, Claimant's Comments on the Draft Proposed Decision, page 22.

[668] *City and County of San Francisco v. Environmental Protection Agency* (2025) 604 U.S. 334, 355.

[669] *Harper v. Virginia Dep't of Taxation* (1993) 509 U.S. 86, 97; *Citicorp North America, Inc. v. Franchise Tax Board* (2000) 83 Cal.App.4th 1403, 1422-1423.

remand.[670] The receiving water limitations in the prior permit were litigated twice and upheld, and the prior permit is no longer open on direct review.[671] Once quasi-judicial decisions are final, whether after judicial review or without judicial review, they are binding, just as are judicial decisions.[672] The Commission has no authority to invalidate the prior permit or any of its provisions.

Part 2.3. of the prior permit required compliance with the discharge prohibitions and receiving water limitations through timely implementation of control measures and other actions identified in their local Stormwater Quality Management Program (SQMP), which was made enforceable by the prior permit,[673] to reduce the pollutants and further required *additional BMPs and monitoring* when a permittee determined its discharges exceeded water quality standards.[674]

Part 3.B. of the prior permit states, "The Permittees shall implement or require the implementation of the most effective combination of BMPs for storm water/urban runoff pollution control. When implemented, BMPs are intended to result in the reduction of pollutants in storm water to the MEP."[675]

> [T]his Order requires that the SQMP specify BMPs that will be implemented to reduce the discharge of pollutants in storm water to the maximum extent practicable. Further, Permittees are to assure that storm water discharges from the MS4 shall neither cause nor contribute to the exceedance of water quality standards and objectives nor create conditions of nuisance in the receiving waters, and that the discharge of non-storm water to the MS4 has been effectively prohibited.[676]

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[670] Exhibit A, Test Claim 13-TC-01, page 1166.

[671] Exhibit L (24), State Water Resources Control Board Order WQ 2015-0075, pages 12-13.

[672] *California School Boards Association v. State of California* (2009) 171 Cal.App.4th 1183, 1201.

[673] Exhibit A, Test Claim, 13-TC-01, page 1193 (Order No. 01-182, Part 3.A.1.), which states "The SQMP is an enforceable element of this Order." The SQMP is defined in the prior permit as follows: ""Stormwater Quality Management Program" means the Los Angeles Countywide Stormwater Quality Management Program, which includes descriptions of programs, collectively developed by the Permittees in accordance with provisions of the NPDES Permit, to comply with applicable federal and state law, as the same is amended from time to time." (Exhibit A, Test Claim 13-TC-01, page 1237.)

[674] Exhibit A, Test Claim 13-TC-01, page 1192.

[675] Exhibit A, Test Claim 13-TC-01, page 1193.

[676] Exhibit A, Test Claim 13-TC-01, page 1187 (Order No. 01-182, Finding F.2.).

Part VI.E.1.d. of the test claim permit states, "A Permittee may comply with water quality-based effluent limitations and receiving water limitations in Attachments L through R using any lawful means."[677]

Thus, the state has not required the implementation of any specific BMPs or directed the claimants on how to reduce or control the discharges. Those decisions are left up to the claimants, just like they were under the prior permit.

Accordingly, implementing BMPs and control measures identified in a WMP or EWMP to comply with the U.S. EPA-adopted TMDLs, as required by Part VI.E.1.c. and Attachments M, O, P, and Q, does not mandate a new program or higher level of service.

i. The TMDL monitoring requirements in Part VI.B and Attachment E, Parts II.E.1. through 3. and Part V.; and Parts VI.A.1.b.iii.-iv., VI.B.2, VI.C.1.a, VI.D.1.a, VIII.B.1.b.ii., IX.A.5, IX.C.1.a, IX.E.1.a. and b., IX.G.1.b., and IX.G.2., do not mandate a new program or higher level of service.

The claimants contend that Part VI.B. of the test claim permit requires claimants "to comply with the [Monitoring and Reporting Program] and future revisions thereto, in Attachment E of this Order or may, in coordination with an approved Watershed Management Program per Part VI.C, implement a customized monitoring program that achieves the five Primary Objectives set forth in Part II.A of Attachment E and includes the elements set forth in Part II.E of Attachment E."[678] The claimants allege that "Permit Attachment E requires that in the performance of the monitoring program, Claimants must include monitoring at 'TMDL receiving water compliance points' and other 'TMDL monitoring requirements specified in approved TMDL Monitoring Plans'" and allege that the following sections of Attachment E impose reimbursable state-mandated programs: Parts II.E.1. through 3. and Part V.; and Parts VI.A.1.b.iii.-iv., VI.B.2., VI.C.1.a., VI.D.1.a., VIII.B.1.b.ii., IX.A.5., IX.C.1.a., IX.E.1.a. and b., IX.G.1.b., and IX.G.2.[679] The claimants further contend that the monitoring requirements are new since only the Los Angeles Flood Control District performed the monitoring under the prior permit and additional monitoring is now required as follows:

> Under the 2001 Permit, however, only the Los Angeles Flood Control District was required to monitor, and that monitoring constituted only "mass-emission" monitoring at 5 stations in major rivers. In the 2012 Permit, the monitoring obligation is imposed on all 84 permittees, and is in addition to the mass-emission monitoring that the District is required to continue to perform. And unlike the mass-emission monitoring, the TMDL monitoring is at "outfalls," i.e., where the MS4 discharges to a water of the United States (Permit, Attachment E.VII and VIII). Again, these are new

[677] Exhibit A, Test Claim 13-TC-01, page 742.

[678] Exhibit A, Test Claim 13-TC-01, page 71; Exhibit B, Test Claim 13-TC-02, page 18.

[679] Exhibit A, Test Claim 13-TC-01, page 71; Exhibit B, Test Claim 13-TC-02, page 18.

requirements that Claimants had not had to implement before. Thus, these monitoring requirements are newly imposed on Claimants.[680]

In comments on the Draft Proposed Decision, the claimant reiterates these points as follows:

- TMDL monitoring is new and was not required by the prior permit. The prior permit only required the Los Angeles Flood Control District, but not each individual permittee, to monitor. In addition, under the prior permit, only mass emissions monitoring at five stations in major receiving waters was required. The test claim permit requires monitoring in addition to the mass emissions monitoring and at different locations. Finally, the TMDL monitoring plans were not enforceable until incorporated into the permit. "The TMDLs, with the exception of trash and the Marina del Rey dry-weather bacteria, were not incorporated into the prior permit. Instead, they were imposed upon Claimants only with the test claim permit's adoption."[681]
- TMDL monitoring is mandated by the state. The permittees could propose a monitoring program, but the location and number of monitoring points, and analysis performed, was not under the permittees control. Instead, each monitoring plan was subject to the Regional Board Executive Officer's approval. Thus, although the Claimants suggested monitoring location and analysis, it was the Regional Board's Executive Officer that mandated them.[682]

  In addition, the claimant states that "Although it is correct that federal law requires monitoring, it is not correct that federal law requires TMDL monitoring in MS4 permits. As set forth above, TMDLs are adopted in order to implement water quality standards. MS4 permits, however, are not required to contain provisions to meet water quality standards. *Defenders*, 191 F.3d at 1164-1165."[683]

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[680] Exhibit G, Claimants' Rebuttal Comments, page 41.

[681] Exhibit I, Claimant's Comments on the Draft Proposed Decision, pages 23-24.

[682] Exhibit I, Claimant's Comments on the Draft Proposed Decision, page 23.

[683] Exhibit I, Claimants' Comments on the Draft Proposed Decision, page 24, citing *Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, which involved a challenge to an NPDES permit and ***not*** the adoption of a TMDL. In that case, the court explained: "Although Congress did not require municipal storm-sewer discharges to comply strictly with [numerical effluent limitations], [section] 1342(p)(3)(B)(iii) [of United States Code, title 33] states that '[p]ermits for discharges from municipal storm sewers ... shall require ... *such other provisions as the* [*EPA*] *Administrator ... determines appropriate for the control of such pollutants.*' (Emphasis added.) That provision gives the EPA discretion to determine what pollution controls are appropriate.... [¶] Under that discretionary provision, the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants. The EPA also has the

The Water Boards contend that the monitoring provisions do not mandate a new program or higher level of service. They contend the test claim permit allows a permittee who has an approved WMP or EWMP to propose alternative monitoring requirements to comply with the TMDLs and, thus, the requirements are not mandated by the state.[684] In addition, the Water Boards contend that the monitoring provisions in the test claim permit do not impose a new program or higher level of service since federal law requires monitoring and the 2001 Permit also included a Monitoring and Reporting Program that included many of the same primary objectives as the test claim permit, required monitoring with the same general frequency, and also required field screening and investigations to determine the source of the exceedance in order to eliminate illicit, non-stormwater connections and discharges.[685] For example, the Water Boards state:

> The 2001 Permit also included a requirement to conduct field screening of the storm drain system, including investigation to determine the source of, and eliminate, any illicit connections and illicit discharges. [Fn. omitted.] Parts II.E.3 and IX.A.5, IX.C.1.a, IX.E.1.a-b, IX.G.1.b of the 2012 Permit's MRP also pertain to field screening for non-stormwater discharges and simply refine the 2001 Permit requirement for field screening by prioritizing outfalls for screening, source identification, and monitoring based on TMDL considerations.[686]

The Water Boards also state that the "requirement for outfall monitoring in the 2012 Permit MRP is a refinement of the Tributary Monitoring and BMP Effectiveness Study required in the 2001 Permit MRP."[687] Finally, the Water Boards contend that monitoring is not unique to local government since industrial facilities are also required to collect and analyze samples of their discharge for various pollutants.[688]

Since Government Code section 17553(b)(1) requires Test Claims to identify the *specific* sections of the executive order alleged to contain a mandate *and* a detailed description of the new activities mandated by the state, the analysis of the monitoring program is limited to the specific sections identified in the Test Claim as they relate to the TMDLs.

For the reasons below, the Commission finds that Part VI.B. and Attachment E., Parts II.E.1. through 3. and Part V.; and Parts VI.A.1.b.iii.-iv., VI.B.2., VI.C.1.a., VI.D.1.a.,

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authority to require less than strict compliance with state water-quality standards. (*Defenders of Wildlife v. Browner* (1999) 191 F.3d 1159, 1166-1167.)

[684] Exhibit F, Water Boards' Comments on the Test Claims, page 56.

[685] Exhibit F, Water Boards' Comments on the Test Claims, pages 57-59.

[686] Exhibit F, Water Boards' Comments on the Test Claims, page 57.

[687] Exhibit F, Water Boards' Comments on the Test Claims, page 57.

[688] Exhibit F, Water Boards' Comments on the Test Claims, page 60.

VIII.B.1.b.ii., IX.A.5., IX.C.1.a., IX.E.1.a. and b., IX.G.1.b., and IX.G.2., do not mandate a new program or higher level of service.

i. The test claim permit requires monitoring to determine compliance with the TMDLs but gives the claimants a lot of flexibility to customize their monitoring plans and modify already approved TMDL Monitoring Plans.

Part VI.B. of the test claim permit states, "Dischargers shall comply with the MRP [Monitoring and Reporting Program] and future revisions thereto, in Attachment E of this Order or *may*, in coordination with an approved Watershed Management Program per Part VI.C, implement a *customized* monitoring program that achieves the five Primary Objectives set forth in Part II.A. of Attachment E and includes the elements set forth in Part II.E. of Attachment E."[689] One of the primary objectives of the monitoring program is to "assess compliance with receiving water limitations and water quality-based effluent limitations (WQBELs) established to implement TMDL wet weather and dry weather wasteload allocations.[690]

The customized monitoring programs allowed by the test claim permit are described in Attachment E, Part IV., and include an integrated monitoring program (IMP) and a coordinated monitoring program (CIMP) with other permittees, to provide flexibility to comply with the monitoring requirements in a cost effective and efficient manner.[691] These customized plans allow the permittees to select monitoring locations, parameters, or monitoring techniques, coordinate their monitoring programs with other permittees to address one or more of the monitoring elements, and use alternative approaches to meet the primary monitoring objectives.[692] These plans incorporate by reference the monitoring requirements contained in TMDL Monitoring Plans approved by the Executive Officer.[693] However, the permittees are also authorized to modify the requirements of an approved TMDL Monitoring Plan with the approval of the executive officer.[694] At a minimum, the plans are required to address all TMDL monitoring requirements, including receiving water monitoring, stormwater outfall based monitoring,

[689] Exhibit A, Test Claim 13-TC-01, page 647, emphasis added.

[690] Exhibit A, Test Claim 13-TC-01, page 817 (Attachment E, Part II.A.).

[691] Exhibit A, Test Claim 13-TC-01, pages 820-822 (Attachment E, Part IV.); see also, Exhibit A, Test Claim 13-TC-01, page 817 (test claim permit, Attachment E, Part II.C.).

[692] Exhibit A, Test Claim 13-TC-01, pages 820-821 (Attachment E, Parts IV.A.3., 4., IV.B.2.).

[693] Exhibit A, Test Claim 13-TC-01, pages 820-821 (Attachment E, Part IV.A.2.).

[694] Exhibit A, Test Claim 13-TC-01, page 821 (Attachment E, Parts IV.A.5. and IV.B.3.).

non-stormwater outfall based monitoring.[695] These customized monitoring plans are submitted with the WMP or EWMP for approval.[696]

An example of a CIMP is found in an MOU between the City of Los Angeles, County of Los Angeles, Los Angeles County Flood Control District, and the Cities of Beverly Hills, Culver City, Inglewood, Santa Monica, and West Hollywood regarding the administration and cost sharing to implement the monitoring program and WMP for the Ballona Creek Watershed, which was approved in 2016. These permittees agreed to cooperatively share and fully fund the estimated costs of the implementation of the CIMP and WMP, and the City of Los Angeles would do the monitoring.[697]

Until the Executive Officer approves an IMP or CIMP, the monitoring requirements imposed by the prior permit and pursuant to TMDL monitoring plans identified in Table E-1 "shall remain in effect."[698]

If a permittee elects *not* to develop or participate in an IMP or CIMP, monitoring "shall be conducted on a jurisdictional basis per the requirements of this MRP, beginning six (6) months after the effective date of this Order."[699]

The claimants have pled the following provisions in Attachment E: Parts II.E.1. through 3. and Part V.; and Parts VI.A.1.b.iii.-iv., VI.B.2., VI.C.1.a., VI.D.1.a., VIII.B.1.b.ii., IX.A.5., IX.C.1.a., IX.E.1.a. and b., IX.G.1.b., and IX.G.2. These provisions are described below.

Parts II.E.1.-3. set forth the required monitoring program elements for receiving water monitoring (Part II.E.1.), stormwater outfall-based monitoring (Part II.E.2.), and non-stormwater outfall-based monitoring (Part II.E.3.), which are conducted to determine if receiving water limitations are met and WQBELs derived from the TMDLs are achieved.[700] This monitoring is required to be conducted at TMDL receiving water

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[695] Exhibit A, Test Claim 13-TC-01, page 821 (Attachment E, Parts IV.A.6. and IV.B.2.).

[696] Exhibit A, Test Claim 13-TC-01, page 822 (Attachment E, Part IV.C.3.).

[697] Exhibit L (8), MOU for Coordinated Integrated Monitoring Program, page 3.

[698] Exhibit A, Test Claim 13-TC-01, page 822 (Attachment E, Part IV.C.8.).

[699] Exhibit A, Test Claim 13-TC-01, page 822 (Attachment E, Part IV.C.7.).

[700] Exhibit A, Test Claim 13-TC-01, page 818. The test claim permit defines "outfall" as "A point source as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances with connect segments of the same stream or other waters of the United Sates and are used to convey waters of the United States. (40 CFR § 122.26(b)(9))." (Exhibit A, Test Claim 13-TC-01, page 768.)

compliance points designated in the approved TMDL monitoring plan and comply with the requirements specified in approved TMDL Monitoring Plans.[701]

Part V. contains a table identifying TMDL Monitoring Plans required by the TMDLs and the status of those plans, including the plans that have been approved.[702] Part V., itself, does not impose any requirements. As indicated above, a permittee is allowed by the test claim permit to modify the requirements of an approved TMDL Monitoring Plan with the approval of the executive officer of the Regional Board.[703]

Parts VI.A.1.b.iii.-iv. state that if receiving water monitoring is performed under the IMP (the customized integrated monitoring program), the plan must contain the following information:

iii. Identification of applicable TMDLs and TMDL compliance points, based on approved TMDL Monitoring Plans or as identified in the Basin Plan for the applicable TMDLs.

iv. A description of how the Permittee is fulfilling its obligations for TMDL receiving water monitoring under this IMP, CIMP or other monitoring plans.[704]

Part VI.B.2. requires that the CIMP (the coordinated integrated monitoring program) include the following:

- A list of applicable TMDLs and TMDL compliance points, based on approved TMDL Monitoring Plans and/or as identified in the Basin Plan for the applicable TMDLs.
- Identification of the proposed receiving water monitoring stations that fulfill the TMDL Monitoring Plan(s) requirements.
- Shoreline Monitoring Stations monitored pursuant to a bacteria TMDL. Sampling for bacterial indicators (total coliform, fecal coliform (or E. coli), and enterococcus) at shoreline monitoring locations addressed by a TMDL shall be conducted 5 times per week at sites subject to the reference system criterion for allowable exceedance days, and weekly at sites subject to the antidegradation criterion for allowable exceedance days.[705]

Part VI.C.1.a. establishes the minimum wet weather receiving water monitoring requirements and states "[t]he receiving water shall be monitored a minimum of three times per year for all parameters except aquatic toxicity, which must be monitored at

[701] Exhibit A, Test Claim 13-TC-01, page 818.

[702] Exhibit A, Test Claim 13-TC-01, pages 822-827.

[703] Exhibit A, Test Claim 13-TC-01, page 821 (Attachment E, Parts IV.A.5 and IV.B.3.).

[704] Exhibit A, Test Claim 13-TC-01, pages 827-828.

[705] Exhibit A, Test Claim 13-TC-01, page 828.

least twice per year, or more frequently if required by applicable TMDL Monitoring Plans."[706]

Part VI.D.1.a. establishes the minimum dry weather receiving water monitoring requirements and states:

- The IMP and/or CIMP plan shall incorporate the following minimum requirements for monitoring the receiving water during dry weather conditions:

  a. The receiving water shall be monitored a minimum of two times per year for all parameters, or more frequently if required by applicable TMDL Monitoring Plans. One of the monitoring events shall be during the month with the historically lowest instream flows, or where instream flow data are not available, during the historically driest month.[707]

Part VIII.B.1.b.ii. establishes the minimum stormwater outfall based monitoring requirements, at a minimum of three times per year, and subdivision b.ii. states the following:

> b. Monitoring shall be performed at the selected outfalls during wet weather conditions, defined for the purposes of this monitoring program as follows:
>
> [§]
>
> ii. When the receiving water body is a river, stream or creek, wet weather shall be defined as when the flow within the receiving water is at least 20 percent greater than the base flow or an alternative threshold as provided for in an approved IMP or CIMP, or as defined by effective TMDLs within the watershed.[708]

Part IX.A.5. states the objectives for non-stormwater outfall-based monitoring and screening, which includes the permittees to "Prioritize monitoring of outfalls considering the potential threat to the receiving water and applicable TMDL compliance schedules."[709]

Part IX.C.1.a. requires each permittee to identify MS4 outfalls with significant non-stormwater discharges, and "[d]ischarges from major outfalls subject to dry weather TMDLs" are considered significant.[710]

Parts IX.E.1.a. and b. require that "[o]utfalls within the inventory shall be prioritized in the following order (a=highest priority, etc.) for source identification activities:

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[706] Exhibit A, Test Claim 13-TC-01, page 829.

[707] Exhibit A, Test Claim 13-TC-01, page 830.

[708] Exhibit A, Test Claim 13-TC-01, page 836.

[709] Exhibit A, Test Claim 13-TC-01, page 838.

[710] Exhibit A, Test Claim 13-TC-01, pages 838-839.

a. Outfalls discharging directly to receiving waters with WQBELs or receiving water limitations in the TMDL provisions for which final compliance deadlines have passed.

b. All major outfalls and other outfalls that discharge to a receiving water subject to a TMDL shall be prioritized according to TMDL compliance schedules."[711]

Part IX.G.1.b. addresses non-stormwater discharges that are exceeding criteria and requires outfall monitoring of the pollutants subject to the TMDLs:

> Within 90 days after completing the source identification or after the Executive Officer of the Regional Water Board approves the IMP or CIMP, whichever is later, each Permittee shall monitor outfalls that have been determined to convey significant discharges comprised of either unknown or conditionally exempt non-storm water discharges, or continuing discharges attributed to illicit discharges. The following parameters shall be monitored: . . . b. Pollutants assigned a WQBEL or receiving water limitation to implement TMDL Provisions for the respective receiving water, as identified in Attachments L - R of this Order.[712]

Part IX.G.2. states the following: "For outfalls subject to a dry weather TMDL, monitoring frequency shall be per the approved TMDL Monitoring Plan or as otherwise specified in the TMDL, or as specified in an IMP or CIMP approved by the Executive Officer of the Regional Water Board."[713]

Accordingly, the test claim permit requires monitoring to determine compliance with the TMDLs but gives the claimants a lot of flexibility to determine the monitoring protocols. The claimants are required to comply with TMDL monitoring plans that have already been approved but are also allowed to modify those plans if approved by the executive officer. The flexibility is highlighted in the following provisions:

- "The Integrated Monitoring Program may leverage monitoring resources by selecting monitoring locations, parameters, or monitoring techniques that will satisfy multiple monitoring requirements." (Attachment E, Part IV.A.3.)[714]
- "Where appropriate, the Integrated Monitoring Program [or CIMP] may develop and utilize alternative approaches to meet the Primary Objectives (Part II.A.)…" (Attachment E, Parts IV.A.4. and IV.B.6.)[715]

[711] Exhibit A, Test Claim 13-TC-01, page 840.

[712] Exhibit A, Test Claim 13-TC-01, page 841.

[713] Exhibit A, Test Claim 13-TC-01, page 842.

[714] Exhibit A, Test Claim 13-TC-01, page 821.

[715] Exhibit A, Test Claim 13-TC-01, pages 821, 822.

- "The requirements of an approved TMDL Monitoring Plan may be modified by an IMP [or CIMP] that is subsequently approved by the Executive Officer…" (Attachment E, Parts IV.A.5. and IV.B.3.)[716]

The only requirements are to conduct receiving water monitoring, stormwater outfall monitoring, and non-stormwater outfall monitoring, with wet weather monitoring conducted three times per year and dry weather monitoring conducted twice per year, or more frequently if required by a TMDL monitoring plan or necessary to meet water quality standards. Like the prior permit, the claimants are required to conduct additional monitoring if exceedances continue to occur, in order to meet water quality standards.[717]

ii. Stormwater and non-stormwater monitoring "sufficient" to determine if the TMDL receiving water limitations and WQBELs are being met is already required by federal law and the minimum requirements imposed are not new and do not mandate a new program or higher level of service.

These requirements do not impose a new state-mandated program. Federal law requires an NPDES permittee to monitor its discharges into the waters of the United States in a manner sufficient to determine whether it is in compliance with the permit.[718] Under federal law, an NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance.[719] Federal regulations require samples and measurements taken for the purpose of monitoring shall be "representative" of the monitored activity and shall be retained for at least five years.[720] Federal law does not require monitoring of each stormwater source at the precise point of discharge, but a monitoring scheme must be established "sufficient to yield data which are representative of the monitored activity."[721] Monitoring must be conducted according to approved test procedures, unless another method is required as specified.[722] Approved

[716] Exhibit A, Test Claim 13-TC-01, page 821.

[717] Exhibit A, Test Claim 13-TC-01, page 640 (test claim permit, Part V.A., Receiving Water Limitations), and pages 1191-1192 (Order 01-182, Part 2.).

[718] United States Code, title 33, section 1342(a)(2) (Public Law 100-4); Code of Federal Regulations, title 40, section 122.44(i)(1).

[719] Code of Federal Regulations, title 40, sections 122.26(d)(2)(i)(F), 122.48(b); see also *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1209.

[720] Code of Federal Regulations, title 40, sections 122.41(j), 122.48(b).

[721] *Natural Resources Defense Council, Inc. v. County of Los Angeles* (2013) 725 F.3d 1194, 1209.

[722] Code of Federal Regulations, title 40, section 122.41(j).

testing procedures for sampling, sample preservation, and analyses are located in federal regulations.[723]

In addition, federal law requires permits for discharges from MS4s "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers," unless those discharges are conditionally exempted from this prohibition.[724] To "effectively prohibit" non-stormwater discharges requires the implementation of a program to detect and remove illicit discharges, which under federal law shall contain inspections, ongoing field screening activities, and investigations to determine and remove the sources of non-stormwater pollution.[725] Federal law also requires a permittee to have a monitoring program for representative data collection that describes the location of outfalls or field screening points to be sampled, why the location is representative, the frequency of sampling, parameters to be sampled, and a description of the sampling equipment.[726] And federal law requires monitoring results to be reported, including any instances of noncompliance.[727]

Thus, stormwater and non-stormwater monitoring "sufficient" to determine if the TMDL receiving water limitations and WQBELs are being met is already required by federal law. Since the choice between complying with the test claim permit's monitoring program or developing a customized program is left up to the claimants, there is no state-mandated program. The only requirement is to comply with federal law and conduct monitoring sufficient to meet water quality standards.

Moreover, the minimum requirements imposed by the test claim permit are not new and do not impose a new program or higher level of service, even if they do result in increased costs.[728] In this respect, the claimants contend that the requirements are new since under the prior permit, only the Los Angeles Flood Control District was required to conduct mass emission monitoring and now, all permittees are required to monitor and to conduct additional outfall monitoring.[729] Although the prior permit required the Flood Control District to conduct the "Countywide Monitoring Program,"

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[723] Code of Federal Regulations, title 40, Part 136.

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

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

[726] Code of Federal Regulations, title 40, section 122.26(d)(2)(iii)(A)-(D).

[727] Code of Federal Regulations, title 40, sections 122.41(l)(4), (7); 122.22, 122.48; Code of Federal Regulations, title 40, Part 127.

[728] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 54; *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 735; *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876-877.

[729] Exhibit G, Claimants' Rebuttal Comments, page 41.

each permittee was responsible for applicable discharges within its boundaries.[730] And the prior permit required each permittee to comply with the receiving water limitations and discharge prohibitions, and if monitoring showed exceedances of water quality standards, the permittee "shall assure compliance with discharge prohibitions and receiving water limitations" by notifying the Regional Board, submitting a compliance report, and thirty days after the compliance report, "the Permittee shall revise the SQMP and its components and monitoring program to incorporate the approved modified BMPs that have been and will be implemented, an implementation schedule, *and any additional monitoring required*."[731]

In addition, the prior permit expressly required the permittees to revise their stormwater quality management plans to implement and comply with the Regional Board-adopted TMDLs once they became effective.[732] The TMDL resolutions, which were also adopted after notice and a hearing,[733] identify the "responsible agencies" assigned wasteload allocations, which are also identified in Attachment K to the test claim permit.[734] And Table E-1. of the test claim permit identifies the 14 TMDL monitoring plans that were approved by the Regional Board's executive officer *before* the adoption of the test claim permit, and nine TMDL monitoring plans required by the TMDL resolutions previously adopted, but not yet approved at the time the test claim permit was adopted.[735] For example,

- Resolution R4-2007-009 adopted the Lake Elizabeth, Munz Lake, and Lake Hughes Trash TMDL, which assigns WLAs to the County of Los Angeles and requires the County and "local land owners that discharge to Lake Elizabeth and

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[730] Exhibit A, Test Claim 13-TC-01, page 1194 (Order No. 01-182, Part D.6.).

[731] Exhibit A, Test Claim 13-TC-01, page 1192 (Order No. 01-182, Part 2.), emphasis added.

[732] Exhibit A, Test Claim 13-TC-01, page 1193 (Order No. 01-182, Part 3.C.); Exhibit L (5), Fact Sheet for Order No. 01-182, pages 14-15 ("Public review of the Regional Board's TMDLs, will occur during the TMDL adoption process (there need not be an additional public process for TMDL implementation and Basin Plan amendment). Upon approval of a TMDL, the waste load allocations and load allocations (specified in that TMDL) will become effective and enforceable under this permit. This TMDL provision is consistent with TMDL provisions in the Long Beach and Ventura County MS4 permits."); *County of Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985, 993 ("*Further, the permittees were required to revise the Storm Water Quality Management Program to comply with specified total daily maximum load allocations. If a permittee modified the countywide Storm Water Quality Management Program, it was required to implement a local management program*." Emphasis added).

[733] Exhibit L (5), Fact Sheet for Order No. 01-182, pages 14-15.

[734] Exhibit A, Test Claim 13-TC-01, pages 1065 et seq. (test claim permit, Attachment K).

[735] Exhibit A, Test Claim 13-TC-01, pages 822-827 (test claim permit, Table E-1.).

Lake Hughs" to submit a trash monitoring and reporting plan to the executive officer six months from the effective date of the TMDL.[736] This monitoring plan was approved on March 25, 2009, before the adoption of the test claim permit.[737]

- Resolutions 2002-004 and 2002-022 adopted the Santa Monica Bay Beaches Bacteria TMDL for dry and wet weather, which assign WLAs to several MS4 permittees and require these "responsible agencies" to submit a coordinated shoreline monitoring plan within 120 days of the effective date of the TMDL.[738] This monitoring plan was approved on January 8, 2004, before the adoption of the test claim permit.[739]
- Resolution R10-008 adopted a TMDL for Machado Lake Pesticides and PCBs, which assigns WLAs to several permittees including Los Angeles County; Los Angeles County Flood Control District; and the Cities of Carson, Lomita, Los Angeles, Palos Verdes Estates, City of Rancho Palos Verdes, Redondo Beach, Rolling Hills, Rolling Hills Estates, and Torrance.[740] These permittees, along with general construction and industrial permittees were required to submit Monitoring Reporting Program and Quality Assurance Project Plan to the Regional Board by September 20, 2012.[741]

Thus, the monitoring requirements were imposed by prior orders and are not new, and several are not unique to government as shown in the above bulleted information for Machado Lake Pesticides and PCBs TMDL and the Lake Elizabeth, Munz Lake, and Lake Hughes Trash TMDL.

Accordingly, Part VI.B. and Attachment E, Parts II.E.1. through 3. and Part V.; and Parts VI.A.1.b.iii.-iv., VI.B.2., VI.C.1.a., VI.D.1.a., VIII.B.1.b.ii., IX.A.5., IX.C.1.a., IX.E.1.a. and b., IX.G.1.b., and IX.G.2., do not mandate a new program or higher level of service.

C. Parts III.A.1., III.A.2., and III.A.4.a.-d., Relating to Nonstormwater Discharges Do Not Mandate a New Program or Higher Level of Service.

The test claims plead the following provisions related to non-stormwater discharges:

[736] Exhibit L (21), R4-2007-009, page 3.

[737] Exhibit A, Test Claim 13-TC-01, page 823 (test claim permit, Table E-1.).

[738] Exhibit A, Test Claim 13-TC-01, pages 1065-1066 (test claim permit, Attachment K); Exhibit L (18), Resolution 2002-004, Attachment A, pages 4, 8; Exhibit L (19), Resolution 2002-022, Attachment A, pages 5, 9, 16.

[739] Exhibit A, Test Claim 13-TC-01, page 823 (test claim permit, Table E-1.).

[740] Exhibit A, Test Claim 13-TC-01, pages 1068-1069 (test claim permit, Attachment K); Exhibit L (22), Resolution R10-008, Attachment A, page 11.

[741] Exhibit A, Test Claim 13-TC-01, page 826 (test claim permit, Table E-1); Exhibit L (22), Resolution R10-008, Attachment A, pages 12-13.

Permit Part III.A.1. of the Permit requires Claimants to prohibit certain non-stormwater discharges "through the MS4 to receiving waters."

Parts III.A.2. and VI.D.9.f., relating to conditional exemptions from the non-stormwater discharge prohibition, requires Claimants to assure that appropriate BMPs are employed for discharges from essential non-emergency firefighting activities and, with regard to unpermitted discharges by drinking water suppliers, to work with those suppliers on the conditions of their discharges.

Part III.A.4.a. requires Claimants to "develop and implement procedures" to require nonstormwater dischargers to fulfill requirements set forth in Part III.A.4.a.(i.-vi.).

Part III.A.4.b. requires Claimants to "develop and implement procedures that minimize the discharge of landscape irrigation water into the MS4 by promoting water conservation programs." Permittees are required to coordinate with local water purveyors, where applicable, to promote landscape water use efficiency requirements, use of drought tolerant native vegetation and the use of less toxic options for pest control and landscape management.

Permittees are required to develop and implement a "coordinated outreach and education program" to minimize the discharge of irrigation water and pollutants associated with such discharge as part of the Public Information and Participation in Part VI.D.4.c. of the Permit.

Part III.A.4.c. requires Claimants to evaluate monitoring data collected pursuant to the Monitoring and Reporting Program of the Permit (Attachment E) and "any other associated data or information" to determine if any authorized or conditionally exempt non-stormwater discharges identified in Permit Parts III.A.1., A.2. and A.3. are a source of pollutants that may be causing or contributing to an exceedance of a receiving water limitation in Part V. or water quality-based effluent limitation in Part VI.E.

Part III.A.4.d. requires that if these data show that the non-stormwater discharges are such a source of pollutants, Claimants are required to take further action to determine whether the discharge is causing or contributing to exceedances of receiving water limitations, report those findings to the LARWQCB, and take steps to effectively prohibit, condition, require diversion or require treatment of the discharge.[742]

As explained below, the Commission finds that Parts III.A.1., III.A.2., and III.A.4.a.-d., do not mandate a new program or higher level of service. In addition, Part III.A.4.f. states that "[i]f the Permittee prohibits the discharge from

[742] Exhibit A, Test Claim 13-TC-01, pages 74-75; Exhibit B, Test Claim 13-TC-02, page 22.

the MS4, as per Part III.A.4.d.i, then the Permittee shall implement procedures developed under Part VI.D.9 (Illicit Connections and Illicit Discharges Elimination Program) in order to eliminate the discharge to the MS4."[743] Part VI.D.9. of the test claim permit does not address the Illicit Connections and Illicit Discharges Elimination Program, however; Part VI.10. does and, thus, the reference to Part VI.D.9. is likely a typographical error in the permit.[744] The Illicit Connections and Illicit Discharges Elimination Program will not be addressed in this section of the Decision but is separately addressed in Section IV.D. of this Decision.

1. Federal Law Requires Permittees to Effectively Prohibit Non-Stormwater Discharges into the MS4.

Federal law distinguishes between stormwater discharges and non-stormwater discharges. Stormwater is defined as "storm water runoff, snow melt runoff, and surface runoff and drainage; events related to precipitation."[745] A discharge to a MS4 that "is *not* composed entirely of stormwater" is considered an illicit non-stormwater, or dry weather discharge.[746] According to a fact sheet issued by EPA, illicit non-stormwater discharges may contribute to high levels of pollutants, including heavy metals, toxics, oil and grease, solvents, nutrients, viruses, and bacteria to receiving waterbodies:

> Illicit discharges enter the MS4 system through either direct connections (e.g., wastewater piping either mistakenly or deliberately connected to the storm drains) or indirect connections (e.g., infiltration into the MS4 from cracked sanitary systems, spills collected by drain outlets, or paint or used oil dumped directly into the drain). The result is untreated discharges that contribute high levels of pollutants, including heavy metals, toxics, oil and grease, solvents, nutrients, viruses, and bacteria to receiving waterbodies. Pollutant levels from these illicit discharges have been shown in EPA studies to be high enough to significantly degrade receiving water quality and threaten aquatic, wildlife, and human health.[747]

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[743] Exhibit A, Test Claim 13-TC-01, page 633.

[744] Exhibit A, Test Claim 13-TC-01, pages 723-737 (test claim permit, Part VI.D.9., Public Agency Activities Program) and page 738 et seq. (test claim permit, Part VI.D.10., Illicit Connections and Illicit Discharges Elimination Program).

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

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

[747] Exhibit L (25), Stormwater Phase II Final Rule, Illicit Discharge Detection and Elimination, USEPA Fact Sheet 2.5.

Examples of illicit non-stormwater discharges include sanitary wastewater, effluent from septic tanks, car wash wastewater, improper oil disposal, radiator flushing disposal, laundry wastewaters, spills from roadway accidents, and improper disposal of automobile and household toxics.[748]

Federal law requires permits for discharges from MS4s "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers," except as authorized by an NPDES permit or the discharges are conditionally exempted from the prohibition.[749] Those exempted discharge categories that are not prohibited from entering into the MS4 are allowed only if BMPs and control measures are implemented to manage any potential pollution from entering the MS4 and ultimately the receiving waters.[750] The discharge continues to be exempt *unless* the discharge is identified by a municipality as a source of pollutants to waters of the United States.[751] If a discharge is identified as a pollutant, the municipality is required by federal law to effectively prohibit the illicit discharge from entering the MS4 by implementing a program to detect and remove the discharge.[752]

To "effectively prohibit" non-stormwater discharges requires the implementation of a program by the MS4 permittee to detect and remove illicit discharges, which under federal law shall contain a description of the following:

- A program, including inspections, to implement and enforce an ordinance to prevent illicit non-stormwater discharges to the MS4.[753]

  The program is required to address all types of illicit discharges and federal law identifies the following categories of non-stormwater discharges that "shall be addressed" when identified as a source of pollutants to the waters of the United States: "water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined . . .) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (program descriptions shall address discharges or flows from fire fighting only where such

[748] Exhibit L (25), Stormwater Phase II Final Rule, Illicit Discharge Detection and Elimination, USEPA Fact Sheet 2.5.

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

[750] Code of Federal Regulations, title 40, sections 122.26(d)(2)(iv)(B), 122.44(k).

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

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

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

discharges or flows are identified as significant sources of pollutants to waters of the United States)."[754]

- Procedures to conduct on-going field screening activities during the life of the permit, including areas or locations to be evaluated.[755]
- Procedures to investigate portions of the MS4 that, based on field screening or other information, indicate a reasonable potential for containing illicit discharges or other sources of non-storm water pollution.[756]
- Procedures to prevent, contain, and respond to spills that may discharge into the MS4;
- A program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from MS4s;
- Educational activities, public information activities, and other activities to facilitate the proper management and disposal of oil and toxic materials; and
- Controls to limit infiltration of seepage from municipal sanitary sewers to MS4s where necessary.[757]

Federal law also requires that a permittee have legal authority established by statute, ordinance, or a series of contracts that enables the permittee to perform the following activities to ensure compliance with water quality standards:

- Prohibit illicit discharges to the MS4.
- Control the discharge to the MS4 of spills, dumping, or disposal of materials other than stormwater.
- Require compliance with conditions in ordinances, permits, contracts or orders.
- Carry out all inspections, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions, including the prohibition on illicit discharges to the MS4.[758]

In addition, federal law requires dischargers to monitor compliance with the effluent limitations identified in an NPDES permit, and report monitoring results at least once per year, or within 24 hours for any noncompliance which may endanger health or the

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

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

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

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

[758] Code of Federal Regulations, title 40, section 122.26(d)(2)(i).

environment.[759] An NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance.[760]

Finally, if a permittee fails to comply with these federal requirements, or otherwise violates the conditions in an NPDES permit, it may be subject to state and federal enforcement actions and private citizen lawsuits for injunctive relief and civil penalties.[761] Federal regulations further state "Any permit noncompliance constitutes a violation of the CWA and is grounds for enforcement action."[762]

2. Part III.A.1., which Prohibits Non-Stormwater Discharges Through the MS4 to Receiving Waters, Implements Federal Law and Does Not Mandate a New Program or Higher Level of Service.

Part III.A.1., "Discharge Prohibitions," states "[e]ach Permittee shall, for the portion of the MS4 for which it is an owner or operator, prohibit non-storm water discharges through the MS4 to receiving waters except where such discharges" are authorized under a general or individual NPDES permit, temporary discharges authorized by U.S. EPA, authorized discharges from emergency fire fighting activities (i.e., flows necessary for the protection of life or property), natural flows, or authorized discharges that are conditionally exempt.[763]

The claimants allege Part III.A.1. mandates a new program or higher level of service for the following reasons:

- The "absolute prohibition" in Part III.A.1. to prohibit non-stormwater discharges is new and not mandated by federal law. The prior permit required the permittees to "*effectively* prohibit non-storm water discharges."[764]
- The Clean Water Act does not require permittees to address non-stormwater discharges "through the MS4 to receiving waters." It only requires MS4 permits

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

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

[761] United States Code, title 33, sections 1319, 1342(b)(7), 1365(a); see also, Water Code sections 13385 and 13387 (potential criminal penalties).

[762] Code of Federal Regulations, title 40, section 122.41.

[763] Exhibit A, Test Claim 13-TC-01, page 628.

[764] Exhibit G, Claimants' Rebuttal Comments, page 41.

include a requirement to effectively prohibit non-stormwater discharges "into the storm sewers."[765]

The Water Boards contend Part III.A.1. does not mandate a new program or higher level of service, since the prohibition of illicit, non-stormwater discharges is mandated by federal law and the requirement is the same as the prior permit, despite the slight change in wording. Specifically, they contend the prohibition is not new, and was included in the prior permit as follows:

> Part III.A.1 of the 2012 Permit was carried over from prior permits and therefore can in no way be considered a new program or higher level of service. The 1996 Permit stated: "Each Permittee shall, within its jurisdiction, effectively prohibit non-storm water discharges into the [MS4] and watercourses…" [Fn. omitted.] The 2001 Permit stated that "The Permittees shall effectively prohibit non-storm water discharges into the MS4 and watercourses…" [Fn. omitted.] The 2012 Permit states "Each Permittee shall, for the portion of the MS4 for which it is an owner or operator, prohibit non-storm water discharges through the MS4 to receiving waters…"[Fn. omitted.] The 2012 Permit language is wholly consistent with the 2001 Permit language. The slight variation in terminology between the 2001 Permit and the 2012 Permit does not alter the substantive requirement but simply serves to provide greater clarity. As explained below, the minor terminology differences are consistent with U.S. EPA's 1990 Phase I MS4 regulations. In the end, there is no meaningful difference between the phrasing of "into the MS4 and watercourses" from the 2001 Permit and "through the MS4 to receiving waters" in the 2012 Permit. Both requirements prohibit non-stormwater discharges from reaching receiving waters, which is wholly consistent with Congress' ultimate intent in the Clean Water Act and U.S. EPA's regulations that such nonstormwater discharges not reach receiving waters. [Fn. omitted.]
>
> Since the slight variation in terminology between the 2001 Permit and the 2012 Permit did not alter the substance of the requirement, Permittees should have already been implementing programs to prevent non-stormwater from reaching receiving waters since at least 1996. For Claimants to argue that this provision in the 2012 Permit is somehow a new or a higher level of service is, frankly, disingenuous.[766]

The Water Boards argue that the claimant is incorrect in the assertion that the prohibition of non-stormwater discharges *through* the MS4 to receiving waters is contrary to federal law.

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[765] Exhibit G, Claimants' Rebuttal Comments, page 41.

[766] Exhibit F, Water Boards' Comments on the Test Claims, pages 61-62.

> The Water Boards acknowledge that CWA section 402, subdivision (p)(3)(B)(ii), requires that MS4 permits include a requirement to effectively prohibit non-stormwater discharges "into the storm sewers." However, the 2012 Permit's prohibition of non-stormwater discharges "through the MS4 to receiving waters" is wholly consistent with this mandate and U.S. EPA's regulations. It can be logically concluded that if non-stormwater discharges are detected leaving the MS4, they must have entered the MS4.[767]

The Water Boards further explain that federal regulations and the 1990 preamble to the Phase I MS4 regulations use the terms "into," "to," "through," and "from" the MS4 interchangeably when describing the federal requirement to effectively prohibit non-stormwater discharges.

> U.S. EPA in its 1990 preamble states that "[t]hese [MS4] permits are to…effectively prohibit non-storm water discharges *to* the municipal separate storm sewer system," and that "[t]oday's rule defines the term 'illicit discharge' to describe any discharge *through* a municipal separate storm sewer that is not composed entirely of storm water and that is not covered by an NPDES permit. Such illicit discharges are not authorized under the CWA. Section 402(p)(3)(B) of the CWA requires that permits for discharges *from* municipal separate storm sewers require the municipality to 'effectively prohibit' non-storm water discharges *from* the municipal separate storm sewer… Ultimately, such non-storm water discharges *through a municipal separate storm sewer* must either be removed from the system or become subject to an NPDES permit."[768]

The Water Boards state "[t]his is also not the first time that many of the Claimants have made this argument."[769] The claimants raised the same arguments before the Los Angeles County Superior Court and to the State Water Board and lost on the issue both times.[770]

The Commission finds that the requirement in Part III.A.1. to prohibit non-stormwater discharges "through" the MS4 to receiving waters unless authorized by a permit or otherwise exempt is mandated by federal law and is not new. The Clean Water Act provides that permits for discharges from MS4s "shall include a requirement to

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[767] Exhibit F, Water Boards' Comments on the Test Claims, page 62.

[768] Exhibit F, Water Boards' Comments on the Test Claims, page 62, citing 55 Federal Register 47990, 47995 (Nov. 16, 1990).

[769] Exhibit F, Water Boards' Comments on the Test Claims, page 62.

[770] Exhibit F, Water Boards' Comments on the Test Claims, pages 62-63, citing *In re Los Angeles County Municipal Storm Water Permit Litigation* (Sup. Ct. Los Angeles County, March 24, 2005, Case No. BS 080548), Statement of Decision from Phase I Trial on Petitions for Writ of Mandate, page 16 (2012 AR, page RB-AR23172); and State Water Board Order WQ 2015-0075, page 61.

effectively prohibit non-stormwater discharges *into* the storm sewers."[771] Federal regulations further require programs "to prevent illicit discharges *to* the municipal separate storm sewer system" since "non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States."[772] Since the purpose of the Clean Water Act "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" with the "goal that the discharge of pollutants into the navigable waters be eliminated,"[773] a permittee is required to prohibit the discharge from entering the MS4, traveling through the MS4, and then leaving the MS4 into the waters of the United States. As the Water Boards state, "[i]t can be logically concluded that if non-stormwater discharges are detected leaving the MS4, they must have entered the MS4."[774] This interpretation is consistent with the prior permit and the test claim permit, both of which state that "Discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited" and that discharges from the MS4, "including non-stormwater, for which a permittee is responsible, shall not cause or contribute to a condition of nuisance."[775]

In addition, as the Water Boards have indicated, the preamble to the federal regulations uses "into" and "through" interchangeably: "The CWA prohibits the point source discharge of non-storm water not subject to an NPDES permit ***through*** municipal separate storm sewers to waters of the United States;" and " . . such discharges [street wash waters] . . . must be addressed by municipal management programs as part of the prohibition on non-storm water discharges ***through*** municipal separate storm sewer systems."[776] Furthermore, when adopting the federal regulations, U.S. EPA made it clear that non-stormwater discharges "through" an MS4 must be either removed from the system or become subject to an NPDES permit as follows:

> Today's rule defines the term "illicit discharge" to describe any discharge through a municipal separate storm sewer that is not composed entirely of storm water and that is not covered by an NPDES permit. Such illicit discharges are not authorized under the CWA. Section 402(p)(3)(B) of the CWA requires that permits for discharges from municipal separate storm sewers require the municipality to "effectively prohibit" non-storm water discharges from the municipal separate storm sewer. As discussed in more detail below, today's rule begins to implement the "effective prohibition" by requiring municipal operators of municipal separate storm

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[771] United States Code, title 33, section 1342(p)(3)(B)(ii) (Public Law 100-4).

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

[773] United States Code, title 33, section 1251.

[774] Exhibit F, Water Boards' Comments on the Test Claims, page 62.

[775] Exhibit A, Test Claim 13-TC-01, pages 639, 1191.

[776] Exhibit L (9), NPDES Permit Application Regulations for Storm Water Discharges; Final Rule, 55 Federal Register 47990 (November 16, 1990), page 7, emphasis added.

> sewer systems serving a population of 100,000 or more to submit a description of a program to detect and control certain non-storm water discharges to their municipal system. Ultimately, such non-storm water discharges ***through*** a municipal separate storm sewer must be either removed from the system or become subject to an NPDES permit . . . .[777]

Thus, the prohibition of non-stormwater discharges "through" the MS4 to receiving waters is mandated by federal law and is not new.

Moreover, the claimants' argument that Part III.A.1. mandates a new program or higher level of service simply because the prior permit required the permittees to "effectively prohibit" non-stormwater discharges and the test claim permit removes the word effectively, thereby requiring the permittees to "absolutely prohibit" non-stormwater discharges, is not a correct interpretation of the law. The claimants' argument suggests that non-stormwater discharges are not prohibited by federal law, but are treated like stormwater discharges, which are subject to the maximum extent practicable (MEP) standard to *reduce,* but not prohibit, the discharge of pollutants. This interpretation conflicts with the Clean Water Act, which imposes the following separate and distinct standards for stormwater discharges and non-stormwater discharges: MS4 permits (1) "shall include a requirement to effectively prohibit nonstormwater discharges into the storm sewers[ ]" and (2) "shall require [i] controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and [ii] such other provisions as the Administrator or the State determines appropriate for the control of such pollutants."[778] As made clear by U.S. EPA when adopting the regulations to implement the Clean Water Act, illicit, non-stormwater discharges through a municipal separate storm sewer "must be either removed from the system or become subject to an NPDES permit."[779] Consistent with federal law, footnote 17 in the test claim permit states "To 'effectively prohibit' means to not allow the non-storm water discharge through the MS4 unless the discharger obtains coverage under a separate NPDES permit prior to discharge to the MS4."[780]

Accordingly, Part III.A.1. implements federal law and does not mandate a new program or higher level of service.

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[777] Exhibit L (9), NPDES Permit Application Regulations for Storm Water Discharges; Final Rule, 55 Federal Register 47990 et seq. (November 16, 1990), page 6.

[778] United States Code, title 33, section 1342(p)(3)(B).

[779] Exhibit L (9), NPDES Permit Application Regulations for Storm Water Discharges; Final Rule, 55 Federal Register 47990 et seq. (November 16, 1990), page 6.

[780] Exhibit A, Test Claim 13-TC-01, page 633, footnote 17.

3. Parts III.A.2. and III.4.a., b., c., and d., Addressing Conditionally Exempt Non-Stormwater Discharges, Do Not Mandate a New Program or Higher Level of Service.

Part III.A.2. addresses the non-stormwater discharges that are conditionally exempt from the discharge prohibition, "provided they meet all required conditions specified below, or as otherwise approved by the Regional Board Executive Officer."[781] As is made clear by Table 8 in Part III.A.2. and in Part III.A.4.a., the permittees are required "to ensure" that a non-stormwater discharger complies with the requirements, conditions, and BMPs to prevent illicit non-stormwater discharges to the MS4 and receiving waters, as required by federal law.[782]

In addition, the Standard Provisions in Part VI.A.2. of the test claim permit (which has not been pled) requires each permittee to "establish and maintain adequate legal authority, within its respective jurisdiction, to control pollutant discharges into and from its MS4 through ordinance, statute, permit, contract or similar means." This legal authority must, at a minimum, authorize or enable the Permittee to: prohibit all non-stormwater discharges through the MS4 to receiving waters not otherwise authorized or conditionally exempt pursuant to Part III.A.; prohibit and eliminate illicit discharges and illicit connections to the MS4; control the discharge of spills, dumping, or disposal of materials other than stormwater to its MS4; require compliance with conditions in Permittee ordinances, permits, contracts or orders (i.e., hold dischargers to its MS4 accountable for their contributions of pollutants and flows); utilize enforcement mechanisms to require compliance with applicable ordinances, permits, contracts, or orders; and carry out all inspections, surveillance, and monitoring procedures necessary to determine compliance and noncompliance with applicable municipal ordinances, permits, contracts and orders, and with the provisions of this Order, including the prohibition of non-storm water discharges into the MS4 and receiving water ["This means the Permittee must have authority to enter, monitor, inspect, take measurements, review and copy records, and require regular reports from entities discharging into its MS4"]; and require the use of control measures to prevent or reduce the discharge of pollutants to achieve water quality standards/receiving water limitations.[783]

a. <u>The requirements imposed by Parts III.A.2. and III.4.a., b., c., and d.</u>

The conditionally exempt non-stormwater discharges, conditions, and BMPs are listed below.

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[781] Exhibit A, Test Claim 13-TC-01, pages 629-630.

[782] Exhibit A, Test Claim 13-TC-01, pages 629-630, 631-632; United States Code, title 33, section 1342(p)(3)(B).

[783] Exhibit A, Test Claim 13-TC-01, pages 640-641.

1. Part III.A.2.a. of the test claim permit addresses the conditionally exempt *essential* non-stormwater discharges.[784] Attachment A defines "conditionally exempt essential non-storm water discharges" as "certain categories of discharges that are not composed entirely of storm water and that are allowed by the Regional Water Board to discharge to the MS4, if in compliance with all specified requirements; are not otherwise regulated by an individual or general NPDES permit; and are essential public services that are directly or indirectly required by other State or federal statute and/or regulation. These include non-storm water discharges from drinking water supplier distribution system releases and non-emergency fire fighting activities. Conditionally exempt essential non-storm water discharges may contain minimal amounts of pollutants, however, when in compliance with industry standard BMPs and control measures, do not result in significant environmental effects."[785] Part III.A.2.a.i. and ii. allow the following essential discharges provided the following BMPs and conditions are satisfied:

    - Discharges from essential non-emergency fire fighting activities, including fire fighting training activities, routine maintenance and testing (including building fire suppression system and fire hydrant testing and maintenance), provided appropriate BMPs are implemented based on the CAL FIRE, Office of the State Fire Marshal's Water-Based Fire Protection Systems Discharge Best Management Practices Plan for Urban Runoff Management (May 1, 2004) or equivalent BMP manual for fire training activities and post-emergency fire fighting activities.[786]
    - Discharges from drinking water supplier distribution systems[787] that are not otherwise regulated by an individual or general NPDES permit, provided appropriate BMPs are implemented based on the American Water Works Association (California-Nevada Section) *Guidelines for the Development of Your Best Management Practices (BMP) Manual for Drinking Water System Releases* (2005) or equivalent industry standard BMP manual.

      Additionally, each permittee shall work with drinking water suppliers that may discharge to the permittee's MS4 to ensure for all discharges greater than 100,000 gallons: (1) notification at least 72 hours prior to a planned

[784] Exhibit A, Test Claim 13-TC-01, pages 629-630.

[785] Exhibit A, Test Claim 13-TC-01, page 759.

[786] Exhibit A, Test Claim 13-TC-01, page 629.

[787] Drinking water supplier distribution system releases means "sources of flows from drinking water storage, supply and distribution systems (including flows from system failures), pressure releases, system maintenance, distribution line testing, and flushing and dewatering of pipes, reservoirs, and vaults, and minor non-invasive well maintenance activities not involving chemical addition(s). . . ." (Exhibit A, Test Claim 13-TC-01, page 629, footnote 8.)

discharge and as soon as possible after an unplanned discharge; (2) monitoring of any pollutants of concern[788] in the drinking water supplier distribution system release; and (3) record keeping by the drinking water supplier.

Permittees shall require that the following information is maintained by the drinking water suppliers for all discharges to the MS4 (planned and unplanned) greater than 100,000 gallons: name of discharger, date and time of notification (for planned discharges), method of notification, location of discharge, discharge pathway, receiving water, date of discharge, time of the beginning and end of the discharge, duration of the discharge, flow rate or velocity, total number of gallons discharged, type of dechlorination equipment used, type of dechlorination chemicals used, concentration of residual chlorine, type(s) of sediment controls used, pH of discharge, type(s) of volumetric and velocity controls used, and field and laboratory monitoring data. Records shall be retained for five years and made available upon request by the Permittee or Regional Water Board.[789]

- Part III.A.2.b. addresses "conditionally exempt non-stormwater discharges," which are "certain categories of discharges that are not composed entirely of storm water and that are either not sources of pollutants or may contain only minimal amounts of pollutants and when in compliance with specified BMPs do not result in significant environmental effects."[790]

  Conditionally exempt non-stormwater discharges that fall within one of the following categories are allowed, provided that the discharge itself is not a source of pollutants and meets all the following conditions and BMPs specified in Table 8 of the test claim permit "or as otherwise specified or approved by the Regional Water Board Executive Officer."

  - Dewatering of lakes. "Immediately prior to discharge, visible trash on the shoreline or on the surface of the lake shall be removed and disposed of in a legal manner. Immediately prior to discharge, the discharge pathway and the MS4 inlet to which the discharge is directed, shall be inspected and cleaned out. Discharges shall be volumetrically and velocity controlled to minimize

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[788] "Pollutants of concern from drinking water supplier distribution system releases may include trash and debris, including organic matter, total suspended solids (TSS), residual chlorine, pH, and any pollutant for which there is a water quality-based effluent limitation (WQBEL) in Part VI.E applicable to discharges from the MS4 to the receiving water. Determination of the pollutants of concern for a particular discharge shall be based on an evaluation of the potential for the constituent(s) to be present in the discharge at levels that may cause or contribute to exceedances of applicable WQBELs or receiving water limitations." (Exhibit A, Test Claim 13-TC-01, page 630, footnote 9.)

[789] Exhibit A, Test Claim 13-TC-01, pages 629-630.

[790] Exhibit A, Test Claim 13-TC-01, pages 630-631, 759.

resuspension of sediments. Measures shall be taken to stabilize lake bottom sediments. Ensure procedures for water quality monitoring for pollutants of concern in the lake. Ensure record-keeping of lake dewatering by the lake owner/operator."

- Landscape irrigation using potable water. "Discharge allowed if runoff due to potable landscape irrigation is minimized through the implementation of an ordinance specifying water efficient landscaping standards, as well as an outreach and education program focusing on water conservation and landscape water use efficiency."

  "Implement BMPs to minimize runoff and prevent introduction of pollutants to the MS4 and receiving water. Implement water conservation programs to minimize discharge by using less water."

- Landscape irrigation using reclaimed or recycled water. "Discharge of reclaimed or recycled water runoff from landscape irrigation is allowed if the discharge is in compliance with the producer and distributor operations and management (O&M) plan, and all relevant portions thereof, including the Irrigation Management Plan."

  "Discharges must comply with applicable O&M Plans, and all relevant portions thereof, including the Irrigation Management Plan."

- Dechlorinated/debrominated swimming pool/spa discharges. "Discharges allowed after implementation of specified BMPs. Pool or spa water containing copper-based algaecides is not allowed to be discharged to the MS4. Discharges of cleaning waste water and filter backwash allowed only if authorized by a separate NPDES permit."

  "Implement BMPs and ensure discharge avoids potential sources of pollutants in the flow path to prevent introduction of pollutants prior to discharge to the MS4 and receiving water. Swimming pool water must be dechlorinated or debrominated using holding time, aeration, and/or sodium thiosulfate. Chlorine residual in the discharge shall not exceed 0.1 mg per L. Swimming pool water shall not contain any detergents, wastes, or algaecides, or any other chemicals including salts from pools commonly referred to as "salt water pools" in excess of applicable water quality objectives. Swimming pool discharges are to be pH adjusted, if necessary, and be within the range of 6.5 and 8.5 standard units. Swimming pool discharges shall be volumetrically and velocity controlled to promote evaporation and/or infiltration. Ensure procedures for advanced notification by the pool owner to the Permittee(s) at least 72 hours prior to planned discharge for discharges of 100,000 gallons or more. For discharges of 100,000 gallons or more, immediately prior to discharge, the discharge pathway and the MS4 inlet to which the discharge is directed, shall be inspected and cleaned out."

- Dewatering of decorative fountains. "Discharges allowed after implementation of specified BMPs. Fountain water containing copper-based algaecides may not be

discharged to the MS4. Fountain water containing dyes my [sic] not be discharged to the MS4."

"Implement BMPs and ensure discharge avoids potential sources of pollutants in the flow path to prevent introduction of pollutants prior to discharge to the MS4 and receiving water. Fountain water must be dechlorinated or debrominated using holding time, aeration, and/or sodium thiosulfate. Chlorine residual in the discharge shall not exceed 0.1 mg per mg/L. Fountain discharges are to be pH adjusted, if necessary, and be within the range of 6.5 and 8.5 standard units. Fountain discharges shall be volumetrically and velocity controlled to promote evaporation and/or infiltration. Ensure procedures for advanced notification by the fountain owner to the Permittee(s) at least 72 hours prior to planned discharge for discharges of 100,000 gallons or more. For discharges of 100,000 gallons or more, immediately prior to discharge, the discharge pathway and the MS4 inlet to which the discharge is directed, shall be inspected and cleaned out."

- Non-commercial car washing by residents or by nonprofit organizations. "Discharges allowed after implementation of specified BMPs."

  "Implement BMPs and ensure discharge avoids potential sources of pollutants in the flow path to prevent introduction of pollutants prior to discharge to the MS4 and receiving water. Minimize the amount of water used by employing water conservation practices such as turning off nozzles or kinking the hose when not spraying a car, and using a low volume pressure washer. Encourage use of biodegradable, phosphate free detergents and non-toxic cleaning products. Where possible, wash cars on a permeable surface where wash water can percolate into the ground (e.g. gravel or grassy areas). Empty buckets of soapy or rinse water into the sanitary sewer system (e.g., sinks or toilets)."

- Street/sidewalk wash water. 'Discharges allowed after implementation of specified BMPs.'

  "Sweeping should be used as an alternate BMP whenever possible and sweepings should be disposed of in the trash. BMPs shall be in accordance with Regional Water Board Resolution No. 98-08 that requires: 1) removal of trash, debris, and free standing oil/grease spills/leaks (use absorbent material if necessary) from the area before washing and 2) use of high pressure, low volume spray washing using only potable water with no cleaning agents at an average usage of 0.006 gallons per square feet of sidewalk area. In areas of unsanitary conditions (e.g., areas where the congregation of transient populations can reasonably be expected to result in a significant threat to water quality), whenever practicable, Permittees shall collect and divert street and alley wash water from the Permittee's street and sidewalk cleaning public agency activities to the sanitary sewer."[791]

[791] Exhibit A, Test Claim 13-TC-01, pages 630-631, 635-638 (test claim permit, Table 8).

Table 8 of the test claim permit further requires that for all six conditionally exempt discharge categories bulleted above, the permittees are required to "[e]nsure . . . discharges avoid potential sources of pollutants in the flow path to prevent introduction of pollutants to the MS4 and receiving water."[792] In addition, "whenever there is a discharge of 100,000 gallons or more into the MS4, Permittees shall require advance notification by the discharger to the potentially affected MS4 Permittees, including at a minimum the LACFCD [Los Angeles County Flood Control District], if applicable, and the Permittee with jurisdiction over the land area from which the discharge originates" and that 72 hours prior notice is required in these situations.[793] The Fact Sheet indicates that the Flood Control District controls a large part of the MS4 system and, thus, notice to LACFCD in these conditions is provided.[794]

Part III.A.4.a. requires each permittee to develop and implement procedures to ensure that a discharger complies with the following requirements for non-stormwater discharges to the Permittee's MS4:

- Notifies the permittee of the planned discharge in advance, consistent with requirements in Table 8 or recommendations pursuant to the applicable BMP manual;
- Obtains any local permits required by the MS4 owner(s) and/or operator(s);
- Provides documentation that it has obtained any other necessary permits or water quality certifications for the discharge;
- Conducts monitoring of the discharge, if required by the permittee;
- Implements BMPs and/or control measures as specified in Table 8 or in the applicable BMP manual(s) as a condition of the approval to discharge into the Permittee's MS4; and
- Maintains records of its discharge to the MS4, consistent with requirements in Table 8 or recommendations pursuant to the applicable BMP manual. For lake dewatering, Permittees shall require that the following information is maintained by the lake owner/operator: name of discharger, date and time of notification, method of notification, location of discharge, discharge pathway, receiving water, date of discharge, time of the beginning and end of the discharge, duration of the discharge, flow rate or velocity, total number of gallons discharged, type(s) of sediment controls used, pH of discharge, type(s) of volumetric and velocity controls used, and field and laboratory monitoring data. Records shall be made available upon request by the permittee or Regional Water Board.[795]

[792] Exhibit A, Test Claim 13-TC-01, page 635.

[793] Exhibit A, Test Claim 13-TC-01, page 635.

[794] Exhibit A, Test Claim 13-TC-01, page 882.

[795] Exhibit A, Test Claim 13-TC-01, pages 631-632.

Part III.A.4.b. requires each permittee to develop and implement procedures that minimize the discharge of landscape irrigation water into the MS4 by promoting conservation programs. In this respect, permittees are required to:

- Coordinate with the local water purveyor(s), where applicable, to promote landscape water use efficiency requirements for existing landscaping, use of drought tolerant, native vegetation, and the use of less toxic options for pest control and landscape management.
- Develop and implement a coordinated outreach and education program to minimize the discharge of irrigation water and pollutants associated with irrigation water consistent with Part VI.D.4.c of this Order (Public Information and Participation Program).[796]

Part III.A.4.c. requires the permittees to evaluate monitoring data pursuant to the Monitoring and Reporting Program in Attachment E, and any other associated data or information, and determine whether any of the conditionally exempt non-stormwater discharges are a source of pollutants that may be causing or contributing to an exceedance of receiving water limitations or water quality-based effluent limitations.[797]

Part III.A.4.d. states that if a permittee determines that any of the conditionally exempt non-stormwater discharges is a source of pollutants that causes or contributes to an exceedance of receiving water limitations or water quality-based effluent limitations, the permittee is required to report the information to the Regional Board and either effectively prohibit the non-stormwater discharge to the MS4, impose additional conditions on the non-stormwater discharge such that it will not be a source of pollutants, require diversion of the non-stormwater discharge to the sanitary sewer, or require treatment of the non-stormwater discharge before discharge to the receiving water.[798]

b. The arguments raised by the parties.

The claimants contend that the requirements are new, that the Regional Board previously had the responsibility to evaluate monitoring data and, therefore, the following activities required by Parts III.A.2. and III.A.4. mandate a new program or higher level of service:[799]

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[796] Exhibit A, Test Claim 13-TC-01, page 632.

[797] Exhibit A, Test Claim 13-TC-01, pages 632-633.

[798] Exhibit A, Test Claim 13-TC-01, page 633. The permit further states, in Part III.A.4.f., "If the Permittee prohibits the discharge from the MS4, as per Part III.A.4.d.i, then the Permittee shall implement procedures developed under Part VI.D.9. (Illicit Connections and Illicit Discharges Elimination Program) in order to eliminate the discharge to the MS4." (Exhibit A, Test Claim 13-TC-01, page 633.)

[799] Exhibit A, Test Claim 13-TC-01, pages 74-77; Exhibit B, Test Claim 13-TC-02, pages 21-24.

(a) police, through the establishment of procedures and standards, the categories of the "conditionally exempt" discharges to the MS4;

(b) assure that appropriate BMPs were employed for discharges from essential nonemergency firefighting activities or drinking water supply systems;

(c) implement procedures that minimized the discharge of landscape irrigation water into the MS4 or to coordinate with local water purveyors to promote landscape water use efficiency requirements;

(d) evaluate monitoring data to determine if any authorized or conditionally exempt non-stormwater discharges were a source of pollutants that may be causing or contributing to an exceedance of a receiving water limitation. (This previously was an obligation of the LARWQCB.); and

(e) "develop and implement procedures" to require non-stormwater dischargers to fulfill requirements set forth in Part III.A.4.a.(i.-vi.).[800]

The claimants acknowledge they can prepare a Watershed Management Plan (WMP) or an Enhanced Watershed Management Plan (EWMP) regarding non-stormwater discharges but contend the test claim permit requires the WMP or EWMP to include the strategies, control measures, and BMPs consistent with Part III.A. and, thus, the requirements are mandated by the state.[801] The claimant further contends that federal regulations (1) do not require a municipality to address certain specified categories of non-stormwater discharges into the MS4 unless the municipality determines that such discharges are sources of pollutants to "waters of the United States;" (2) do not require a municipality *to affirmatively evaluate* those discharges to determine if they are such a source of pollutants, as required by Section III.A.4.c. of the Permit; and (3) refer to the discharges as sources of pollutants to "waters of the United States," not to MS4 systems.[802] The claimant also states that "even if these requirements were federal in origin, the Regional Board's specification of compliance, an exercise of discretion that usurped the Claimants' ability to design their own program, rendered these permit provisions state mandates."[803]

The Water Boards contend Part III.A.2. does not mandate a new program or higher level of service for the following reasons:

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[800] Exhibit A, Test Claim 13-TC-01, pages 75-76; Exhibit B, Test Claim 13-TC-02, page 23; Exhibit I, Claimants' Comments on the Draft Proposed Decision, pages 26-27, 29.

[801] Exhibit A, Test Claim 13-TC-01, page 74; Exhibit B, Test Claim 13-TC-02, page 21; Exhibit G, Claimants' Rebuttal Comments, page 40.

[802] Exhibit I, Claimants' Comments on the Draft Proposed Decision page 27.

[803] Exhibit I, Claimants' Comments on the Draft Proposed Decision page 27.

- The claimants have the option of complying with the requirements of the permit by developing a Watershed Management Program (WMP) or Enhanced Watershed Management Program (EWMP) and customizing strategies, control measures, and BMPs consistent with federal law. Therefore, there is no state-mandated program. In addition, Part VI.C.4.d.i.-iii. of the test claim permit requires permittees electing to develop a WMP or EWMP to continue implementing their existing stormwater management program under the 2001 permit prior to the approval of their WMP or EWMP, which is not reimbursable.[804]
- Part III.A.2. allows Permittees to propose for approval by the Los Angeles Water Board Executive Officer alternative conditions from those specified in Parts III.A.2, including Table 8, for the conditionally exempt discharges. "Part III.A.2 states '[t]he following categories of non-storm water discharges are conditionally exempt from the non-storm water discharge prohibition, provided they meet all required conditions specified below, *or as otherwise approved by the Regional Water Board Executive Officer* …'."[805]
- "The provision in Part III.A.2.a.i is not a new program or higher level of service. Under the 2001 Permit, 'essential *non-emergency* firefighting activities' was not a category of discharge conditionally exempt from the non-stormwater discharge prohibition. [Fn. omitted.] This means that, under the 2001 Permit, those discharges fell under the non-stormwater discharge prohibition and Permittees were not authorized to discharge non-stormwater associated with non-emergency firefighting activities at all through the MS4 to receiving waters. To comply with the prohibition, Permittees would have had to employ BMPs to ensure that this category of discharge did not reach receiving waters. Part III.A.2.a.i of the 2012 Permit changed that by allowing the discharge of non-stormwater from non-emergency firefighting activities, but subject to certain conditions, recognizing this category as an essential conditionally exempt non-stormwater discharge. [Fn. omitted.] As such, this provision, which allows for a conditional discharge that was otherwise previously prohibited, certainly can not be considered a new program or higher level of service; if anything, it is a lesser standard since Permittees would have to employ fewer BMPs."[806]
- "The provision in Part III.A.2.a.ii is also not a new program or higher level of service. Under the 2001 Permit, 'potable drinking water supply and distribution system releases' was identified as a conditionally exempt non-stormwater discharge. The 2001 Permit stated that the category of discharge was conditioned on the releases being 'consistent with American Water Works Association guidelines for dichlorination and suspended solids reduction practices.' [Fn. omitted.] The 2012 Permit carried over this conditional exemption,

[804] Exhibit F, Water Boards' Comments on the Test Claims, pages 40-44.

[805] Exhibit F, Water Boards' Comments on the Test Claims, page 67.

[806] Exhibit F, Water Boards' Comments on the Test Claims, page 68.

but refined the applicable conditions. [Fn. omitted.] Permittees' BMPs are still required to be implemented based on the American Water Works Association guidelines or an equivalent industry standard BMP manual. The remaining conditions simply require the Claimants to work with drinking water suppliers that discharge 10,000 gallons or more to a Permittee's MS4 such that the Permittees receive advanced notice of the discharge and that the drinking water supplier monitor the discharge and keep records."[807]

- "Regarding the other conditionally exempt non-stormwater discharges in Part III.A.2.b of the Permit, dewatering of lakes, landscape irrigation, dechlorinated/dibrominated swimming pool/spa discharges, dewatering of decorative fountains, non-commercial car washing by residents or by non-profit organizations, and sidewalk rinsing were all conditionally exempted in the 2001 Permit. [Fn. omitted.] The 2012 Permit carried over these categories, but with clarification and centralization of the conditions that need to be met in order for the discharge to be exempted from the nonstormwater discharge prohibition and thus allowed through the MS4. [Fn. omitted.] The Los Angeles Water Board made extensive findings pertaining to the purpose of the conditions and BMPs required in the 2012 Permit Fact Sheet."[808]
- Part 1.A.2 of the prior permit authorized the Regional Board executive officer to impose conditions or withdraw the exemption if non-stormwater discharges were determined to be a source of pollutants. "Consistent with this provision of the 2001 Permit, the Los Angeles Water Board clarified the conditions for the continued exemption from the non-stormwater discharge prohibition for these categories of non-stormwater discharges in the 2012 Permit."[809]
- The BMPs in Table 8 for street/sidewalk wash water are the same as those in Resolution 98-08 (the permit before the 2001 prior permit). And the other conditions in the test claim permit for these categories of non-stormwater discharges were based on what the permittees were already doing under the 2001 Permit.[810]
- "Also, on September 29, 2011, U.S. EPA conducted a joint audit with the Los Angeles Water Board of the City of El Segundo's Illicit Connection and Illicit Discharge Elimination (IC/IDE) program, where they found that the City 'had in place a permit process for discharges of permitted non-storm water discharges that specifically prohibits, including dechlorinated and dibrominated swimming pool water and decorative fountain water, from being discharged into the storm drain system. All non-storm water discharges are to be directed to the sanitary

[807] Exhibit F, Water Boards' Comments on the Test Claims, page 68.

[808] Exhibit F, Water Boards' Comments on the Test Claims, page 68.

[809] Exhibit F, Water Boards' Comments on the Test Claims, pages 68-69.

[810] Exhibit F, Water Boards' Comments on the Test Claims, page 69.

sewer. In addition, the City has a prohibition against the draining of swimming pools and decorative fountains to the public right-of-way.' [Fn. omitted.] Likewise, on September 30, 2011, U.S. EPA conducted a joint audit with the Board of Culver City's IC/IDE program where they found that '[t]he City does not authorize the discharge of pool water to the storm sewer system. Essentially, there are no authorized discharges to the storm drain system with residential car washing being a "grey area' of oversight.' [Fn. omitted.] U.S. EPA's findings from the audits show that permittees already had in place prohibitions on certain non-stormwater discharges."[811]

- The requirements are necessary to comply with federal law to prohibit or control specified categories of non-stormwater discharges if they are determined to be a source of pollutants to waters of the United States.[812]
- Part III.A.4.a.-b. of the 2012 Permit is consistent with federal regulations by requiring Permittees to develop and implement procedures to ensure that a discharger, if not a Permittee, controls non-stormwater discharges such that they are not a significant source of pollutants to waters of the United States.[813]
- The alternative to Part III.A.2. and Part III.A.4.a.-b. of the 2012 Permit, which is more stringent than permit requirements and is a conservative interpretation of CWA 402(p)(3)(B)(ii), is to require Permittees to effectively prohibit all non-stormwater discharges. However, with this alternative, Permittees may incur more costs to implement a prohibition of all non-stormwater discharges than to implement or ensure implementation of specified BMPs to address non-stormwater discharges that are conditionally exempt from the discharge prohibition.[814]
- The challenged requirements in Part III.A.4.c. and d. to evaluate monitoring data and take further action if a non-stormwater discharge is causing or contributing to an exceedance of receiving water limitations or water quality-based effluent limitations is not new, but is derived "directly from the 2001 Permit and federal regulations."[815]

c. <u>The requirements imposed by Parts III.A.2. and III.A.4.a., b., c., and d., are not new and do not mandate a new program or higher level of service.</u>

As indicated above, Parts III.A.2. and III.A.4.a., b., c., and d., impose the following requirements:

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[811] Exhibit F, Water Boards' Comments on the Test Claims, page 70.

[812] Exhibit F, Water Boards' Comments on the Test Claims, page 71.

[813] Exhibit F, Water Boards' Comments on the Test Claims, page 73.

[814] Exhibit F, Water Boards' Comments on the Test Claims, page 73.

[815] Exhibit F, Water Boards' Comments on the Test Claims, page 75.

- Ensure that conditionally exempted non-stormwater dischargers comply with the requirements, conditions, and BMPs identified above to prevent the introduction of pollutants to the MS4 and receiving waters. These include BMPs, coordination with conditionally exempt non-stormwater dischargers, conditions to provide notice prior to discharging, monitoring, and reporting as specified above.
- Develop and implement procedures that minimize the discharge of landscape irrigation water into the MS4 by promoting conservation programs. This requires the permittee to coordinate with the local water purveyor and develop and implement coordinated outreach and education programs.
- Evaluate monitoring data pursuant to the Monitoring and Reporting Program in Attachment E, and any other associated data or information, and determine whether any of the conditionally exempt non-stormwater discharges are a source of pollutants that may be causing or contributing to an exceedance of receiving water limitations or water quality-based effluent limitations.
- If a permittee determines that any of the conditionally exempt non-stormwater discharges is a source of pollutants that causes or contributes to an exceedance of receiving water limitations or water quality-based effluent limitations, the permittee is required to report the information to the Regional Board and either effectively prohibit the non-stormwater discharge to the MS4, impose additional conditions on the non-stormwater discharge such that the discharge will not be a source of pollutants, require diversion of the non-stormwater discharge to the sanitary sewer, or require treatment of the non-stormwater discharge before discharge to the receiving water.[816]

These requirements do not constitute state-mandated new programs or higher levels of service.

First, as indicated by the parties, the permittees have the option of preparing Watershed Management Programs (WMPs) approved by the Regional Board's executive officer to address the conditionally exempt non-stormwater discharges, which at a minimum, must comply with federal law. Part VI.C.1. allows permittees to customize the control measures in Parts III.A.4. (which requires the permittees to develop a program to ensure compliance with the conditions, controls, and BMPs identified in Table 8 for the conditionally exempt non-stormwater discharges identified in Part III.A.2.) by developing a WMP or EWMP, which all permittees have done.[817] This is reiterated in Part III.A.2., which explicitly states the non-stormwater discharges that are conditionally exempt from the discharge prohibition remain exempt "provided they meet all required conditions specified below, *or as otherwise approved by the Regional Board Executive Officer*."[818] "The purpose of Part VI.C. is to allow Permittees the flexibility to develop Watershed

[816] Exhibit A, Test Claim 13-TC-01, pages 629-633.

[817] Exhibit A, Test Claim 13-TC-01, page 648.

[818] Exhibit A, Test Claim 13-TC-01, page 629.

Management Programs to implement the requirements of this Order on a watershed scale through customized strategies, control measures, and BMPs."[819]

Part VI.C.5.iv.2. states that the watershed control measures in a WMP or EWMP shall include strategies, control measures, and BMPs to effectively eliminate the source of pollutants consistent with Parts III.A. and VI.D.10. (the Illicit Connections and Illicit Discharges Elimination Program requirements) as follows:

> Non-Storm Water Discharge Measures. Where Permittees identify non-storm water discharges from the MS4 as a source of pollutants that cause or contribute to exceedance of receiving water limitations, the Watershed Control Measures shall include strategies, control measures, and/or BMPs that must be implemented to effectively eliminate the source of pollutants consistent with Parts III.A and VI.D.10. These may include measures to prohibit the non-storm water discharge to the MS4, additional BMPs to reduce pollutants in the non-storm water discharge or conveyed by the non-storm water discharge, diversion to a sanitary sewer for treatment, or strategies to require the non-storm water discharge to be separately regulated under a general NPDES permit.[820]

One of the goals of the Watershed Management Program is to ensure that non-stormwater discharges from the MS4 are not a source of pollutants to the receiving waters in accordance with federal law and the option "will provide permittees with the flexibility to prioritize and customize control measures to address the water quality issues specific to the watershed management area (WMA), consistent with federal regulations."[821]

As indicated above, federal law allows exempted non-stormwater discharge categories only if BMPs and control measures are implemented to manage any potential pollution from entering the MS4 and ultimately the receiving waters.[822] The discharge continues to be exempt *unless* the discharge is identified as a source of pollutants to waters of the United States.[823] If a discharge is identified as a pollutant, the MS4 permittee is required by federal law to effectively prohibit the illicit discharge from entering the MS4 by implementing a program to detect and remove the discharge.[824] To "effectively prohibit" non-stormwater discharges requires the implementation of a program to implement BMPs and control measures and enforce an ordinance to prevent illicit

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[819] Exhibit A, Test Claim 13-TC-01, page 648.

[820] Exhibit A, Test Claim 13-TC-01, page 663.

[821] Exhibit A, Test Claim 13-TC-01, page 918 (Fact Sheet) referring to Code of Federal Regulations, title 40, section 122.26(d)(2)(iv).

[822] Code of Federal Regulations, title 40, sections 122.26(d)(2)(iv)(B), 122.44(k).

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

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

stormwater discharges to the MS4; procedures to conduct on-going monitoring, field screening activities, and investigations of portions of the MS4 that, based on field screening or other information, indicate a reasonable potential for containing illicit discharges or other sources of non-stormwater pollution; and legal authority established by statute, ordinance, or a series of contracts that enables the permittee to control, enforce conditions and orders, and prohibit illicit discharges to the MS4.[825]

Thus, these requirements are not new and the specific BMPs, coordination requirements with conditionally exempt non-stormwater dischargers, conditions to provide notice prior to discharging, monitoring, and reporting as specified in Parts III.A.2. and III.A.4. for the conditionally exempt non-stormwater discharges are not mandated by the state because the claimants have the option of developing their own conditions either within their jurisdiction or with other co-permittees in the watershed area[826] to comply with federal law, which prohibits the discharge of illicit non-stormwater discharges.[827]

In addition, the claimants are required to "continue" to implement their existing stormwater quality management programs developed under the prior permit until their WMP or EWMP is approved.[828] Reimbursement is not required for any of the activities required by the prior permit, and to the extent the specific BMPs and control measures are in the permittees' existing stormwater management programs, those BMPs and control measures are not new.[829] The prior permit made the stormwater quality management programs enforceable.[830]

Moreover, most of the specific activities required by Parts III.A.2. and III.A.4. were explicitly required by the prior permit and are not new. In accordance with federal law, Part I of the prior permit required the permittees to prohibit illicit, non-stormwater discharges, except where such discharges were covered by an NPDES permit or the discharges were exempt as conditional discharges.[831] Conditional discharges included natural flows (i.e., natural springs and rising ground water, flows from riparian habitats or wetlands, stream diversions permitted by the State Board, and uncontaminated

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[825] Code of Federal Regulations, title 40, sections 122.26(d)(2)(i); 122.26(d)(2)(iv)(B); section 122.41 (conditions applicable to all permits, including monitoring and reporting requirements); section 122.44(i) (monitoring requirements to ensure compliance with permit limitations); section 122.48 (requirements for recording and reporting monitoring results); and Part 127 (electronic reporting).

[826] Exhibit A, Test Claim 13-TC-01, page 648.

[827] United States Code, title 33, section 1342(p)(3)(B)(ii).

[828] Exhibit A, Test Claim 13-TC-01, page 658.

[829] The stormwater quality management program (SQMP) has not been provided by the parties and is not publicly available.

[830] Exhibit A, Test Claim, 13-TC-01, page 1193.

[831] Exhibit A, Test Claim, 13-TC-01, pages 1190-1191.

ground water infiltration); flows from emergency firefighting activity; and the following "flows incidental to urban activities:"

(1) Reclaimed and potable landscape irrigation runoff;

(2) Potable drinking water supply and distribution system releases (consistent with American Water Works Association guidelines for dechlorination and suspended solids reduction practices);

(3) Drains for foundations, footings, and crawl spaces;

(4) Air conditioning condensate;

(5) Dechlorinated/debrominated swimming pool discharges;

(6) Dewatering of lakes and decorative fountains;

(7) Non-commercial car washing by residents or by non-profit organizations; and

(8) Sidewalk rinsing.[832]

The prior permit further stated the "Regional Board Executive Officer may add or remove categories of non-storm water discharges above. Furthermore, in the event that any of the above categories of non-storm water discharges are determined to be a source of pollutants by the Regional Board Executive Officer, the discharge will no longer be exempt from this prohibition unless the Permittee implements conditions approved by the Regional Board Executive Officer to ensure that the discharge is not a source of pollutants."[833] As explained below, the Executive Officer's determination that a discharge will no longer be exempt is based on the monitoring data that the prior permit required the claimant to obtain to determine whether any of the conditionally exempt non-stormwater discharges are a source of pollutants that may be causing or contributing to an exceedance of receiving water limitations and the report required to be submitted to the Regional Board when that occurs.[834]

Part III.A.2.a. of the test claim permit did add *non-emergency* firefighting activity discharges as a conditionally exempt non-stormwater discharge, but that addition does not impose a new program or higher level of service. The test claim permit requires the claimants to ensure that appropriate BMPs are implemented based on CalFire's BMP Manual or "equivalent BMP manual for fire training activities and post emergency fire fighting activities" for essential non-emergency firefighting activities.[835] Under the prior permit, discharges from non-emergency firefighting activities were not listed as conditionally exempt and, therefore, those discharges were prohibited as non-

[832] Exhibit A, Test Claim, 13-TC-01, pages 1190-1191.

[833] Exhibit A, Test Claim, 13-TC-01, page 1191.

[834] Exhibit A, Test Claim 13-TC-01, pages 1190-1191.

[835] Exhibit A, Test Claim, 13-TC-01, page 629.

stormwater illicit discharges.[836] Thus, under the prior permit, the claimants had to ensure that BMPs and other conditions were implemented to prevent all non-emergency firefighting non-stormwater discharges from entering the MS4 and into the receiving waters.[837] Moreover, the prior permit required conditionally exempt non-stormwater discharges, like this one is now, to be controlled with BMPs to reduce the pollutants in the discharge and the permittees were required to ensure that the discharge did not cause or contribute to an exceedance of water quality standards.[838] Simply by naming the BMPs listed in the CAL FIRE, Office of the State Fire Marshal's Water-Based Fire Protection Systems Discharge Best Management Practices Plan for Urban Runoff Management (May 1, 2004) *or* allowing the permittees to use BMPs identified in an equivalent BMP manual for fire training activities and post-emergency fire fighting activities to prevent pollutants from entering the MS4 and receiving waters, does not increase the level of service to the public. Thus, conditionally allowing the discharge from non-emergency firefighting activities to the MS4 does not impose a new program or higher level of service.

Furthermore, the requirements in the test claim permit for the conditional exemption for discharges from drinking water supplier distribution systems in Part III.A.2.a. are not new.[839] The test claim permit requires the permittees to ensure that BMPs are implemented based on the American Water Works Association *or* "another equivalent industry standard BMP manual."[840] As the Fact Sheet explains, the BMPs ensure that residual chlorine and other pollutants are not discharged to receiving waters as follows:

> In addition to the specific inclusion of Basin Plan water quality objectives for residual chlorine, this Order allows discharges of drinking water supplier distribution system releases as long as specified BMPs are implemented. BMPs must be implemented to prevent introduction of pollutants to drinking water supplier distribution system releases prior to discharge to the receiving water. BMPs must be consistent with the American Water Works Association (California – Nevada Section) BMP Manual for Drinking Water System Releases and other applicable guidelines. Similar to discharges of swimming pools/spas and dewatering of decorative fountains, drinking water supplier distribution system releases must be dechlorinated or dibrominated using holding time, aeration, and/or sodium thiosulfate and if necessary shall be pH adjusted to within the range of 6.5 and 8.5. The MS4 inlet and outlet must be inspected and cleaned out immediately prior to discharge to protect receiving water quality. BMPs such as sand bags or gravel bags, or other

[836] Exhibit A, Test Claim, 13-TC-01, pages 1190-1191.

[837] Exhibit A, Test Claim, 13-TC-01, pages 1190-1191 (Parts 1.A.1. and 2.3.).

[838] Exhibit A, Test Claim, 13-TC-01, page 1191.

[839] Exhibit A, Test Claim, 13-TC-01, pages 629-630.

[840] Exhibit A, Test Claim, 13-TC-01, pages 629-630.

> appropriate means shall be utilized to prevent sediment transport and all sediment shall be collected and disposed of in a legal and appropriate manner. In addition provisions for volumetrically and velocity controlling discharges are incorporated into the provisions of this Order to ensure that turbidity in receiving waters are maintained at an acceptable level.[841]

As stated above, the prior permit also exempted discharges from drinking water supplier distribution systems, provided the permittees allow the discharge "consistent with American Water Works Association guidelines for dechlorination and suspended solids reduction practices."[842] Thus, despite the slight change in wording, the requirement to ensure that BMPs are implemented based on the American Water Works Association *or* another equivalent industry standard BMP manual is not new.

The other categories of conditionally exempted non-stormwater discharges identified in Part III.A.2.b. are the same as the those listed in Part 1 of the prior permit (i.e., dewatering of lakes, reclaimed and potable landscape irrigation runoff, dechlorinated/debrominated swimming pool discharges, dewatering of decorative fountains, non-commercial car washing by residents or by non-profit organizations, and street/sidewalk wash water) and, like the test claim permit, the prior permit allowed the permittees to customize BMPs and control measures to prevent illicit discharges to the MS4 and receiving waters.[843]

Part 2 of the prior permit stated "Discharges from the MS4 that cause or contribute to the violation of Water Quality Standards or water quality objectives are prohibited" and that discharges from the MS4, "including non-stormwater, for which a permittee is responsible, shall not cause or contribute to a condition of nuisance."[844] The prior permit then required the permittees to comply with these receiving water limitations and discharge prohibitions "through timely implementation of control measures and other actions to reduce pollutants in discharges in accordance" with their stormwater quality management plans, and permittees were required to "assure compliance" by implementing additional BMPs and monitoring when an exceedance of water quality standards existed.[845] Part 3.B. required "the implementation of the most effective combination of BMPs for storm water/urban runoff pollution control."[846]

Part 3.G. of the prior permit required that each permittee "shall possess the necessary legal authority to prohibit non-storm water discharges to the storm drain system," and the permittees were directed to develop stormwater and urban runoff ordinances for its jurisdiction "to hold dischargers to its MS4 accountable for their contributions of

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[841] Exhibit A, Test Claim, 13-TC-01, page 906.

[842] Exhibit A, Test Claim, 13-TC-01, page 1190.

[843] Exhibit A, Test Claim, 13-TC-01, pages 629-631, 1190-1191.

[844] Exhibit A, Test Claim, 13-TC-01, page 1191.

[845] Exhibit A, Test Claim, 13-TC-01, page 1191.

[846] Exhibit A, Test Claim, 13-TC-01, page 1193.

pollutants and flows;" "[u]tilize enforcement mechanisms to require compliance with Permittees ordinances, permits, contracts, or orders;" and to "[r]equire the use of BMPs to prevent or reduce the discharge of pollutants to MS4s."[847] That Part also stated the "Permittees must possess authority to enter, sample, inspect, review and copy records, and require regular reports from industrial facilities (including construction sites) discharging polluted or with the potential to discharge polluted storm water runoff into its MS4."[848]

Moreover, the prior permit, like Parts III.A.4.c. and III.A.4.d. of the test claim permit, required the permittees to evaluate monitoring data to determine whether any of the conditionally exempt non-stormwater discharges are a source of pollutants that may be causing or contributing to an exceedance of receiving water limitations and to report to the Regional Board when that occurs and either effectively prohibit the non-stormwater discharge to the MS4 or impose additional conditions on the non-stormwater discharge such that the discharge will not be a source of pollutants. Part 2 of the prior permit, which specifically required the following:

- "Upon a determination by either the Permittee or the Regional Board that discharges are causing or contributing to an exceedance of an applicable Water Quality Standard, the Permittee shall promptly notify and thereafter submit a Receiving Water Limitations (RWL) Compliance Report (as described in the Program Reporting Requirements, Section I of the Monitoring and Reporting Program) to the Regional Board that describes BMPs that are currently being implemented and additional BMPs that will be implemented to prevent or reduce any pollutants that are causing or contributing to the exceedances of Water Quality Standards."
- The permittee shall "revise the SQMP [stormwater quality management plan] and its components and monitoring program to incorporate modified BMPs that have been and will be implemented, an implementation schedule, and any additional monitoring required."[849]

An NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance.[850] Moreover, the prior permit made it clear that "[e]ach permittee is responsible . . . for a discharge for which it is the operator" and expressly required that in the event a conditionally exempt non-stormwater discharge is determined to be a source of pollutants, the discharge will no longer be exempt unless the permittee implements conditions to ensure that the discharge is not a source of pollutants.[851]

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[847] Exhibit A, Test Claim, 13-TC-01, pages 1196-1197.

[848] Exhibit A, Test Claim, 13-TC-01, page 1197.

[849] Exhibit A, Test Claim 13-TC-01, pages 1190-1191.

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

[851] Exhibit A, Test Claim 13-TC-01, pages 1189, 1191.

In addition, Part 4.G. of the prior permit contained an Illicit Connections and Illicit Discharge Elimination Program in accordance with federal law, requiring the permittees to eliminate all illicit connections and illicit discharges to the storm drain system and "document, track, and report all such cases."[852] Upon discovery of an illicit connection or discharge, the prior permit required the permittees to investigate, eliminate the source, and take enforcement action.[853] Thus, evaluating monitoring data and reporting on illicit non-stormwater discharges that may cause or contribute to an exceedance of receiving water limitations is not new and does not mandate a new program or higher level of service.

Finally, the requirement in Part III.A.4.b. to develop and implement procedures that minimize the discharge of landscape irrigation water into the MS4 by promoting conservation programs, which include a coordinated outreach and education program does not mandate a new program or higher level of service.[854] All permittees were required by Part IV. of the prior permit, Public Information and Participation Program, to "conduct educational activities within its jurisdiction and participate in countywide [educational] events."[855] In addition, the claimants may choose to modify and customize these requirements with a WMP or EWMP. Part V.C.1. expressly allows permittees to customize the control measures in Parts III.A.4. by developing a WMP or EWMP.[856]

Accordingly, the requirements imposed by Parts III.A.2. and III.A.4.a., b., c., and d. of the test claim permit do not mandate a new program or higher level of service.

D. Minimum Control Measures (Parts VI.D.4.- VI.D.10.)

The claimants have pled various requirements in Parts VI.D.4.-VI.D.10. addressing the "Minimum Control Measures" as follows:

- Public Information and Participation Program (PIPP) - Requirements relating to the provision of a means for public reporting of clogged catch basin inlets and illicit discharges, missing catch basin labels and other pollution prevention information, contained in Permit Part VI.D.5.a.-d.[857]
- Industrial/Commercial Facilities Program - Requirements relating to the inspection of industrial and commercial facilities and to inventory and create a

[852] Exhibit A, Test Claim 13-TC-01, page 1226.

[853] Exhibit A, Test Claim 13-TC-01, pages 1227-1228.

[854] Exhibit A, Test Claim 13-TC-01, page 632.

[855] Exhibit A, Test Claim 13-TC-01, page 1200.

[856] Exhibit A, Test Claim 13-TC-01, page 648.

[857] Exhibit A, Test Claim 13-TC-01, pages 77-79; Exhibit B, Test Claim 13-TC-02, pages 30-32.

database of critical industrial and commercial sources in Permit Part VI.D.6.b., d., and e.[858]

- Planning and Development Program - Requirements in Permit Part VI.D.7.d.iv.1.a., b., and c., and Attachment E, Part X., to implement a GIS or other electronic system for tracking projects that have been conditioned for post-construction BMPs, including such information as project identification, acreage, BMP type and description, BMP locations, dates of acceptance and maintenance agreement, inspection dates and summaries and corrective action; to inspect all development sites upon completion of construction and before issuance of an occupancy certificate to "ensure proper installation" of LID measures, structural BMPs, treatment control BMPs and hydromodification control BMPs; and to develop a post-construction BMP maintenance inspection checklist and inspect at an interval of at least once every two years permittee-operated post-construction BMPs to assess operation conditions.[859]
- Development Construction Program - Requirements in Permit Parts VI.D.8.g.i. and ii., VI.D.8.h., VI.D.8.i.i., ii, iv., and v., VI.D.8.j., and VI.D.8.l.i. and ii. relating to construction site activities, including to inspect construction sites of one acre or greater covered by the general construction activities stormwater permit, to electronically inventory various land use permits and to update this inventory, to require review and approval of erosion and sediment control plans, to develop technical standards for the selection, installation and maintenance of construction BMPs, to develop procedures to review and approve relevant construction plan documents, and to train permittee employees with respect to review and inspections.[860]
- Public Agency Activities Program - Requirements relating to public agencies in Permit Parts VI.D.4.c.iii., vi., and x.2., VI.D.9.d.i., ii. iv., and v., VI.D.9.g.ii., VI.D.9.h.vii., and VI.D.9.k.ii. including to maintain an updated inventory of permittee-owned or operated public facilities that are potential sources of stormwater pollution, to develop an inventory of public rights of ways or other areas that can be retrofitted to reduce the discharge of stormwater, to develop and implement an Integrated Pest Management Program, and for areas not subject to a trash TMDL to install trash excluders or equivalent devices on catch

[858] Exhibit A, Test Claim 13-TC-01, pages 79-82; Exhibit B, Test Claim 13-TC-02, pages 32-35.

[859] Exhibit A, Test Claim 13-TC-01, pages 82-83; Exhibit B, Test Claim 13-TC-02, pages 35-36.

[860] Exhibit A, Test Claim 13-TC-01, pages 83-87; Exhibit B, Test Claim 13-TC-02, pages 37-41.

basins or take alternative steps such as increased street sweeping, adding trash cans or installing trash nets.[861]

- Illicit Connections and Illicit Discharges Elimination Program - Requirements in Permit Parts VI.D.4.d.v.2., VI.D.4.d.v.3., VI.D.4.d.v.4., VI.D.4.d.vi.1.a., VI.D.4.d.vi.1.c., VI.D.4.d.vi.1.d., VI.D.10.d.iii, VI.D.10.d.iv., VI.D.10.d.v., VI.D.10.e.i.1., VI.D.10.e.i.3., and VI.D.10.e.i.4. to promote, publicize and facilitate public reporting of illicit discharges, ensure that signage adjacent to open channels includes information regarding dumping prohibitions and public reporting of illicit discharges, develop procedures regarding documentation of the handling of complaint calls, develop spill response plans, and expand training programs.[862]

These are called "minimum control measures" because they are "considered to be baseline or default requirements for meeting the requirements of" section 122.26(d)(2)(iv) of the title 40 stormwater regulations for large and medium municipal separate storm sewer discharges.[863] The Fact Sheet states the following:

> These requirements were determined appropriate within Order No. 01-182 and again appropriate for this Order. The minimum control measures require Permittees to implement BMPs that are considered necessary to reduce pollutants in storm water to the MEP and to effectively prohibit non-storm water discharges. In lieu of implementing the MCMs as described in Part VI of this Order, this Order allows for Permittees to develop alternative BMPs to comply with 40 CFR section 122.26(d)(2)(iv), when implemented through a Watershed Management Program approved by the Executive Officer of the Regional Water Board.[864]

Section 122.26(d)(2)(iv) of the federal regulations requires permittees to have a management program that contains the following categories of minimum control measures:

- Public education and outreach. The regulations require the management program to include the following:
  - "A description of a program to reduce to the maximum extent practicable, pollutants in discharges from MS4s associated with the application of pesticides, herbicides, and fertilizer which will include, as appropriate, controls such as *educational activities*, permits, certifications, and other

[861] Exhibit A, Test Claim 13-TC-01, pages 87-90; Exhibit B, Test Claim 13-TC-02, pages 24-27.

[862] Exhibit A, Test Claim 13-TC-01, page 90-91; Exhibit B, Test Claim 13-TC-02, pages 28-29.

[863] Exhibit A, Test Claim 13-TC-01, page 924 (Fact Sheet).

[864] Exhibit A, Test Claim 13-TC-01, page 924 (Fact Sheet).

measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities."[865]

- "A description of *education* activities, *public information activities*, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials."[866]

- Industrial Facilities Program. The regulations require the management program to include a "description of a program to monitor and control pollutants in storm water discharges to municipal systems from municipal landfills, hazardous waste treatment, disposal and recovery facilities, *industrial facilities* that are subject to section 313 of title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), and *industrial facilities* that the municipal permit applicant determines are contributing a substantial pollutant loading to the municipal storm sewer system. The program shall:

  (*1*) Identify priorities and procedures for inspections and establishing and implementing control measures for such discharges;

  (*2*) Describe a monitoring program for storm water discharges associated with the industrial facilities identified in paragraph (d)(2)(iv)(C) of this section, to be implemented during the term of the permit, including the submission of quantitative data on the following constituents: any pollutants limited in effluent guidelines subcategories, where applicable; any pollutant listed in an existing NPDES permit for a facility; oil and grease, COD, pH, BOD_5, TSS, total phosphorus, total Kjeldahl nitrogen, nitrate plus nitrite nitrogen, and any information on discharges required under § 122.21(g)(7) (vi) and (vii)."[867]

- Commercial Facilities Program. The regulations require the management program to include "[a] description of a program to implement and maintain structural and non-structural best management practices to reduce pollutants in storm water runoff from *construction sites* to the municipal storm sewer system, which shall include: (*1*) A description of procedures for site planning which incorporate consideration of potential water quality impacts; (*2*) A description of requirements for nonstructural and structural best management practices; (*3*) A description of procedures for identifying priorities for inspecting sites and enforcing control measures which consider the nature of the construction activity, topography, and the characteristics of soils and receiving water quality; and (*4*) A

[865] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(A)(6), emphasis added.

[866] Code of Federal Regulations, title 40, section 122.26(d)(2)(iv)(B)(6), emphasis added.

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

description of appropriate educational and training measures for construction site operators."[868]

- Public Agency Activities Program. The regulations require the management to include "[a] description of structural and source control measures to reduce pollutants from runoff from commercial and residential areas that are discharged from the municipal storm sewer system that are to be implemented during the life of the permit, accompanied with an estimate of the expected reduction of pollutant loads and a proposed schedule for implementing such controls. At a minimum, the description shall include:

  (*1*) A description of *maintenance activities* and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers;

  (*2*) A description of *planning procedures* including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges from areas of new development and significant redevelopment. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed. (Controls to reduce pollutants in discharges from municipal separate storm sewers containing construction site runoff are addressed in paragraph (d)(2)(iv)(D) of this section;

  (*3*) A description of practices for *operating and maintaining public streets, roads and highways* and procedures for reducing the impact on receiving waters of discharges from municipal storm sewer systems, including pollutants discharged as a result of deicing activities;

  (*4*) A description of procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from storm water is feasible;

  (*5*) A description of a program to monitor pollutants in runoff from operating or closed municipal landfills or other treatment, storage or disposal facilities for municipal waste, which shall identify priorities and procedures for inspections and establishing and implementing control measures for such discharges (this program can be coordinated with the program developed under paragraph (d)(2)(iv)(C) of this section); and

  (*6*) A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the *application of pesticides, herbicides and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications*

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

and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities."[869]

- Illicit Connections and Illicit Discharges Elimination Program. The regulations require the management program to include "[a] description of a program, including a schedule, to *detect and remove (or require the discharger to the municipal separate storm sewer to obtain a separate NPDES permit for) illicit discharges and improper disposal into the storm sewer*. The proposed program shall include:

  (*1*) A description of a program, including inspections, to implement and enforce an ordinance, orders or similar means to prevent illicit discharges to the municipal separate storm sewer system; this program description shall address all types of illicit discharges, however the following category of non-storm water discharges or flows shall be addressed where such discharges are identified by the municipality as sources of pollutants to waters of the United States: water line flushing, landscape irrigation, diverted stream flows, rising ground waters, uncontaminated ground water infiltration (as defined at 40 CFR 35.2005(20)) to separate storm sewers, uncontaminated pumped ground water, discharges from potable water sources, foundation drains, air conditioning condensation, irrigation water, springs, water from crawl space pumps, footing drains, lawn watering, individual residential car washing, flows from riparian habitats and wetlands, dechlorinated swimming pool discharges, and street wash water (program descriptions shall address discharges or flows from fire fighting only where such discharges or flows are identified as significant sources of pollutants to waters of the United States);

  (*2*) A description of procedures to conduct on-going field screening activities during the life of the permit, including areas or locations that will be evaluated by such field screens;

  (*3*) A description of procedures to be followed to investigate portions of the separate storm sewer system that, based on the results of the field screen, or other appropriate information, indicate a reasonable potential of containing illicit discharges or other sources of non-storm water (such procedures may include: sampling procedures for constituents such as fecal coliform, fecal streptococcus, surfactants (MBAS), residual chlorine, fluorides and potassium; testing with fluorometric dyes; or conducting in storm sewer inspections where safety and other considerations allow. Such description shall include the location of storm sewers that have been identified for such evaluation);

  (*4*) A description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer;

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

(*5*) A description of a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or water quality impacts associated with discharges from municipal separate storm sewers;

(*6*) A description of educational activities, public information activities, and other appropriate activities to facilitate the proper management and disposal of used oil and toxic materials; and

(*7*) A description of controls to limit infiltration of seepage from municipal sanitary sewers to municipal separate storm sewer systems where necessary".[870]

As explained below, Parts VI.D.4.-VI.D.6. and VI.8.-VI.10. do not impose a state-mandated program because the permittees have the option to comply with the requirements stated in the permit or they can develop a customized Watershed Management Program (WMP) with alternative BMPs, consistent with the federal regulations, to reduce pollutants in stormwater to the MEP and to effectively prohibit non-stormwater discharges. Moreover, many of the requirements in Parts VI.D.4.-VI.D.6. and VI.8.-VI.10. are not new and do not result in increased costs mandated by the state (as explained below). Some of the requirements in Part VI.D.7., regarding the Planning and Land Development Program mandate a new program or higher level of service, but the claimants have regulatory fee authority to cover the costs of these requirements and, thus, there are no costs mandated by the state.

1. The Requirements Pled in Parts VI.D.4., VI.D.5., VI.D.6., and VI.D.8., to VI.D.10., Do Not Impose a State-Mandated New Program or Higher Level of Service.

Parts VI.D.4., VI.D.5., VI.D.6., and VI.D.8., to VI.D.10. identify specific BMPs and control measures for the minimum control measures identified above. However, the test claim permit gives the permittees a choice to comply with the specific BMPs and control measure requirements or develop and implement customized watershed programs and BMPs consistent with federal law. "In lieu of implementing the MCMs as described in Part VI of this Order, this Order allows for Permittees to develop alternative BMPs to comply with 40 CFR section 122.26(d)(2)(iv), when implemented through a Watershed Management Program approved by the Executive Officer of the Regional Water Board.[871]

Part VI.C. of the test claim permit governs the development of the Watershed Management Program (WMP), and states the following: "Participation in a Watershed Management Program is voluntary and allows a Permittee to address the highest watershed priorities, including complying with the requirements of Part . . . VI.D. (Minimum Control Measures)."[872] If the permittees choose to develop a WMP, the

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

[871] Exhibit A, Test Claim 13-TC-01, page 924 (Fact Sheet).

[872] Exhibit A, Test Claim 13-TC-01, page 648.

WMPs shall "[m]odify strategies, control measures, and BMPs as necessary based on analysis of monitoring data collected pursuant to the MRP [Monitoring and Reporting Program] to ensure that applicable water quality-based effluent limitations and receiving water limitations and other milestones set forth in the Watershed Management Program are achieved in the required timeframes."[873]

> The objectives of the Watershed Control Measures shall include:
>
> (1) Prevent or eliminate non-storm water discharges to the MS4 that are a source of pollutants from the MS4 to receiving waters.
>
> (2) Implement pollutant controls necessary to achieve all applicable interim and final water quality-based effluent limitations and/or receiving water limitation pursuant to corresponding compliance schedules.
>
> (3) Ensure that discharges from the MS4 do not cause or contribute to exceedances of receiving water limitations.[874]

If the permittees choose to develop a WMP, then they "shall assess" the minimum control measures (MCMs) as defined in Part VI.D.4 to Part VI.D.10 of this Order to identify opportunities for focusing resources on the high priority issues in each watershed. For each of the following minimum control measures, Permittees shall identify potential modifications that will address watershed priorities:

- Development Construction Program (Part VI.D.8.)
- Industrial/Commercial Facilities Program (Part VI.D.6.)
- Illicit Connection and Illicit Discharges Detection and Elimination Program (Parts VI.D.4. and 10.)
- Public Agency Activities Program (Parts VI.D.4. and VI.D.9.)
- Public Information and Participation Program (Part VI.D.5.).[875]

Part VI.C.4.b. provides that "At a minimum, the Watershed Management Program shall include management programs consistent with 40 CFR section 122.26(d)(2)(iv)(A)-(D)."[876] Similarly, Part VI.D.1.a. states that each permittee shall implement the requirements in Parts VI.D.4.-VI.D.6. and VI.8.-VI.10. or may implement customized actions in a WMP, consistent with the requirements of section 122.26(d)(2)(iv) of the federal regulations:

> Each Permittee shall implement the requirements in Parts VI.D.4 through VI.D.10 below, or may in lieu of the requirements in Parts VI.D.4 through

[873] Exhibit A, Test Claim 13-TC-01, page 648.

[874] Exhibit A, Test Claim 13-TC-01, page 662.

[875] Exhibit A, Test Claim 13-TC-01, pages 662-663.

[876] Exhibit A, Test Claim 13-TC-01, page 663.

> VI.D.10 implement customized actions within each of these general categories of control measures as set forth in an approved Watershed Management Program per Part VI.C. Implementation shall be consistent with the requirements of 40 CFR section 122.26(d)(2)(iv).[877]

If a permittee elects to eliminate a control measure identified in Parts VI.D.4., VI.D.5., VI.D.6., and VI.D.8., to VI.D.10. because that specific control measure is not applicable to the permittee, the permittee "shall provide a justification for its elimination."[878]

Once approved, the WMP "shall replace in part or in whole the requirements in Parts VI.D.4, VI.D.5, VI.D.6 and VI.D.8 to VI.D.10 for participating Permittees."[879]

Part VI.D.1.b. provides that permittees electing to develop a WMP shall continue to implement their existing stormwater management programs, consistent with federal regulations, until the WMP is approved.

> Permittees that elect to develop a Watershed Management Program or EWMP shall continue to implement their existing storm water management programs, including actions within each of the six categories of minimum control measures consistent with 40 CFR section 122.26(d)(2)(iv) until the Watershed Management Program or EWMP is approved by the Regional Water Board Executive Officer.[880]

"Permittees that develop and implement a WMP/EWMP and fully comply with all requirements and dates of achievement for the WMP/ EWMP as established in the Los Angeles MS4 Order, are deemed to be in compliance with the receiving water limitations in Part V.A for the water body-pollutant combinations addressed by the WMP/EWMP."[881]

Permittees that choose not to develop a WMP or EWMP "shall be subject to the baseline requirements in Part VI.D [i.e., the Minimum Control Measures] and shall demonstrate compliance with receiving water limitations pursuant to Part V.A. . . ."[882]

The Water Boards contend that the requirements in Parts VI.D.4., VI.D.5., VI.D.6., and VI.D.8. to VI.D.10. are not mandated by the state because compliance is within the

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[877] Exhibit A, Test Claim 13-TC-01, page 668.

[878] Exhibit A, Test Claim 13-TC-01, page 663.

[879] Exhibit A, Test Claim 13-TC-01, page 663. Note that a WMP does not replace the requirements in Part VI.D.7., which addresses the Planning and Land Development Program, and is separately addressed in this Decision. See also, Exhibit F, Water Boards' Comments on the Test Claims, page 42.

[880] Exhibit A, Test Claim 13-TC-01, page 668.

[881] Exhibit A, Test Claim 13-TC-01, page 653 (test claim permit, Part VI.C.2.b.).

[882] Exhibit A, Test Claim 13-TC-01, page 659 (test claim permit, Part IV.C.4.e.).

discretion of the claimants, who may instead choose to customize the programs to comply with federal law.

> Thus, where the Claimants participating in a WMP or EWMP have not proposed alternative program elements and activities to achieve the intent of Part VI.D (excluding VI.D.7), then they have elected to implement these requirements to meet the federal requirements of 40 CFR § 122.26(d)(2)(iv). As previously noted, all Claimants are participating in an approved WMP or EWMP. Therefore, their contentions that Parts VI.D.4, VI.D.5, VI.D.6, VI.D.8 and VI.D.9 of the 2012 Permit are state mandates are incorrect.[883]

The claimants respond that participation in a WMP does not relieve the claimant's compliance with the minimum control measures as follows:

> Permittees which participate in a WMP or EWMP must assess the MCMs for the Development Construction Program (Part VI.D.8), the Industrial/Commercial Facilities Program (Part VI.D.6), the Illicit Connection and Illicit Discharges Detection and Elimination Program (Part VI.D.10), the Public Agency Activities Program (Part VI.D.9) and the Public Information and Participation Program (Part VI.D.5) and identify "potential modifications" that will address watershed priorities." Part VI.C.5.b(iv)(1)(a). The discretion of permittees participating in a WMP or EWMP is thus constrained by the requirements of the MCMs. Permit Part VI.C.5.b.(iv)(1)(c) further requires that if a permittee "elects to eliminate a control measure identified in Parts VI.D.4 [relating to the Los Angeles County Flood Control District], VI.D.5, VI.D.6 and VI.D.8 to VI.D.10 because that specific control measure is not applicable to the Permittee(s), the Permittee(s) shall provide a justification for its elimination."[884]

The claimants further argue the development of WMP or EWMP to comply with the minimum control measures is not voluntary, but is mandated by the state under a practical compulsion theory since failing to develop a plan requires "immediate" compliance with the receiving water limitations:

> The finding that the development of a WMP or EWMP is voluntary, however, is incorrect. As set forth in Section II.E above [regarding the development of a WMP or EWMP for TMDLs], the preparation of a WMP is practically compelled, and therefore is a mandate. Claimants must either implement an improved WMP or EWMP or immediately comply with receiving water limitations, i.e., water quality standards. Because, as

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[883] Exhibit F, Water Boards' Comments on the Test Claims, page 43.

[884] Exhibit A, Test Claim 13-TC-01, page 69; see also, Exhibit G, Claimants' Rebuttal Comments, page 37; see also, Exhibit I, Claimants' Comments on the Draft Proposed Decision, pages 30-31.

> evidenced by the TMDLs, it is impossible for Claimants' discharges to immediately comply with receiving water limitations and water quality standards for all of the TMDLs that have been adopted, Claimants have no choice but to prepare a WMP or EWMP.[885]

The Commission finds that Parts VI.D.4., VI.D.5., VI.D.6., and VI.D.8. to VI.D.10. do not constitute a state mandated new program or higher level of service.

The plain language of the test claim permit authorizes the claimants to either comply with the specific BMPs and requirements outlined in Parts VI.D.4., VI.D.5., VI.D.6., and VI.D.8. to VI.D.10. relating to the public information and participation program (PIPP), industrial and commercial facilities programs, development construction program, public agency activities program, and the illicit connections and discharges elimination program; ***or*** implement their own customized actions in an approved WMP in accordance with the requirements of section 122.26(d)(2)(iv) of the federal regulations.

Moreover, based on the options outlined in the test claim permit, the decision whether to comply with the specific BMPs in Parts VI.D.4., VI.D.5., VI.D.6., and VI.D.8. to VI.D.10. or customize the BMPs within a WMP or EWMP in accordance with the requirements of the federal regulations is within the discretion of the claimants and is not legally compelled by state law. As the Fact Sheet explains,

> The Watershed Management Programs will provide permittees with the flexibility to prioritize and customize control measures to address the water quality issues specific to the watershed management area (WMA), consistent with federal regulations (40 CFR §122.26(d)(2)(iv)).
>
> Focusing on watershed implementation does not mean that the Permittees must expend funds outside of their jurisdictions. Rather, the Permittees within each watershed are expected to collaborate to develop a watershed strategy to address the high priority water quality problems within each watershed. They have the option of implementing the strategy in the manner they find to be most effective. Each Permittee can implement the strategy individually within its jurisdiction, or the Permittees can group together to implement the strategy throughout the watershed.[886]

Moreover, the permittees participating in a WMP are not constrained by the requirements of the minimum control measures, as suggested by the claimants. As stated above, federal law requires the permittees to have a stormwater program that contains the minimum control measure categories and this requirement is not new.[887] And the requirements to assess the minimum control measures before developing a WMP and to justify the elimination of a control measure are required only after a permittee voluntary decides to develop and implement a customized WMP. The plain

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[885] Exhibit I, Claimants' Comments on the Draft Proposed Decision, page 30.

[886] Exhibit A, Test Claim 13-TC-01, page 918 (Fact Sheet).

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

language of the test claim permit states that "[p]articipation in a Watershed Management Program is voluntary and allows a Permittee to address the highest watershed priorities, including complying with the requirements of Part . . . VI.D. (Minimum Control Measures)."[888]

In addition, assessing minimum control measures is not new. The prior permit also required each permittee to implement a stormwater quality management program that complied with the minimum requirements of "40 CFR 122.26(d)(2)" to reduce the discharge of pollutants in stormwater to the MEP, and each permittee was required to implement *additional* controls when necessary to reduce the discharge of pollutants in stormwater to the MEP.[889] The prior permit further required annual reports to the Regional Board, which had to include an assessment of the effectiveness of their stormwater programs to reduce stormwater pollution.[890] This is consistent with federal law, which requires the permittees to *assess* the controls to estimate "reductions in loadings of pollutants from discharges of municipal storm sewer constituents from municipal storm sewer systems expected as the result of the municipal storm water expected as the result of the municipal storm water quality management program."[891] Thus, the requirement to develop a program including the assessment of the minimum control measures outlined in the test claim permit to see if the controls are effective in a permittees' jurisdiction to reduce the discharge of pollutants is not new.

Moreover, there is no evidence in the plain language of the test claim permit or in the record that the claimants are practically compelled by certain and severe penalties, which the claimants describe as "immediate," to develop a WMP or EWMP to comply with the minimum control measures. Rather, the language says that permittees that choose not to develop a WMP or EWMP "shall be subject to the baseline requirements in Part VI.D [i.e., the Minimum Control Measures] and shall demonstrate compliance with receiving water limitations pursuant to Part V.A. . . . ."[892]. This language is materially different than the language in the test claim permit for failing to develop a

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[888] Exhibit A, Test Claim 13-TC-01, page 648; *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.)* (2003) 30 Cal.4th 727, 731.

[889] Exhibit A, Test Claim 13-TC-01, page 1193; Exhibit A, Test Claim 13-TC-01, page 1237 (Order No. 01-182, Definitions) which states the "Stormwater Quality Management Program" or SQMP "means the Los Angeles Countywide Stormwater Quality Management Program, which includes descriptions of programs, *collectively developed by the Permittees* in accordance with provisions of the NPDES Permit, to comply with applicable federal and state law, as the same is amended from time to time." (Emphasis added.). See also, Exhibit A, Test Claim 13-TC-01, page 1193 (Order No. 01-182, Part 3.A.2.), which states the SQMP "shall, at a minimum, comply with the applicable storm water program requirements of 40 CFR 122.26(d)(2)."

[890] Exhibit L (23), Revised Monitoring and Reporting Program June 15, 2005, page 2.

[891] Code of Federal Regulations, title 40, section 122.26(d)(2)(v).

[892] Exhibit A, Test Claim 13-TC-01, page 659 (Test claim permit, Part IV.C.4.e.).

WMP or EWMP for the U.S. EPA-adopted TMDLs, which does require "immediate" compliance with numeric wasteload allocations of those TMDLs. Under the rules of statutory construction, where the Legislature (or, in this case, the Regional Board) uses materially different language in provisions addressing the same or related subjects, the normal inference is that the Regional Board intended a difference in meaning.[893]

Moreover, demonstrating compliance with receiving water limitations is not new. Both the prior permit and the test claim permit require compliance with the receiving water limitations by timely implementing control measures and other actions to reduce pollutants in the discharges. If an exceedance of a water quality standard persists, the permittee is required to notify the Regional Board, modify their BMPs, and conduct any additional monitoring required to achieve water quality standards.[894] Thus, while the Regional Board provides the permittees with options to customize their WMPs or EWMPs for the minimum control measures, it did not establish any penalties.

Accordingly, Parts VI.D.4., VI.D.5., VI.D.6., and VI.D.8. to VI.D.10. do not mandate a new program or higher level of service but instead provide the permittees with the option to develop their own program and customize their BMPs in accordance with federal law.

2. Moreover, Many of the Specific Measures Identified in Parts VI.D.4., VI.D.5., VI.D.6., and VI.D.8. to VI.D.10. Were Required by the Prior Permit and Are Not New.

a. The Illicit Discharge Elimination Program (ICID)

The claimants plead Parts VI.D.4.d.v.2., VI.D.4.d.v.3., VI.D.4.d.v.4., VI.D.4.d.vi.1.a., VI.D.4.d.vi.1.c., VI.D.4.d.vi.1.d., VI.D.10.d.iii., VI.D.10.d.iv., VI.D.10.d.v., VI.D.10.e.i.1., VI.D.10.e.i.3., and VI.D.10.e.i.4. of the test claim permit relating to the Illicit Connections and Illicit Discharge Elimination Program for the Los Angeles County Flood Control District (in Part VI.D.4.) and the remaining permittees (in Part VI.D.10.) and contend these provisions impose new requirements that are mandated by the state.[895] These sections impose the following requirements:

- Public reporting of non-stormwater discharges and spills. Each permittee shall:
  1. Include information regarding public reporting of illicit discharges and improper disposal on the signage adjacent to open channels as required in Part VI.D.9.h.vi.4. (Parts VI.D.4.d.v.2., VI.D.10.d.iii.)[896] Part VI.D.9.h.vi.4.

[893] *People v. Trevino* (2001) 26 Cal.4th 237, 241.

[894] Exhibit A, Test Claim, 13-TC-01, pages 639-640 (test claim permit, Part V.A.), 1191-1191 (Order No. 01-182, Part 2.).

[895] Exhibit A, Test Claim 13-TC-01, pages 90-91; Exhibit B, Test Claim 13-TC-02, pages 28-29; Exhibit I, Claimants' Comments on the Draft Proposed Decision, pages 31-32.

[896] Exhibit A, Test Claim 13-TC-01, pages 686, 740.

says "[e]ach Permittee shall post signs, referencing local code(s) that prohibit littering and illegal dumping . . . ."[897]

2. Develop and maintain written procedures that document how complaint calls are received, documented, and tracked to ensure that all complaints are adequately addressed. The procedures shall be evaluated to determine whether changes or updates are needed to ensure that the procedures accurately document the methods employed by the permittee. Any identified changes shall be made to the procedures subsequent to the evaluation. (Parts VI.D.4.d.v.3., VI.D.10.d.iv.).[898]
3. Maintain documentation of the complaint calls and internet submissions and record the location of the reported spill or IC/ID and the actions undertaken in response to all IC/ID complaints, including referrals to other agencies. (Parts VI.D.4.d.v.4., VI.D.10.d.v.).[899]

- Implement an illicit discharge and spill response plan, which shall contain the following:
  1. Implement a spill response plan for all sewage and other spills that may discharge into the permittees' MS4. The spill response plan shall clearly identify agencies responsible for spill response and cleanup, telephone numbers and e-mail address for contacts, and shall contain at a minimum the following requirements: Coordination with spill response teams throughout all appropriate departments, programs and agencies so that maximum water quality protection is provided. (Parts VI.D.4.d.vi.1.a., VI.D.10.e.i.1.)[900]
  2. Respond to illicit discharges and spills within four hours of becoming aware of the illicit discharge or spill, except where such illicit discharges or spills occur on private property, in which case the response should be within two hours of gaining legal access to the property. (Parts VI.D.4.d.vi.1.c., VI.D.10.e.i.3.)[901]
  3. Illicit discharges or spills that may endanger health or the environment shall be reported to appropriate public health agencies and the Office of Emergency Services (OES). (Parts VI.D.4.d.vi.1.d., VI.D.10.e.i.4.)[902]

As indicated above, existing federal law requires each permittee have a program to promote, publicize, and facilitate public reporting of the presence of illicit discharges or

[897] Exhibit A, Test Claim 13-TC-01, page 733.

[898] Exhibit A, Test Claim 13-TC-01, pages 686, 740.

[899] Exhibit A, Test Claim 13-TC-01, pages 686, 740.

[900] Exhibit A, Test Claim 13-TC-01, pages 686, 741.

[901] Exhibit A, Test Claim 13-TC-01, pages 686, 741.

[902] Exhibit A, Test Claim 13-TC-01, pages 686, 741.

water quality impacts associated with discharges from MS4s.[903] The prior permit also required each permittee to mark storm drain inlets with a "no dumping" message and to post signs with prohibitive language discouraging illegal dumping at designated public access points to creeks, other water bodies, and channels, and to keep these signs maintained.[904] Thus, the public reporting requirements stated above are not new and do not impose a higher level of service.

The prior permit also required the permittees to "eliminate all illicit connections and illicit discharges to the storm drain system, and shall document, track, and report all such cases . . . ."[905] Each permittee was required to develop an Implementation Program which specified how each permittee was implementing the IC/ID program, which had to be documented and available for review and approval by the Regional Board.[906]

The prior permit further required the permittees to respond to spills and illicit discharges within one business day of discovery or report of a suspected illicit discharge, with activities to abate, contain, and clean up all illicit discharges, including hazardous substances.[907] Although the test claim permit in Parts VI.D.4.d.vi.1.c. and VI.D.10.e.i.3. require a response in a shorter period of time, the requirement and the costs to respond are not new, and the permittees can modify the timing of the response by adopting WMP and ICID procedures. In addition, and as stated above, federal law requires that each permittee have procedures in place to prevent, contain, and respond to spills that may discharge into the MS4.[908]

Thus, these requirements are not new and do not impose a higher level of service.

b. The Public Agency Activities Program

The claimants request reimbursement for requirements in Parts VI.D.4.c.iii., VI.D.4.c.vi., VI.D.4.c.x.2. (applicable only to the Los Angeles County Flood Control District) and Parts VI.D.9.c., VI.D.9.d.i., ii., iv., v., VI.D.9.g.ii., VI.D.9.h.vii., and VI.D.9.k.ii. (applicable to all permittees) relating to their public agency activities and contend that these Parts impose new state-mandated requirements.[909] The requirements imposed by these Parts include implementing BMPs for public facilities, the use of pesticides and fertilizer, employee and contractor training regarding pesticides and fertilizer, maintaining an updated inventory of all permittee-owned or operated facilities, developing an inventory of properties that can be retrofitted and a requirement to work with landowners to

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

[904] Exhibit A, Test Claim 13-TC-01, page 1199.

[905] Exhibit A, Test Claim 13-TC-01, page 1226.

[906] Exhibit A, Test Claim 13-TC-01, pages 1226-1227.

[907] Exhibit A, Test Claim 13-TC-01, page 1228.

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

[909] Exhibit A, Test Claim 13-TC-01, pages 87-90; Exhibit B, Test Claim 13-TC-02, pages 24-27; Exhibit I, Claimants' Comments on the Draft Proposed Decision, pages 32-33.

encourage specific retrofit projects, implementing an integrated pest management program (IPM), and installing trash excluders, or equivalent devices, on or in catch basins or outfalls in high priority areas that are not subject to a trash TMDL to prevent the discharge of trash to the MS4 or receiving water. The specific requirements imposed by these Parts are listed below.

- Maintain an updated inventory with specified information of all permittee-owned or operated facilities within its jurisdiction that are potential sources of stormwater pollution. Each permittee shall update its inventory at least once during the term of the test claim permit.[910]
- Develop an inventory of retrofitting opportunities that meets the requirements of this Part VI.9.d. Retrofit opportunities shall be identified within the public right-of-way or in coordination with a TMDL implementation plan(s). The goals of the existing development retrofitting inventory are to address the impacts of existing development through regional or sub-regional retrofit projects that reduce the discharges of stormwater pollutants into the MS4 and prevent discharges from the MS4 from causing or contributing to a violation of water quality standards as defined in Part V.A, Receiving Water Limitations.[911]
- Screen existing areas of development to identify candidate areas for retrofitting using watershed models or other screening level tools.[912] And consider the results of the evaluation in the following programs:

  (1) The Permittee's stormwater management program: Highly feasible projects expected to benefit water quality should be given a high priority to implement source control and treatment control BMPs in a Permittee's SWMP.

  (2) Off-site mitigation for New Development and Redevelopment: Each Permittee shall consider high priority retrofit projects as candidates for off-site mitigation projects per Part VI.D.7.c.iii.(4).(d).[913]
- Each Permittee shall cooperate with private landowners to encourage site specific retrofitting projects. Each Permittee shall consider the following practices in cooperating with private landowners to retrofit existing development:

  (1) Demonstration retrofit projects;

  (2) Retrofits on public land and easements that treat runoff from private developments;

  (3) Education and outreach;

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[910] Exhibit A, Test Claim 13-TC-01, pages 674-675, 724-726 (test claim permit, Parts VI.D.4.c.iii., VI.D.9.c.).

[911] Exhibit A, Test Claim 13-TC-01, page 726 (test claim permit, Part VI.D.9.d.i.).

[912] Exhibit A, Test Claim 13-TC-01, page 726 (test claim permit, Part VI.D.9.d.ii.).

[913] Exhibit A, Test Claim 13-TC-01, pages 726-727 (test claim permit, Part VI.D.9.d.iv.).

(4) Subsidies for retrofit projects;

(5) Requiring retrofit projects as enforcement, mitigation or ordinance compliance;

(6) Public and private partnerships; and

(7) Fees for existing discharges to the MS4 and reduction of fees for retrofit implementation.[914]

- Implement an Integrated Pest Management Program (IPM) that includes the following:

  (1) Pesticides are used only if monitoring indicates they are needed, and pesticides are applied according to applicable permits and established guidelines.

  (2) Treatments are made with the goal of removing only the target organism.

  (3) Pest controls are selected and applied in a manner that minimizes risks to human health, beneficial non-target organisms, and the environment.

  (4) The use of pesticides, including organophosphates and pyrethroids, does not threaten water quality.

  (5) Partner with other agencies and organizations to encourage the use of IPM.

  (6) Adopt and verifiably implement policies, procedures, and/or ordinances requiring the minimization of pesticide use and encouraging the use of IPM techniques (including beneficial insects) for Public Agency Facilities and Activities.

  (7) Policies, procedures, and ordinances shall include commitments and a schedule to reduce the use of pesticides that cause impairment of surface waters by implementing the following procedures:

    (a) Prepare and annually update an inventory of pesticides used by all internal departments, divisions, and other operational units.

    (b) Quantify pesticide use by staff and hired contractors.

    (c) Demonstrate implementation of IPM alternatives where feasible to reduce pesticide use.[915]

- No later than one year after Order adoption and annually thereafter before June 30, train all of their employees and contractors who use or have the potential to use pesticides or fertilizers (whether or not they normally apply these as part of their work). Training programs shall address:

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[914] Exhibit A, Test Claim 13-TC-01, page 727 (test claim permit, Part VI.D.9.d.v.).

[915] Exhibit A, Test Claim 13-TC-01, pages 677, 730-731 (test claim permit, Parts VI.D.4.c.vi.2., VI.D.9.g.ii.).

(1) The potential for pesticide-related surface water toxicity.

(2) Proper use, handling, and disposal of pesticides.

(3) Least toxic methods of pest prevention and control, including IPM.

(4) Reduction of pesticide use.[916]

Outside contractors can self-certify, providing they certify they have received all applicable training required in the Permit and have documentation to that effect.[917]

- Additional Trash Management Practices: In areas that are not subject to a trash TMDL, each Permittee shall install trash excluders, or equivalent devices, on or in catch basins or outfalls to prevent the discharge of trash to the MS4 or receiving water no later than four years after the effective date of this Order in areas defined as Priority A (Part VI.D.9.h.iii.(1)) except at sites where the application of such BMP(s) alone will cause flooding. Lack of maintenance that causes flooding is not an acceptable exception to the requirement to install BMPs.

  Alternatively, each Permittee may implement alternative or enhanced BMPs beyond the provisions of this Order (such as but not limited to increased street sweeping, adding trash cans near trash generation sites, prompt enforcement of trash accumulation, increased trash collection on public property, increased litter prevention messages or trash nets within the MS4) that provide substantially equivalent removal of trash. Each Permittee shall demonstrate that BMPs, which substituted for trash excluders, provide equivalent trash removal performance as excluders.

  When outfall trash capture is provided, revision of the schedule for inspection and cleanout of catch basins in Part VI.D.9.h.iii.(2) shall be reported in the next year's annual report.[918]

As indicated above, the permittees can choose to comply with these requirements or implement their own program consistent with federal law and, thus, these requirements are not mandated by the state.[919] Existing federal law requires permittees to have a public agency activities program that includes structural and source control measures to reduce pollutants from runoff, including maintenance activities; practices for operating and maintaining public streets, roads and highways; procedures to assure that flood management projects assess the impacts on the water quality of receiving water bodies

[916] Exhibit A, Test Claim 13-TC-01, pages 682, 737 (test claim permit, Parts VI.D.4.c.x.2., VI.D.9.k.ii.).

[917] Exhibit A, Test Claim 13-TC-01, page 737 (test claim permit, Parts VI.D.9.k.iii.).

[918] Exhibit A, Test Claim 13-TC-01, page 733 (test claim permit, Part VI.D.9.h.vii.).

[919] Exhibit A, Test Claim 13-TC-01, pages 648, 668 (test claim permit, Parts VI.C. and VI.D.1.a.).

and that existing structural flood control devices have been evaluated to determine if retrofitting the device to provide additional pollutant removal from stormwater is feasible; and a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer which will include, as appropriate, controls such as educational activities, permits, certifications and other measures for commercial applicators and distributors, and controls for application in public rights-of-way and at municipal facilities.[920] Thus, the requirements here are not mandated by the state.

Moreover, *some* of the public agency requirements were expressly imposed by the prior permit and are not new. For example, the prior permit also imposed the following requirements on each permittee related to the use of pesticides, herbicides, and fertilizers.

> Each Permittee shall implement the following requirements:
>
> a) A standardized protocol for the routine and non-routine application of pesticides, herbicides (including pre-emergents), and fertilizers;
>
> b) Consistency with State Board's guidelines and monitoring requirements for application of aquatic pesticides to surface waters (WQ Order No. 2001-12 DWQ);
>
> c) Ensure no application of pesticides or fertilizers immediately before, during, or immediately after a rain event or when water is flowing off the area to be applied;
>
> d) Ensure that no banned or unregistered pesticides are stored or applied;
>
> e) Ensure that staff applying pesticides are certified by the California Department of Food and Agriculture, or are under the direct supervision of a certified pesticide applicator;
>
> f) Implement procedures to encourage retention and planting of native vegetation and to reduce water, fertilizer, and pesticide needs;
>
> g) Store fertilizers and pesticides indoors or under cover on paved surfaces or use secondary containment;
>
> h) Reduce the use, storage, and handling of hazardous materials to reduce the potential for spills; and
>
> i) Regularly inspect storage areas.[921]

The prior permit also imposed trash management practices in areas that were not subject to a trash TMDL, which included routinely cleaning catch basins and ensuring they were cleaned when either 40 or 25 percent full, requiring trash management conditions for special use permits for events, placing trash receptacles at all transit

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

[921] Exhibit A, Test Claim 13-TC-01, page 1222.

stops, implementing BMPs for storm drain maintenance to remove and properly dispose of trash and debris, and requirements for street sweeping.[922]

Accordingly, in addition to not being mandated by the state, some of the specific requirements in Parts VI.D.4.c.iii., VI.D.4.c.vi., VI.D.4.c.x.2. and Parts VI.D.9.c., VI.D.9.d.i., ii., iv., v., VI.D.9.g.ii., VI.D.9.h.vii., VI.D.9.k.ii. are not new and do not impose a new program or higher level of service.

c. The Public Information and Participation Program (PIPP)

Part VI.D.5.a. requires each permittee to implement a Public Information and Participation Program (PIPP) and the claimants contend Part VI.D.5.a. imposes new requirements that are mandated by the state.[923] The claimant further states that the prior permit contained no requirements for permittees other than the Los Angeles County Flood Control District to undertake PIPP obligations and the specific requirements were not required before.[924]

The objectives of the PIPP are to measurably increase the knowledge of the target audiences about the MS4, the adverse impacts of storm water pollution on receiving waters and potential solutions to mitigate the impacts; measurably change the waste disposal and stormwater pollution generation behavior of target audiences by developing and encouraging the implementation of appropriate alternatives; and involve and engage a diversity of socio-economic groups and ethnic communities in Los Angeles County to participate in mitigating the impacts of storm water pollution.[925] The permittees can participate in a county-wide PIPP, participate in one or more watershed group sponsored PIPPs, or implement the requirements individually within its own jurisdiction.[926] The requirements for "Public Participation" are as follows:

- Provide a means for public reporting of clogged catch basin inlets and illicit discharges/dumping, faded or missing catch basin labels, and general stormwater and non-stormwater pollution prevention information.
- Include the reporting information, updated when necessary, in public information, and the government pages of the telephone book, as they are developed or published.
- Identify staff or departments who will serve as the contact person(s) and shall make this information available on its website.
- Provide current, updated hotline contact information to the general public within its jurisdiction.

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[922] Exhibit A, Test Claim 13-TC-01, pages 1223-1224.

[923] Exhibit I, Claimants' Comments on the Draft Proposed Decision, pages 33-34.

[924] Exhibit I, Claimants' Comments on the Draft Proposed Decision, page 34.

[925] Exhibit A, Test Claim 13-TC-01, pages 687-688.

[926] Exhibit A, Test Claim 13-TC-01, page 688 (test claim permit, Part VI.D.5.b.).

- Organize events targeted to residents and population subgroups to educate and involve the community in storm water and non-storm water pollution prevention and clean-up (e.g., education seminars, clean-ups, and community catch basin stenciling).[927]

Part VI.D.5.d. also imposes the following "Residential Outreach Program" requirements on the permittees:

- Conduct stormwater pollution prevention public service announcements and advertising campaigns.
- Public education materials shall include but are not limited to information on the proper handling (i.e., disposal, storage and/or use) of: (a) Vehicle waste fluids, (b) Household waste materials (i.e., trash and household hazardous waste, including personal care products and pharmaceuticals), (c) Construction waste materials, (d) Pesticides and fertilizers (including integrated pest management practices [IPM] to promote reduced use of pesticides), (e) Green waste (including lawn clippings and leaves), and (f) Animal wastes.
- Distribute activity specific storm water pollution prevention public education materials at, but not limited to, the following points of purchase: (a) Automotive parts stores, (b) Home improvement centers/lumber yards/hardware stores/paint stores, (c) Landscaping/gardening centers, and (d) Pet shops/feed stores.
- Maintain stormwater websites or provide links to stormwater websites via the permittee's website, which shall include educational material and opportunities for the public to participate in stormwater pollution prevention and clean-up activities listed in Part VI.D.4.
- Provide independent, parochial, and public schools within in each permittee's jurisdiction with materials to educate school children (K-12) on stormwater pollution.
- When implementing these activities, permittees shall use effective strategies to educate and involve ethnic communities in storm water pollution prevention through culturally effective methods.[928]

As indicated above, the permittees can choose to comply with these requirements or implement their own program consistent with federal law and, thus, these requirements are not mandated by the state.[929]

In addition, many of the PIPP requirements of the test claim permit are not new. The prior permit also imposed the following requirements:

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[927] Exhibit A, Test Claim 13-TC-01, page 688 (test claim permit, Part VI.D.5.c.).

[928] Exhibit A, Test Claim 13-TC-01, pages 688-689.

[929] Exhibit A, Test Claim 13-TC-01, pages 648, 668 (test claim permit, Parts VI.C. and VI.D.1.a.).

- Establish a Countywide Hotline (888-Clean-LA) or an individual permittee-established hotline that will serve as the general public reporting contact for reporting clogged catch basin inlets, and illicit discharges and dumping, faded or lack of catch basin stencils, and general stormwater management information. This information shall be included and updated in public information and the government pages of the telephone book.[930]
- The principal permittee shall compile a list of general public reporting contacts from all permittees and make this information available on the website or upon request.[931]
- The principal permittee shall continue to implement advertising, media relations, public service announcements, "how to" instructional materials, events targeted to specific activities and population subgroups, and each permittee "shall conduct educational activities within its jurisdiction and participate in countywide events."[932]
- The principal permittee shall develop a strategy to educate ethnic communities and businesses through culturally effective methods.[933]
- The principal permittee shall ensure that a minimum of 35 million impressions per year are made on the general public about stormwater quality via print, local TV access, local radio, or other appropriate media.[934]
- The principal permittee, in cooperation with the permittees, shall provide schools within each school district with materials, including but not limited to videos, live presentations, and other information necessary to educate a minimum of 50 percent of all school children (K-12) every two years on stormwater pollution.[935]
- Each Permittee shall make outreach materials available to the general public and target audiences, such as schools, community groups, contractors and developers, and at appropriate public counters and events. Outreach material shall include information on pollutants, sources of concern, and source abatement measures.[936]

[930] Exhibit A, Test Claim 13-TC-01, page 1199.

[931] Exhibit A, Test Claim 13-TC-01, page 1199.

[932] Exhibit A, Test Claim 13-TC-01, page 1199.

[933] Exhibit A, Test Claim 13-TC-01, page 1199.

[934] Exhibit A, Test Claim 13-TC-01, page 1200.

[935] Exhibit A, Test Claim 13-TC-01, page 1200.

[936] Exhibit A, Test Claim 13-TC-01, page 1201.

Although there are slight wording differences between the prior permit and Part VI.D.5.a.-d. of the test claim permit, these activities do not impose a new program or higher level of service.

d. Industrial and Commercial Facilities Program

Part VI.D.6.b. requires the permittees to "maintain an updated watershed-based inventory or database containing the latitude and longitude coordinates of all industrial and commercial facilities within its jurisdiction that are critical sources of stormwater pollution. The inventory or database shall be maintained in electronic format."[937] The permit lists the "critical sources" of facilities to be inventoried, and requires the following minimum fields of information for each critical source industrial and commercial facility identified in its watershed-based inventory or database:

(1) Name of facility.

(2) Name of owner/ operator and contact information.

(3) Address of facility (physical and mailing).

(4) North American Industry Classification System (NAICS) code.

(5) Standard Industrial Classification (SIC) code.

(6) A narrative description of the activities performed and/or principal products produced.

(7) Status of exposure of materials to stormwater.

(8) Name of receiving water.

(9) Identification of whether the facility is tributary to a CWA section 303(d) listed water body segment or water body segment subject to a TMDL, where the facility generates pollutants for which the water body segment is impaired.

(10) Ability to denote if the facility is known to maintain coverage under the State Water Board's General NPDES Permit for the Discharge of Stormwater Associated with Industrial Activities (Industrial General Permit) or other individual or general NPDES permits or any applicable waiver issued by the Regional or State Water Board pertaining to storm water discharges.

(11) Ability to denote if the facility has filed a No Exposure Certification with the State Water Board.[938]

The inventory is required to be updated annually "through collection of new information obtained through field activities or through other readily available inter-and intra-agency

[937] Exhibit A, Test Claim 13-TC-01, page 690.

[938] Exhibit A, Test Claim 13-TC-01, page 691.

informational databases (e.g., business licenses, pretreatment permits, sanitary sewer connection permits, and similar information)."[939]

Part VI.D.6.d. requires the permittees to inspect all commercial facilities twice during the permit term "to confirm that storm water and non-storm water BMPs are being effectively implemented in compliance with municipal ordinances" and to require additional BMPs when existing BMPs are not adequate or where stormwater from MS4 discharges to a significant ecological area or an impaired water body.[940]

Part VI.D.6.e. requires the permittees to inspect industrial facilities no later than two years from the effective date of the permit and perform a secondary compliance inspection for those facilities that have not filed a "No Exposure Certification" with the State Water Board. The inspection is required to confirm that each industrial facility:

- Has a current Waste Discharge Identification number for coverage under the Industrial General Permit and that its stormwater prevention plan is available on-site.
- Has received a current "No Exposure Certification."
- Is effectively implementing BMPs in compliance with municipal ordinances.[941]

The claimants contend these requirements are new and mandated by the state.[942]

The prior permit also required the permittees to track and inspect commercial and industrial facilities to ensure that stormwater compliance with stormwater ordinances and that BMPs are effective.[943] Specifically, each permittee was required to maintain a watershed-based inventory or database of all commercial and industrial facilities, which was required to include the name of the facility and the owner, coverage under general or individual NPDES permits, and narrative descriptions that best reflect the activities and products. Each permittee was required to update the inventory at least annually.[944] However, there was no requirement in the prior permit to maintain the inventory or database in electronic format and, thus, this requirement is new.

The prior permit also required each permittee to inspect commercial facilities at least twice during the permit term to determine if stormwater BMPs were being effectively implemented in compliance with State law, and county and municipal ordinances, with specific inspection requirements for each type of commercial facility.[945]

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[939] Exhibit A, Test Claim 13-TC-01, page 691.

[940] Exhibit A, Test Claim 13-TC-01, page 692.

[941] Exhibit A, Test Claim 13-TC-01, pages 692-693.

[942] Exhibit I, Claimants' Comments on the Draft Proposed Decision, pages 34-35.

[943] Exhibit A, Test Claim 13-TC-01, pages 1202-1209.

[944] Exhibit A, Test Claim 13-TC-01, pages 1202-1203.

[945] Exhibit A, Test Claim 13-TC-01, pages 1203-1206.

Permittees were also required by the prior permit to inspect industrial facilities (if not inspected by the Regional Board within the past 24 months) twice during the permit term to determine if the facility has a current Waste Discharge Identification (WDID) number, that a Storm Water Pollution Prevention Plan available on-site, and that the facility is effectively implementing BMPs in compliance with County and municipal ordinances, Regional Board Resolution 98-08, and the stormwater quality management plan.[946]

Thus, most of the requirements in Part VI.D.6.b., d., and e. of the test claim permit are not new. In addition, and as further explained below, the claimants have fee authority sufficient as a matter of law to cover all costs of the industrial and commercial facilities program and, therefore, there are no costs mandated by the state.

e. Development Construction Program

Part VI.D.8. addresses the requirement for the permittees to have a development construction program to ensure pollutants in stormwater runoff from construction sites are controlled. The claimants plead Parts VI.D.8.g.i. and ii., VI.D.8.h., VI.D.8.i.i., ii., iv., and v., VI.D.8.j., and VI.D.8.l.i. and ii.[947] These provisions require the permittees to have an electronic inventory and tracking system for all projects; develop procedures that require each operator of a construction project to prepare and submit an Erosion and Sediment Control Plan(ESCP); develop technical standards consistent with the permit for various BMPs, which must be made available to the public; conduct construction site inspections before construction begins, during construction at least monthly or more often with rain events, and after completion of construction and before the certificate of occupancy is issued; develop, implement, and revise as necessary standard operating inspection procedures, which shall include verification of active coverage under the Construction General Permit; and specified staff and contractor training, as follows:

- Each permittee shall use an electronic system to inventory grading permits, encroachment permits, demolition permits, building permits, or construction permits and any other municipal authorization to move soil or construct or destruct that involves land disturbance. The use of a database or GIS system is recommended.[948]
- Each permittee shall complete an inventory and continuously update the inventory as new sites are permitted and completed. The inventory and tracking system shall contain the following information:
    - Contact information for each project.

[946] Exhibit A, Test Claim 13-TC-01, page 1206.

[947] Exhibit A, Test Claim 13-TC-01, pages 83-87; Exhibit B, Test Claim 13-TC-02, pages 37-41.

[948] Exhibit A, Test Claim 13-TC-01, pages 715-716 (test claim permit, Part VI.D.8.g.i.).

- Basic site information including location, status, size of the project and area of disturbance.
- Proximity to all water bodies, water bodies listed as impaired by sediment-related pollutants, and water bodies for which a sediment-related TMDL has been adopted.
- Significant threat to water quality status, based on consideration of factors listed in Appendix 1 to the Statewide General Permit for Discharges of Storm Water Associated with Construction Activity (Construction General Permit).
- Current construction phase where feasible.
- The required inspection frequency.
- The project start date and anticipated completion date.
- Whether the project has submitted a Notice of Intent and obtained coverage under the Construction General Permit.
- The date the Permittee approved the project's Erosion and Sediment Control Plan (ESCP).
- Post-Construction Structural BMPs subject to Operation and Maintenance Requirements.[949]

- Each permittee shall develop procedures to review and approve construction plan documents, which shall comply with the following minimum requirements:
  - Prior to issuing a grading or building permit, require each operator of a construction activity to prepare and submit an ESCP (Erosion and Sediment Control Plan) before the disturbance of land for the permittee's review and written approval. The ESCP shall not be approved unless it contains appropriate site-specific construction site BMPs that meet the minimum requirements of a Permittee's erosion and sediment control ordinance.
  - The ESCP must include the elements of a storm water pollution prevention plan, prepared in accordance with the requirements of the Construction General Permit.
  - The ESCP must address methods to minimize the footprint of the disturbed area and to prevent soil compaction outside of the disturbed area, methods used to protect native vegetation and trees, sediment and erosion control, controls to prevent tracking on and off the site, non-stormwater controls, materials management, spill prevention and control, waste management, and identification of the site risk level as identified in the Construction General Permit.

[949] Exhibit A, Test Claim 13-TC-01, page 716, (test claim permit, Part VI.D.8.g.ii.).

- The ESCP must include the rationale for the selection and design of proposed BMPs, including quantifying the expected soil loss from different BMPs.
- Each permittee shall require that the ESCP is developed and certified by a qualified SWPPP developer.
- Each permittee shall required that all structural BMPs be designed by a licensed California engineer.
- Each Permittee shall require that for all sites, the landowner or the landowner's agent sign a statement on the ESCP as follows: (a) "I certify that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to ensure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, to the best of my knowledge and belief, the information submitted is true, accurate, and complete. I am aware that submitting false and/ or inaccurate information, failing to update the ESCP to reflect current conditions, or failing to properly and/ or adequately implement the ESCP may result in revocation of grading and/ or other permits or other sanctions provided by law."[950]

- Each permittee shall implement technical standards, as specified in Part VI.D.8.i.ii., for the selection, installation and maintenance of construction BMPs tailored to the risks posed by the construction site (based on the potential for erosion from the site and the sensitivity of the receiving water body) for all construction sites within its jurisdiction.[951]
- The local BMP technical standards shall be readily available to the development community and shall be clearly referenced within each permittee's storm water or development services website, ordinance, permit approval process and/or ESCP review forms. The local BMP technical standards shall also be readily available to the Regional Water Board upon request.[952]
- Local BMP technical standards shall be consistent with Tables 13 (minimum BMPs for all construction sites), 14 (additional BMPs for construction sites disturbing one acre or more), 15 (additional BMPs for high risk sites), and 16 (minimum BMPs for roadway paving or repair operation).[953]

[950] Exhibit A, Test Claim 13-TC-01, pages 716-718 (test claim permit, Part VI.D.8.h.).

[951] Exhibit A, Test Claim 13-TC-01, page 718 (test claim permit, Part VI.D.8.i.i., ii.).

[952] Exhibit A, Test Claim 13-TC-01, page 718 (test claim permit, Part VI.D.8.i.iv.).

[953] Exhibit A, Test Claim 13-TC-01, pages 718-720, (test claim permit, Part VI.D.8.i.v.).

- Construction site inspections. Each permittee shall use its legal authority to implement procedures for inspecting public and private construction sites, as specified in Table 17, which requires (1) monthly inspections or (2) for sites one acre or larger that discharge to a tributary listed by the state as an impaired water for sediment or turbidity or determined to be a significant threat to water quality, inspect at least once every two weeks or within 48 hours of a 1/2 inch rain event or when two or more consecutive days with greater than 50 percent chance of rainfall is predicted.[954]
    - Inspections shall occur prior to land disturbance to ensure all necessary erosion and sediment structural and non-structural BMP materials and procedures are available pursuant to the ESCP.
    - Inspections shall occur during active construction, in accordance with the frequencies specified in Table 17, to ensure all necessary erosion and sediment structural and non-structural BMP materials and procedures are available pursuant to the ESCP.
    - Inspections shall occur at the conclusion of the project and as a condition of approving and issuing a certificate of occupancy to ensure that all graded areas have reached final stabilization and that all trash, debris, and construction materials, and temporary erosion and sediment BMPs are removed.[955]
- Each permittee shall develop, implement, and revise as necessary standard operating inspection procedures, which shall include verification of active coverage under the Construction General Permit for sites disturbing one acre or more, or that are part of a planned development that will disturb one acre or more and a process for referring non-filers to the Regional Board; review of the applicable ESCP and inspection of the construction site to determine whether all BMPs have been selected, installed, implemented, and maintained; assessment of the appropriateness of the planned and installed BMPs; visual observation and record-keeping of non-stormwater discharges, potential illicit discharges and connections, and potential discharge of pollutants in stormwater runoff; development of a written or electronic inspection report generated from an inspection checklist used in the field; and tracking of the number of inspections for the inventoried construction sites throughout the reporting period to verify that the sites are inspected at the minimum frequencies required in Table 17.[956]
- Permittee staff training. Each permittee shall ensure that all staff whose primary job duties are related to implementing the construction stormwater program

[954] Exhibit A, Test Claim 13-TC-01, page 721 (test claim permit, Part VI.D.8.j.i., ii.).

[955] Exhibit A, Test Claim 13-TC-01, page 721-722 (test claim permit, Part VI.D.8.j.ii.(1), (2)).

[956] Exhibit A, Test Claim 13-TC-01, page 721-722 (test claim permit, Part VI.D.8.j.ii.(4)).

(including plan reviewers and permitting staff, erosion sediment control and stormwater inspectors) are adequately trained, as specified. Outside contractors can self-certify they have received all applicable training required by the test claim permit and have documentation to that effect.[957]

The parties dispute whether these activities are new and impose a new program or higher level of service.[958] The prior permit, in Part 4.E., contained a Development Construction Program, which also required a program to control runoff to ensure that sediments, materials, and wastes from construction sites are retained; the preparation of a plan by the developer, with certified statements by an engineer or designee and the landowner, to ensure proper BMPs are used; inspection requirements at least once during the wet season, or as often as necessary, and before a grading permit is issued; proof of a Waste Discharger Identification (WDID) Number for filing a Notice of Intent (NOI) for coverage under the Construction General Permit, and staff training, as follows:

- Each permittee shall implement a program to control runoff from construction activity at all construction sites to ensure that sediments generated on the project site are retained using BMPs; construction materials, wastes, and spills are retained; non-stormwater runoff from equipment and vehicle washing are contained; and erosion from slopes and channels are controlled by limiting grading during the wet season, inspecting graded areas during rain events, planting and maintaining vegetation on slopes, and covering erosion susceptible slopes.
- For construction sites of one acre or greater, permittees shall also:
    - Require the preparation and submittal of a Local Storm Water Pollution Prevention Plan (Local SWPPP), for approval prior to issuance of a grading permit for construction projects, which shall include appropriate construction site BMPs and maintenance schedules. The project architect, or engineer of record, or authorized qualified designee, must sign a statement on the Local SWPPP to the effect:

        "As the architect/engineer of record, I have selected appropriate BMPs to effectively minimize the negative impacts of this project's construction activities on storm water quality. The project owner and contractor are aware that the selected BMPs must be installed, monitored, and maintained to ensure their effectiveness. The BMPs not selected for implementation are redundant or deemed not applicable to the proposed construction activity."

        The landowner or the landowner's agent shall sign a statement to the effect:

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[957] Exhibit A, Test Claim 13-TC-01, page 723 (test claim permit, Part VI.D.8.I.i. and ii.).

[958] Exhibit F, Water Boards' Comments on the Test Claims, pages 108-118; Exhibit G, Claimants' Rebuttal Comments, pages 68-78; Exhibit I, Claimants' Comments on the Draft Proposed Decision, page 35.

"I certify that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, to the best of my knowledge and belief, the information submitted is true, accurate, and complete. I am aware that submitting false and/or inaccurate information, failing to update the Local SWPPP to reflect current conditions, or failing to properly and/or adequately implement the Local SWPPP may result in revocation of grading and/or other permits or other sanctions provided by law."

- Inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet season. The Local SWPPP shall be reviewed for compliance with local codes, ordinances, and permits. For inspected sites that have not adequately implemented their Local SWPPP, a follow-up inspection to ensure compliance will take place within two weeks. If compliance has not been attained, the permittee will take additional actions to achieve compliance (as specified in municipal codes). If compliance has not been achieved, and the site is also covered under a statewide general construction storm water permit, each permittee shall enforce their local ordinance requirements, and if non-compliance continues the Regional Board shall be notified for further joint enforcement actions.
- Require, no later than March 10, 2003, prior to issuing a grading permit for all projects less than five acres requiring coverage under a statewide general construction storm water permit, proof of a Waste Discharger Identification (WDID) Number for filing a Notice of Intent (NOI) for permit coverage and a certification that a SWPPP has been prepared by the project developer.

- For sites greater than five acres, the permittees shall comply with the requirements above and:
  - Require, prior to issuing a grading permit for all projects requiring coverage under the state general permit, proof of a Waste Discharger Identification (WDID) Number for filing a Notice of Intent (NOI) for coverage under the GCASP and a certification that a SWPPP has been prepared by the project developer.
  - Require proof of an NOI and a copy of the SWPPP at any time a transfer of ownership takes place for the entire development or portions of the common plan of development where construction activities are still on-going.
  - Use an effective system to *track* grading permits issued by each Permittee. "To satisfy this requirement, the use of a database or GIS system is encouraged, but not required."

- Training. Each permittee shall train employees in targeted positions (whose jobs or activities are engaged in construction activities including construction inspection staff) regarding the requirements of the storm water management program no later than August 1, 2002, and annually thereafter. For Permittees with a population of 250,000 or more (2000 U.S. Census), initial training shall be completed no later than February 3, 2003. Each permittee shall maintain a list of trained employees.[959]

Comparing the prior permit to the test claim permit, it is clear that requiring the permittees to have an electronic inventory and tracking system for all projects is new and that the number of required inspections has increased. The test claim permit also contains more specificity.

However, as mentioned above, these requirements are not mandated by the state. The permittees can choose to comply with these requirements or implement their own WMP consistent with federal law.[960] Federal regulations require a program that addresses maintenance activities and maintenance schedules for structural controls to reduce pollutants in discharges from the MS4; planning procedures to enforce controls to reduce the discharge of pollutants from areas of new development and significant redevelopment, including controls for after construction is complete; practices for operating and maintaining public streets, roads, and highways and procedures for reducing the impact of discharges on receiving waters; a program for storage or disposal of waste, including inspections and establishing control measures for such discharge; a program to detect and remove illicit discharges and improper disposal into the storm sewer; and procedures to prevent, contain, and respond to spills that may discharge into the MS4, all to ensure that water quality standards are met.[961]

In addition, and as further explained below, the claimants have fee authority sufficient as a matter of law to cover the costs of the industrial and commercial facilities program and, therefore, there are no costs mandated by the state.

3. VI.D.7. Planning and Land Development Program, Post Construction BMPs

The claimants have pled Part VI.D.7.d.iv.1.a., b., and c. and Attachment E, Part X., relating to tracking and inspecting post-construction BMPs for new development and redevelopment projects approved by a permittee under its regulatory authority.[962] The requirements in Part VI.D.7. are not replaced by the permit's WMP option to develop an

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[959] Exhibit A, Test Claim 13-TC-01, pages 1217-1220 (Order No. 01-182, Part 4.E.).

[960] Exhibit A, Test Claim 13-TC-01, pages 648, 668 (test claim permit, Parts VI.C. and VI.D.1.a.).

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

[962] Exhibit A, Test Claim 13-TC-01, page 82, Exhibit B, Test Claim 13-TC-02, pages 35-36.

alternative local program consistent with federal law and, thus, these provisions are separately analyzed.[963]

Part VI.D.7.d.iv.1. states "Each Permittee shall implement a tracking system and an inspection and enforcement program for new development and redevelopment post-construction storm water no later than 60 days after Order adoption date." Part VI.D.7.d.iv.1.a., b., and c. and Attachment E, Part X., specify these requirements as follows:

a. Part VI.D.7.d.iv.1.a. requires the permittees to implement a GIS or other electronic system for tracking projects that have been conditioned for post-construction BMPs, which "should contain" such information as project identification, acreage, BMP type and description, BMP locations, dates of acceptance and maintenance agreement, inspection dates and summaries and corrective action.[964]

b. Attachment E, Part X. (Monitoring and Reporting Program) requires the permittees to maintain a database providing the following information for each new development and re-development project approved by the permittee on or after the effective date of the test claim permit:

    1. Name of the Project and Developer
    2. Project location and map (preferably linked to the GIS storm drain map)
    3. Date of Certificate of Occupancy
    4. 85th percentile storm event for the project design (inches per 24 hours)
    5. 95th percentile storm event for projects draining to natural water bodies (inches per 24 hours)
    6. Other design criteria required to meet hydromodification requirements for drainages to natural water bodies
    7. Project design storm (inches per 24-hours)
    8. Project design storm volume (gallons or MGD)
    9. Percent of design storm volume to be retained on site
    10. Design volume for water quality mitigation treatment BMPs, if any
    11. If flow through water quality treatment BMPs are approved, provide the one year, one-hour storm intensity as depicted on the most recently issued isohyetal map published by the Los Angeles County Hydrologist
    12. Percent of design storm volume to be infiltrated at an off-site mitigation or groundwater replenishment project site

[963] Exhibit A, Test Claim 13-TC-01, page 663.

[964] Exhibit A, Test Claim 13-TC-01, page 713.

13. Percent of design storm volume to be retained or treated with biofiltration at an off-site retrofit project
14. Location and maps (preferably linked to the GIS storm drain map required in Part VII.A of this MRP) of off-site mitigation, groundwater replenishment, or retrofit sites
15. Documentation of issuance of requirements to the developer.[965]

a. Part VI.D.7.d.iv.1.b. requires the permittees to inspect all development sites upon completion of construction and before issuance of occupancy certificates to ensure proper installation of LID (low impact development) measures, structural BMPs, treatment control BMPs, and hydromodification control BMPs. The inspection may be combined with other inspections provided it is conducted by trained personnel.[966]
b. Part VI.D.7.d.iv.1.c. requires the permittees to verify proper maintenance and operation of post-construction BMPs previously approved for new development and redevelopment. The post-construction BMP maintenance inspection program shall incorporate the following elements:
    - The permittees are required to develop a post-construction BMP maintenance inspection checklist; and
    - Inspect, at least once every two years after project completion, post-construction BMPs to assess operation conditions with particular attention to criteria and procedures for post-construction treatment control and hydromodification control BMP repair, replacement, or re-vegetation.[967]

New development and re-development projects subject to these requirements are described in Part VI.D.7.b. of the test claim permit and generally include all development projects equal to one acre or greater of disturbed area and adding more than 10,000 square feet of impervious surface area, industrial parks and commercial malls 10,000 square feet or more, retail gasoline outlets, restaurants, automotive facilities, parking lots of 5,000 square feet or more of impervious surface or with 25 or more parking spaces, street and road construction of 10,000 square feet or more of impervious surface, single family hillside homes, and redevelopment projects (which do not include routine maintenance) that either create 2,500 square feet or more of impervious surface area and is its discharge is likely to impact a sensitive biological species or habitat or those that are at least 5,000 square feet.[968]

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[965] Exhibit A, Test Claim 13-TC-01, pages 842-843 (Attachment E, Monitoring and Reporting Program).

[966] Exhibit A, Test Claim 13-TC-01, page 713.

[967] Exhibit A, Test Claim 13-TC-01, pages 713-714.

[968] Exhibit A, Test Claim 13-TC-01, pages 696-698.

The Water Boards contend that these requirements are a "refinement" of Part 4.D. and Attachment U-4 of the prior permit, but do not mandate a new program or higher level of service for the following reasons:

- The permittees should have been tracking this information under the prior permit.
- Part 4.D.8. of the prior permit required an acceptance and maintenance agreement that requires recipients of development to assume responsibility for maintenance of structural or treatment control BMPs and to conduct maintenance inspections at least once a year.
- The inspection requirements are necessary to ensure the appropriate implementation of permit-required post-construction treatment controls and hydromodification controls in new development and redevelopment projects, which have been in place since the 2001 Permit, are performed.
- The requirements are necessary to implement federal law (in 40 C.F.R. § 122.26(d)(2)(iv)(A)(1)-(2)), which requires that permittees implement a management program that includes maintenance activities and a maintenance schedule for structural controls to reduce pollutants in discharges from MS4s and procedures to develop, implement, and enforce controls to reduce the discharge of pollutants from areas of new development and significant redevelopment after construction is completed. Therefore, these requirements do not mandate a new program or higher level of service.[969]

The Commission finds that some of these requirements are new and mandated by the state.

Federal law requires the permittees to have a management program to address post-construction BMPs to reduce the discharge of pollutants from MS4s that receive discharges from new development and redevelopment projects, but federal law does not identify any specific requirements for how to comply. Federal regulations state the proposed management program shall include:

> A description of planning procedures including a comprehensive master plan to develop, implement and enforce controls to reduce the discharge of pollutants from municipal separate storm sewers which receive discharges *from areas of new development and significant redevelopment*. Such plan shall address controls to reduce pollutants in discharges from municipal separate storm sewers *after construction is completed*."[970]

Part 4.D. of the prior permit required the permittees to:

[969] Exhibit F, Water Boards' Comments on the Test Claims, pages 102-106.

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

- Provide for appropriate permanent measures to reduce stormwater pollutant loads from the development site.[971]
- Control post-development peak stormwater runoff discharge rates, velocities, and duration in Natural Drainage Systems located in Malibu Creek, Topanga Canyon Creek, Upper Los Angeles River, Upper San Gabriel River, Santa Clara River, and Los Angeles County Coastal streams to prevent accelerated stream erosion and to protect stream habitat.[972]
- Require post-construction treatment control BMPs to incorporate either a volumetric or flow based treatment control design standard, as defined, to mitigate stormwater runoff.[973]
- Require the following categories of planning priority projects to design and implement post-construction treatment controls to mitigate stormwater pollution:
    - Single family hillside residential developments of one acre or more of surface area;
    - Housing developments (includes single family homes, multifamily homes, condominiums, and apartments) of ten units or more;
    - A 100,000 square feet or more impervious surface area industrial/ commercial development;
    - Automotive service facilities (SIC 5013, 5014, 5541, 7532-7534 and 7536-7539) [5,000 square feet or more of surface area];
    - Retail gasoline outlets [5,000 square feet or more of impervious surface area and with projected Average Daily Traffic (ADT) of 100 or more vehicles]. Subsurface Treatment Control BMPs which may endanger public safety (i.e., create an explosive environment) are considered not appropriate;
    - Restaurants (SIC 5812) [5,000 square feet or more of surface area];
    - Parking lots 5,000 square feet or more of surface area or with 25 or more parking spaces;
    - Projects located in, adjacent to or discharging directly to an ESA that meet threshold conditions identified above in 2.e; and
    - Redevelopment projects in subject categories that meet Redevelopment thresholds.[974]

[971] Exhibit A, Test Claim 13-TC-01, page 1209.

[972] Exhibit A, Test Claim 13-TC-01, pages 1209-1210.

[973] Exhibit A, Test Claim 13-TC-01, pages 1211-1212.

[974] Exhibit A, Test Claim 13-TC-01, pages 1212-1213.

- Require the implementation of post-construction control requirements for the industrial/commercial development category to projects that disturb one acre or more of surface area.[975]
- Require the implementation of a site-specific plan to mitigate post development stormwater for new development and redevelopment not requiring a SUSMP, but which may potentially have adverse impacts on post-development stormwater quality, where specified characteristics exist.[976]
- Apply all post-construction stormwater mitigation to all planning priority projects that undergo significant redevelopment.[977]
- Require all developments subject to SUSMP and site specific plan requirements to provide verification of maintenance provisions for structural and treatment control BMPs, which at a minimum, shall include the developer's signed statement accepting responsibility for maintenance until the responsibility is legally transferred, and either a signed statement from the public entity assuming responsibility for the structural and treatment control BMPs and that it meets all local agency designed standards; or a sales or lease agreement that requires the recipient to assume responsibility for maintenance and to conduct a maintenance inspection at least once a year; or CCRs for residential properties assigning maintenance responsibilities to the HOA for maintenance of the structural and treatment control BMPs; or other legally enforceable agreement that assigns responsibility for the maintenance of post-construction structural or treatment control BMPs.[978]

Attachment U-4 to the prior permit is the prior annual reporting form, and it required that permittees report the following information:

- Whether the priority development and redevelopment projects are required to have appropriate permanent measures to reduce stormwater pollutant loads from the development site.
- A list of "the types and numbers of BMPs that your agency required for priority projects to meet the requirements described above."
- Identification of "[h]ow many of each of the following projects [residential, commercial, industrial, automotive service facilities, retail gasoline outlets, restaurants, parking lots, projected located in or directly adjacent to or discharging to an environmentally sensitive area, including total number of permits issued to priority projects] did your agency review and condition to meet SUSMP requirements last year?"

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[975] Exhibit A, Test Claim 13-TC-01, page 1213.

[976] Exhibit A, Test Claim 13-TC-01, page 1213.

[977] Exhibit A, Test Claim 13-TC-01, pages 1213-1214.

[978] Exhibit A, Test Claim 13-TC-01, page 1214.

- What is the percentage of total development projects that were conditioned to meet SUSMP requirements?[979]

Although the permittees would have had to keep track of the post-construction BMPs required for the priority developments in order to complete the prior annual reporting form, they were not required implement *a GIS or other electronic system* for tracking projects that have been conditioned for post-construction BMPs and were not required to maintain a database of the detailed information required by Attachment E, Part X. (Monitoring and Reporting Program) of the test claim permit. Thus, the requirements in Part VI.D.7.d.iv.1.a. and Attachment E, Part X. of the test claim permit are new.

The remaining provisions in Parts VI.D.7.d.iv.1.b., and c., require the following activities:

a. Inspect all development sites upon completion of construction and before issuance of occupancy certificates to ensure proper installation of LID (low impact development) measures, structural BMPs, treatment control BMPs, and hydromodification control BMPs. The inspection may be combined with other inspections provided it is conducted by trained personnel.[980]

b. Develop a post-construction BMP maintenance inspection checklist; and

c. Inspect, at least once every two years *after* project completion, post-construction BMPs to assess operation conditions with particular attention to criteria and procedures for post-construction treatment control and hydromodification control BMP repair, replacement, or re-vegetation.[981]

The Commission finds that the requirement to inspect all development sites upon completion of construction and before issuance of occupancy certificates is new. Although this activity may have been performed by the permittees before issuing a final occupancy certificate for the project, the prior permit does not impose this requirement.[982] Instead, the prior permit generally required the permittees to have legal authority to carry out all inspection, surveillance, and monitoring procedures necessary to determine compliance and non-compliance with permit conditions, and to inspect all construction sites for stormwater quality requirements during routine inspections a minimum of once during the wet season.[983] But there was no requirement to inspect all

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[979] Exhibit F, Water Boards' Comments on the Test Claims, pages 2494-2495 (2001 permit attachment U-4).

[980] Exhibit A, Test Claim 13-TC-01, page 713.

[981] Exhibit A, Test Claim 13-TC-01, pages 713-714.

[982] Government Code section 17565 states: "If a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate."

[983] Exhibit A, Test Claim 13-TC-01, pages 1196, 1218 (Order No. 01-182, Parts 3.G., 4.E.2.b.).

development sites upon completion of construction and before issuance of occupancy certificates. Thus, this requirement is new.

Moreover, the requirement to develop a post-construction BMP maintenance checklist was not required by the prior permit and is a new requirement imposed by the state.

However, ***not*** all of the requirements to inspect projects after completion for post-construction treatment control and hydromodification control BMPs are new, since the prior permit required the permittees to inspect critical commercial and industrial facilities twice during the permit term to determine if stormwater BMPs are being effectively implemented.[984] Thus, except for inspecting commercial and industrial facilities after construction, the post-construction inspections of the remaining projects are new.

Thus, the following requirements are new:

a. Implement a GIS or other electronic system for tracking projects that have been conditioned for post-construction BMPs, which "should contain" such information as project identification, acreage, BMP type and description, BMP locations, dates of acceptance and maintenance agreement, inspection dates and summaries and corrective action.[985]

b. Maintain a database providing the following information for each new development and re-development project approved by the permittee on or after the effective date of the test claim permit:

    1. Name of the Project and Developer
    2. Project location and map (preferably linked to the GIS storm drain map)
    3. Date of Certificate of Occupancy
    4. 85th percentile storm event for the project design (inches per 24 hours)
    5. 95th percentile storm event for projects draining to natural water bodies (inches per 24 hours)
    6. Other design criteria required to meet hydromodification requirements for drainages to natural water bodies
    7. Project design storm (inches per 24-hours)
    8. Project design storm volume (gallons or MGD)
    9. Percent of design storm volume to be retained on site
    10. Design volume for water quality mitigation treatment BMPs, if any
    11. If flow through water quality treatment BMPs are approved, provide the one year, one-hour storm intensity as depicted on the most recently issued isohyetal map published by the Los Angeles County Hydrologist

[984] Exhibit A, Test Claim 13-TC-01, pages 1203-1207 (Order No. 01-182, Part 4.C.2.).

[985] Exhibit A, Test Claim 13-TC-01, page 713 (test claim permit, Part VI.D.7.d.iv.1.a.).

12. Percent of design storm volume to be infiltrated at an off-site mitigation or groundwater replenishment project site
13. Percent of design storm volume to be retained or treated with biofiltration at an off-site retrofit project
14. Location and maps (preferably linked to the GIS storm drain map required in Part VII.A of this MRP) of off-site mitigation, groundwater replenishment, or retrofit sites
15. Documentation of issuance of requirements to the developer.[986]

c. Inspect all development sites upon completion of construction and before issuance of occupancy certificates to ensure proper installation of LID (low impact development) measures, structural BMPs, treatment control BMPs, and hydromodification control BMPs.[987]

d. Develop a post-construction BMP maintenance inspection checklist.[988]

e. *Except* for the post-construction inspections for critical commercial and industrial facilities required by Part 4.C.2. of the prior permit (Order 01-182) (which is not new), inspect the remaining new development or redevelopment projects, at least once every two years after project completion, post-construction BMPs to assess operation conditions with particular attention to criteria and procedures for post-construction treatment control and hydromodification control BMP repair, replacement, or re-vegetation.[989]

The Commission finds these activities are mandated by the state. The California Supreme Court, in *Department of Finance v. Commission on State Mandates*, identified the following test to determine whether certain conditions imposed by an NPDES stormwater permit issued by the Los Angeles Regional Water Board were mandated by the state or the federal government:

> If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[990]

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[986] Exhibit A, Test Claim 13-TC-01, pages 842-843 (Attachment E, Part X., Monitoring and Reporting Program).

[987] Exhibit A, Test Claim 13-TC-01, page 713 (test claim permit, Part VI.D.7.d.iv.1.b.).

[988] Exhibit A, Test Claim 13-TC-01, pages 713-714 (test claim permit, Part VI.D.7.d.iv.1.c.).

[989] Exhibit A, Test Claim 13-TC-01, page 714 (test claim permit, Part VI.D.7.d.iv.1.c.).

[990] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 765.

The courts have also explained "except where a regional board finds the conditions are the *only means* by which the [federal] 'maximum extent practicable' standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard."[991]

As indicated above, federal law requires the permittees to have a management program for new development and redevelopment projects, which shall address controls to reduce pollutants in discharges from municipal separate storm sewers after construction is completed."[992] However, federal law does not itself impose these specific requirements. "That the . . . Regional Board found the permit requirements were 'necessary' to meet the standard establishes only that the . . . Regional Board exercised its discretion."[993]

Moreover, the new requirements are imposed on the permittees based on their authority to regulate land use and development and, thus, are uniquely imposed on government.[994] The requirements also provide a governmental service to the public by reducing the discharge of pollutants to waters of the United States. As the Fact Sheet explains:

> Land development and urbanization have been linked to the impairment of aquatic life beneficial uses in numerous studies. Poorly planned new developments and re-development have the potential to impact the hydrology of the watershed and the water quality of the surface waters. Development without proper controls, often result in increased soil compaction, changes in vegetation and increased impervious surfaces. These conditions may lead to a reduction in groundwater recharge and changes in the flow regime of the surface water drainages. Historically, urban development has resulted in increased peak stream flows and flow duration, reduced base flows, and increased water temperatures. Pollutant loading in storm water runoff often increases due to post-construction use and because the storm water runoff is directly connected to the storm

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[991] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682 citing to *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 768, emphasis added.

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

[993] *Department of Finance v. Commission on State Mandates* (2017) 18 Cal.App.5th 661, 682.

[994] Exhibit A, Test Claim 13-TC-01, page 618, "Permittees that have such land use authority are responsible for implementing a storm water management program to inspect and control pollutants from industrial and commercial facilities, *new development and re-development projects*, and development construction sites within their jurisdictional boundaries."

drain system or to the surface water body, without the benefit of filtration through soil and vegetation.[995]

However, as explained below, reimbursement is not required for these activities because the claimants have regulatory fee authority sufficient as a matter of law to cover the costs of these requirements and, thus, there are no costs mandated by the state.

E. The Test Claim Permit Results in Costs Mandated by the State from December 28, 2012 through January 31, 2017, for the New State-Mandated Requirements In Part VI.E.1.c. and Attachments M, O, P, and Q (which Incorporate by Reference Part VI.E.3. of the Test Claim Permit). However, There Are No Costs Mandated by the State Pursuant to Government Code Section 17556(d) for the Requirements in Part VI.D.7.d.iv.1.a., b., c., and Attachment E, Part X., of the Test Claim Permit, as well as Part VI.D.6.b., d., and e., and Part VI.D.8.g.i. and ii., VI.D.8.h., VI.D.8.i.i., ii, iv., and v., VI.D.8.j., and VI.D.8.l.i. and ii., Because the Claimants Have Regulatory Fee Authority Sufficient as a Matter of Law to Cover the Costs of the Requirements.

As explained above, the following activities impose a state-mandated new program or higher level of service:

1. The pro rata costs to develop and submit a WMP or EWMP for only the U.S. EPA-adopted TMDLs identified below and in accordance with Part VI.E.3. as follows:

   a. Each Permittee subject to one of the U.S. EPA-adopted TMDLs identified below shall propose BMPs to achieve the WLAs contained in the applicable U.S. EPA-established TMDL, and a schedule for implementing the BMPs that is as short as possible, in a WMP or EWMP.

   b. Each Permittee subject to one of the U.S. EPA-adopted TMDLs identified below may either individually submit a WMP or may jointly submit a WMP or EWMP with other Permittees subject to the WLAs contained in the U.S. EPA-established TMDL.

   c. At a minimum, each Permittee subject to one of the U.S. EPA-adopted TMDLs identified below shall include the following information in its WMP or EWMP, relevant to each applicable U.S. EPA-established TMDL:

      - Available data demonstrating the current quality of the Permittee's MS4 discharge(s) in terms of concentration and/or load of the target pollutant(s) to the receiving waters subject to the TMDL;

[995] Exhibit A, Test Claim 13-TC-01, pages 940-941.

- A detailed description of BMPs that have been implemented, and/or are currently being implemented by the Permittee to achieve the WLA(s), if any;
- A detailed time schedule of specific actions the Permittee will take in order to achieve compliance with the applicable WLA(s);
- A demonstration that the time schedule requested is as short as possible, taking into account the time since USEPA establishment of the TMDL, and technological, operation, and economic factors that affect the design, development, and implementation of the control measures that are necessary to comply with the WLA(s); and
- If the requested time schedule exceeds one year, the proposed schedule shall include interim requirements and numeric milestones and the date(s) for their achievement.[996]

d. Each Permittee subject to a WLA in a TMDL established by U.S. EPA identified below shall submit a draft of a WMP or EWMP to the Regional Water Board Executive Officer for approval per the schedule Part VI.C.4.[997]

These requirements apply only to the following U.S. EPA-adopted TMDLs:

- Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL (effective March 26, 2012 (Attachment O).[998]
- Los Angeles Area Lakes TMDLs, effective March 26, 2012 (Attachment O for the TMDLs Los Angeles River Watershed Management Area, which include the following: Lake Calabasas Nutrient; Echo Park Lake PCBs, Chlordane, and Dieldrin; and Legg Lake Nutrient Peck Road Park Lake Nutrient, PCBs, Chlordane, DDT, and Dieldrin; and Attachment P for the TMDLs in the San Gabriel River Watershed Management Area, which include the Puddingstone Reservoir Nutrient, Mercury, PCBs, Chlordane, Dieldrin, DDT TMDLs.)[999]

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[996] Exhibit A, Test Claim 13-TC-01, pages 742, 746-747, 1100, 1105, 1115, 1142, 1143-1154, 1155-1160, and 1161 (test claim permit, Parts VI.E.1.c., VI.E.3., and Attachments M, O, P, and Q, which incorporate by reference Part VI.E.3.).

[997] Exhibit A, Test Claim 13-TC-01, pages 742, 746-747, 1100, 1105, 1115, 1142, 1143-1154, 1155-1160, and 1161 (test claim permit, Parts VI.E.1.c., VI.E.3., and Attachments M, O, P, and Q, which incorporate by reference Part VI.E.3.).

[998] Exhibit A, Test Claim 13-TC-01, page 1142. The following permittees are required to comply with the Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL: Los Angeles County Flood Control District and Signal Hill. (Exhibit A, Test Claim 13-TC-01, pages 1070-1071 (test claim permit, Attachment K).)

[999] Exhibit A, Test Claim 13-TC-01, page 1143-1154, 1155-1160, 1071 et seq. The following permittees are required to comply with the Los Angeles Area Lakes TMDLs: Los Angeles County Flood Control District, County of Los Angeles, and the Cities of Los

- Los Cerritos Channel Metals TMDL, effective March 17, 2010 (Attachment Q).[1000]
- San Gabriel River and Impaired Tributaries Metals and Selenium TMDL, effective March 26, 2007 (Attachment P).[1001]
- Malibu Creek Watershed Nutrients TMDL, effective March 21, 2003 (Attachment M).[1002]

2. The following land development and inspection requirements imposed by Part VI.D.7.d.iv.1.a., b., c. and Attachment E, Part X., of the test claim permit:

    a. Implement a GIS or other electronic system for tracking projects that have been conditioned for post-construction BMPs, which "should contain" such information as project identification, acreage, BMP type and description, BMP locations, dates of acceptance and maintenance agreement, inspection dates and summaries and corrective action.[1003]

Angeles, Arcadia, Bradbury, Calabasas, Duarte, El Monte, Irwindale, Monrovia, Sierra Madra, and South El Monte. (Exhibit A, Test Claim 13-TC-01, pages 1169-1171 (test claim permit, Attachment K).)

The permittees in the San Gabriel River Management Area include the Cities of Azusa, Claremont, Irwindale, La Verne, Pomona, San Dimas, the County of Los Angeles, and Los Angeles County Flood Control District. (Exhibit A, Test Claim 13-TC-01, pages 1072-1073 (test claim permit, Attachment K).)

[1000] Exhibit A, Test Claim 13-TC-01, page 1161. The following permittees are required to comply with the Los Cerritos Channel Metals TMDL: Bellflower, Cerritos, Downey, Lakewood, County of Los Angeles, Los Angeles County Flood Control District, Paramount, and Signal Hill. (Exhibit A, Test Claim 13-TC-01, page 1074 (test claim permit, Attachment K).)

[1001] Exhibit A, Test Claim 13-TC-01, page 1161. The following permittees are required to comply with the San Gabriel River and Impaired Tributaries Metals and Selenium TMDL: Arcadia, Artesia, Azusa, Baldwin Park, Bellflower, Bradbury, Cerritos, Claremont, Covina, Diamond Bar, Downey, Duarte, El Monte, Glendora, Hawaiian Gardens, Industry, Irwindale, La Habra Heights, La Mirada, La Puente, La Verne, Lakewood, County of Los Angeles, and Los Angeles County Flood Control District, Monrovia, Norwalk, Pico Rivera, Pomona, San Dimas, Santa Fe Springs, South El Monte, Walnut, West Covina, and Whittier. (Exhibit A, Test Claim 13-TC-01, pages 1072-1073 (test claim permit, Attachment K).)

[1002] Exhibit A, Test Claim 13-TC-01, page 1105. The following permittees are required to comply with the Malibu Creek Watershed Nutrients TMDL: Agoura Hills, Calabasas, and Hidden Hills, County of Los Angeles, Los Angeles County Flood Control District, Malibu, and Westlake Village. (Exhibit A, Test Claim 13-TC-01, pages 1065-1066 (test claim permit, Attachment K).)

[1003] Exhibit A, Test Claim 13-TC-01, page 713 (test claim permit, Part VI.D.7.d.iv.1.a.).

b. Maintain a database providing the following information for each new development and re-development project approved by the permittee on or after the effective date of the test claim permit:

   1. Name of the Project and Developer
   2. Project location and map (preferably linked to the GIS storm drain map)
   3. Date of Certificate of Occupancy
   4. 85th percentile storm event for the project design (inches per 24 hours)
   5. 95th percentile storm event for projects draining to natural water bodies (inches per 24 hours)
   6. Other design criteria required to meet hydromodification requirements for drainages to natural water bodies
   7. Project design storm (inches per 24-hours)
   8. Project design storm volume (gallons or MGD)
   9. Percent of design storm volume to be retained on site
   10. Design volume for water quality mitigation treatment BMPs, if any
   11. If flow through water quality treatment BMPs are approved, provide the one year, one-hour storm intensity as depicted on the most recently issued isohyetal map published by the Los Angeles County Hydrologist
   12. Percent of design storm volume to be infiltrated at an off-site mitigation or groundwater replenishment project site
   13. Percent of design storm volume to be retained or treated with biofiltration at an off-site retrofit project
   14. Location and maps (preferably linked to the GIS storm drain map required in Part VII.A of this MRP) of off-site mitigation, groundwater replenishment, or retrofit sites
   15. Documentation of issuance of requirements to the developer.[1004]

c. Inspect all development sites upon completion of construction and before issuance of occupancy certificates to ensure proper installation of LID (low impact development) measures, structural BMPs, treatment control BMPs, and hydromodification control BMPs.[1005]

[1004] Exhibit A, Test Claim 13-TC-01, pages 842-843 (Attachment E, Part X., Monitoring and Reporting Program).

[1005] Exhibit A, Test Claim 13-TC-01, page 713 (test claim permit, Part VI.D.7.d.iv.1.b.).

d. Develop a post-construction BMP maintenance inspection checklist.[1006]

e. *Except* for the post-construction inspections for critical commercial and industrial facilities required by Part 4.C.2. of the prior permit (Order 01-182) (which is not new), inspect the remaining new development or redevelopment projects, at least once every two years after project completion, post-construction BMPs to assess operation conditions with particular attention to criteria and procedures for post-construction treatment control and hydromodification control BMP repair, replacement, or re-vegetation.[1007]

There are also activities required by Part VI.D.6.b., d., and e. (the Industrial and Commercial Facilities Program requiring permittees to maintain an updated watershed-based inventory in electronic format of all industrial and commercial facilities that are critical sources of stormwater pollution and inspect such facilities as specified) and the similar requirements imposed by the Development Construction Program in Part VI.D.8., which have been denied on other mandate grounds, for which fee authority under Government Code section 17556(d) is also an issue.[1008]

The claimants state they are not aware of any designated state, federal or non-local agency funds that are or will be available to fund these mandated activities. They also argue they are restricted by the California Constitution with respect to their ability to assess fees and assessments sufficient to pay for these requirements.[1009] In addition, they claim they cannot assess a regulatory fee for inspections and to develop BMP inventories and databases for industrial and construction sites as follows:

> . . . no fee can be assessed for inspection of industrial or construction sites, at least to the extent those sites hold general industrial or general construction stormwater permits for which the State Water Resources Control Board already assesses a fee, which includes a fee to pay for inspections. Water Code §13260(d)(2)(B). Because the State is already assessing a fee for these inspections, the Claimants would have difficulty demonstrating that their fees would bear a fair and reasonable relationship to the payors' burdens or benefits; the State has already collected a fee for that activity. Likewise, there is no party on which to assess the cost of creating the inventory and databases of industrial and commercial sites or to pay for the inspection of post construction BMP requirements every two years into the future.[1010]

[1006] Exhibit A, Test Claim 13-TC-01, pages 713-714 (test claim permit, Part VI.D.7.d.iv.1.c.).

[1007] Exhibit A, Test Claim 13-TC-01, page 714 (test claim permit, Part VI.D.7.d.iv.1.c.).

[1008] Exhibit A, Test Claim 13-TC-01, pages 690-693, 715-723.

[1009] Exhibit A, Test Claim 13-TC-01, pages 93-95; Exhibit G, Claimants' Rebuttal Comments, pages 92-94.

[1010] Exhibit A, Test Claim 13-TC-01, page 93.

The Water Boards and Finance disagree, contending that the claimants have the authority to assess fees or assessments sufficient as a matter of law to cover the costs of the mandated activities and, thus, there are no costs mandated by the state pursuant to Government Code section 17556(d).[1011]

As explained below, the Commission finds that there are costs mandated by the state from December 28, 2012, to December 31, 2017, to develop and submit a WMP or EWMP for the U.S. EPA-adopted TMDLs in accordance with Parts VI.E.1.c., VI.E.3., and Attachments M, O, P, and Q (which incorporate by reference Part VI.E.3.) because the claimants' fee authority is subject to the voter's approval. Under these conditions, there are no costs mandated by the state.[1012] However, the claimants have authority to impose property stormwater fees beginning January 1, 2018, which is subject only to the voter protest provisions of Proposition 218 and, thus, beginning January 1, 2018, there are no costs mandated by the state pursuant to Government Code section 17556(d).[1013]

The Commission further finds there are no costs mandated by the state to comply with the land development and inspection requirements imposed by VI.D.7.d.iv.1.a., b., c. and Attachment E, Part X., of the test claim permit because the claimants have regulatory fee authority that is not subject to the voter's approval and is sufficient as a matter of law to cover the costs of the mandated activities pursuant to Government Code section 17556(d).[1014]

[1011] Exhibit C, Finance's Comments on the Test Claims, pages 1-2; Exhibit F, Water Boards' Comments on the Test Claims, pages 35-40; Exhibit J, Water Boards' Comments on the Draft Proposed Decision, pages 11-13; Exhibit K, Finance's Comments on the Draft Proposed Decision, pages 1-2.

[1012] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581.

[1013] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 189.

[1014] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 564-565; *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

1. **There Is Substantial Evidence in the Record, As Required by Government Code Section 17559, the Claimants Incurred Increased Costs Exceeding $1,000 and Used Their Local "Proceeds of Taxes" to Comply with the New State-Mandated Activities.**

    a. The reimbursement requirement in article XIII B, section 6 was included because of the tax and spend limitations in articles XIII A and XIII B and is triggered only when the state forces the expenditure of local proceeds of taxes; section 6 was not intended to reach beyond taxation or to protect nontax sources.

In 1978, the voters adopted Proposition 13, which added article XIII A to the California Constitution. Article XIII A reduced the authority of local government to impose property taxes by providing "the maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property," and the one percent (1%) tax was to be collected by counties and "apportioned according to law to the districts within the counties…."[1015] In addition to limiting the property tax, section 4 also restricts a local government's ability to impose special taxes by requiring a two-thirds approval by the voters.[1016]

Article XIII B was adopted by the voters as Proposition 4, less than 18 months after the addition of article XIII A to the state Constitution, and was billed as "the next logical step to Proposition 13."[1017] While article XIII A is aimed at controlling ad valorem property taxes and the imposition of new special taxes, "the thrust of article XIII B is toward placing certain limitations on the growth of appropriations at both the state and local government level; in particular, article XIII B places limits on the authorization to expend the 'proceeds of taxes.'"[1018] "Proceeds of taxes," in turn, includes "all tax revenues," as well as proceeds from "regulatory licenses, user charges, and user fees to the extent those proceeds *exceed* the costs reasonably borne by that entity in providing the regulation, product, or service," and proceeds from the investment of tax revenues.[1019] And, with respect to local governments, the section reiterates that "proceeds of taxes" includes state subventions other than mandate reimbursement, and, with respect to the State's spending limit, excludes such state subventions.[1020] Article XIII B does *not* restrict the growth in appropriations financed from nontax sources, such as "user fees

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[1015] California Constitution, article XIII A, section 1 (effective June 7, 1978).

[1016] California Constitution, article XIII A, section 4 (effective June 7, 1978).

[1017] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446.

[1018] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 762; *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446.

[1019] California Constitution, article XIII B, section 8(c) (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990), emphasis added.

[1020] California Constitution, article XIII B, section 8(c) (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

based on reasonable costs."[1021] And appropriations subject to limitation do not include "[a]ppropriations for debt service."[1022]

Proposition 4 also added article XIII B, section 6, which was specifically "designed to protect the tax revenues of local governments from state mandates that would require the expenditure of such revenues."[1023] The California Supreme Court, in *County of Fresno v. State of California*,[1024] explained:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra,* 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6.) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.[1025]

The California Supreme Court concluded articles XIII A and XIII B work "in tandem," for the purpose of precluding "the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities *because of the taxing and spending limitations that articles XIII A and XIII B impose*."[1026] Accordingly, reimbursement under article XIII B, section 6 is only required when a mandated new program or higher level of service forces local

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[1021] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; see also, *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 451, (finding that revenues from a local special assessment for the construction of public improvements are not "proceeds of taxes" subject to the appropriations limit).

[1022] California Constitution, article XIII B, section 9 (added, Nov. 7, 1979; amended by Proposition 111, June 5, 1990).

[1023] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

[1024] *County of Fresno v. State of California* (1991) 53 Cal.3d 482.

[1025] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487, emphasis in original.

[1026] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763, emphasis added.

government to incur "increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit."[1027]

b. There is substantial evidence in the record that the claimants incurred increased costs exceeding $1,000 and used their local "proceeds of taxes" to comply with the new state-mandated activities.

Consistent with these constitutional principles, reimbursement under article XIII B, section 6 is only required if the claimants show, with substantial evidence in the record,[1028] they have incurred increased costs mandated by the state within the meaning of Government Code section 17514. When alleged mandated activities do not compel the increased expenditure of local "proceeds of taxes," reimbursement under section 6 is not required.[1029]

Government Code section 17514 defines "costs mandated by the state" as any increased costs a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) further requires that no claim shall be made nor shall any payment be made unless the claim exceeds $1,000.

The claimants have identified increased costs to comply with the requirements pled in the Test Claim exceeding $1,000. The County of Los Angeles and the Los Angeles County Flood Control District identify costs of $3,212,000 in fiscal year 2012-2013 and $10,692,000 in fiscal year 2013-2014 to comply with the sections of the test claim permit that were pleaded, including the new requirements mandated by the state, which are supported by declarations signed under penalty of perjury.[1030] The City claimants state they have incurred costs of $3,172,000 in fiscal year 2012-2013 and $4,070,000 in fiscal year 2013-2014 to comply with the requirements including the TMDLs, supported by declarations signed under penalty of perjury.[1031] The declarations further state that

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[1027] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1185, emphasis added.

[1028] Government Code section 17559.

[1029] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 (Reimbursement is required only when "the costs in question can be recovered solely from tax revenues."). See also, *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189; *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 32; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986-987; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281.

[1030] Exhibit A, Test Claim 13-TC-02, pages 41, 47 et seq.

[1031] Exhibit A, Test Claim 13-TC-01, pages 90, 98 et seq.

"there are no dedicated state, federal or regional funds that are or will be available to pay for any of the new and/or upgraded programs and activities . . . ."[1032]

However, reimbursement is not required to the extent the claimants receive fee revenue and used that revenue to pay for the state-mandated activities, or used any other revenues, including but not limited to grant funding, assessment revenue, and federal funds, that are *not* the claimants' proceeds of taxes. When state-mandated activities do not compel the increased expenditure of local "proceeds of taxes," reimbursement under section 6 is not required.[1033]

In this respect, the Legislature amended the Los Angeles Flood Control Act in Assembly Bill 2554 to authorize the Flood Control District to impose a fee or charge, in compliance with article XIII D of the California Constitution, to pay the costs and expenses of carrying out projects and providing services to improve water quality and reduce stormwater and urban runoff pollution in the District.[1034] The statute requires the District to allocate the revenues derived from the fees as follows: ten percent to the district for implementation and administration of water quality programs; forty percent to the cities within the boundaries of the district and to the County of Los Angeles for water quality improvement programs; and 50 percent to the nine watershed authority groups to implement collaborative water quality improvement plans or programs.[1035] The Fact Sheet *estimates* the revenues generated and allocated pursuant to Assembly Bill 2554 as follows:

> In addition to current funding options, future funding options continue to be created. Assembly Bill 2554, known as the Los Angeles County Flood Control District's Water Quality Funding Initiative, is currently under consideration by the LACFCD's Board of Supervisors. If the Board of Supervisors approve the fee proposal and no majority protest is received, then it will be submitted for voter approval and could create an estimated annual revenue of $300 million to be utilized for various storm water projects including but not limited to:

[1032] See, for example, Exhibit A, Test Claim 13-TC-01, page 113.

[1033] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 (Reimbursement is required only when "the costs in question can be recovered solely from tax revenues."). See also, *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189; *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 32; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986-987; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281.

[1034] Water Code Appendix, section 28-2 (Stats. 2010, ch, 602 (AB 2554, sections 8a and 8b)).

[1035] Water Code Appendix, section 28-2 (Stats. 2010, ch, 602 (AB 2552, section 8b.)).

- New and Existing Water Quality Projects and Programs
- Maintenance of Existing Facilities
- TMDL and MS4 Permit Implementation

Of the annual revenue, forty percent would be returned to the municipalities to create new local projects and programs and maintenance. Below are the estimated revenues that would be allocated to certain municipalities based on the estimated annual revenue of $300 million.

Municipalities	Estimated Annual Revenue
City of Los Angeles	$37 million
City of Santa Monica	$1 million
El Segundo	$600,000
Manhattan Beach	$300,000
Redondo Beach	$750,000
Unincorporated Areas on Los Angeles County	$15 million

Fifty percent of the annual revenue would be spread across nine watershed authority groups (WAGs) to develop Water Quality Improvement Plans and implement regional projects and programs. Some examples of the possible annual revenues available to the WAGs are provided below:

WAG	Estimated Revenue
Santa Monica Bay	$12 million
Upper Los Angeles River	$36 million
Lower Los Angeles River	$15 million
Upper San Gabriel River	$17 million

The remaining ten percent of the annual revenues would be allocated to the Los Angeles County Flood Control District for administration of the program and other district water quality projects and programs.[1036]

The Fact Sheet also shows funding that can be applied to stormwater costs from local Propositions A and O, and other state and grant funds.[1037]

There is no evidence in the record, however, showing the claimants used fee or grant revenue to pay for the new state-mandated activities. And the State has not filed any evidence rebutting the claimants' assertion that proceeds of taxes were used to pay for the new state-mandated activities.

[1036] Exhibit A, Test Claim 13-TC-01, pages 1028-1029 (Fact Sheet).

[1037] Exhibit A, Test Claim 13-TC-01, page 1027 (Fact Sheet).

Accordingly, there is substantial evidence in the record the claimants incurred increased costs exceeding $1,000 and used their proceeds of taxes to comply with the test claim permit. However, additional analysis is required to determine if any exception to the definition of "costs mandated by the state" in Government Code section 17556 apply.

2. The Claimants Have Authority to Impose Property-Related Stormwater Fees for the New Activities Mandated by the State. However, from December 28, 2012, through December 31, 2017, Voter Approval of These Fees Is Required and the Courts Have Found That When Voter Approval Is Required, Government Code section 17556(d) Does Not Apply and There Are Costs Mandated by the State. Beginning January 1, 2018, When Property-Related Fees Are Subject Only to the Voter Protest Provisions of Article XIII D, Section 6 of the California Constitution, Government Code Section 17556(d) Applies, There Are No Costs Mandated by the State, and Reimbursement Is Denied.

As indicated above, Part VI.E.1.c., and Attachments M, O, P, and Q, which incorporate by reference Part VI.E.3. of the test claim permit, mandate a new program or higher level of service, beginning December 28, 2012, for the pro rata costs to develop and submit a WMP or EWMP for only the U.S. EPA-adopted TMDLs identified below and in accordance with Part VI.E.3., as follows:

a. Each Permittee subject to one of the U.S. EPA-adopted TMDLs identified below shall propose BMPs to achieve the WLAs contained in the applicable U.S. EPA-established TMDL, and a schedule for implementing the BMPs that is as short as possible, in a WMP or EWMP.

b. Each Permittee subject to one of the U.S. EPA-adopted TMDLs identified below may either individually submit a WMP or may jointly submit a WMP or EWMP with other Permittees subject to the WLAs contained in the U.S. EPA-established TMDL.

c. At a minimum, each Permittee subject to one of the U.S. EPA-adopted TMDLs identified below shall include the following information in its WMP or EWMP, relevant to each applicable U.S. EPA-established TMDL:

- Available data demonstrating the current quality of the Permittee's MS4 discharge(s) in terms of concentration and/or load of the target pollutant(s) to the receiving waters subject to the TMDL;
- A detailed description of BMPs that have been implemented, and/or are currently being implemented by the Permittee to achieve the WLA(s), if any;
- A detailed time schedule of specific actions the Permittee will take in order to achieve compliance with the applicable WLA(s);
- A demonstration that the time schedule requested is as short as possible, taking into account the time since USEPA establishment of the TMDL, and technological, operation, and economic factors that affect the design,

development, and implementation of the control measures that are necessary to comply with the WLA(s); and

- If the requested time schedule exceeds one year, the proposed schedule shall include interim requirements and numeric milestones and the date(s) for their achievement.[1038]

d. Each Permittee subject to a WLA in a TMDL established by U.S. EPA identified below shall submit a draft of a WMP or EWMP to the Regional Water Board Executive Officer for approval per the schedule Part VI.C.4.[1039]

These requirements apply only to the following U.S. EPA-adopted TMDLs:

- Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL (effective March 26, 2012 (Attachment O).[1040]
- Los Angeles Area Lakes TMDLs, effective March 26, 2012 (Attachment O for the TMDLs Los Angeles River Watershed Management Area, which include the following: Lake Calabasas Nutrient; Echo Park Lake PCBs, Chlordane, and Dieldrin; and Legg Lake Nutrient Peck Road Park Lake Nutrient, PCBs, Chlordane, DDT, and Dieldrin; and Attachment P for the TMDLs in the San Gabriel River Watershed Management Area, which include the Puddingstone Reservoir Nutrient, Mercury, PCBs, Chlordane, Dieldrin, DDT TMDLs.)[1041]

[1038] Exhibit A, Test Claim 13-TC-01, pages 742, 746-747, 1100, 1105, 1115, 1142, 1143-1154, 1155-1160, and 1161 (test claim permit, Parts VI.E.1.c., VI.E.3., and Attachments M, O, P, and Q, which incorporate by reference Part VI.E.3.).

[1039] Exhibit A, Test Claim 13-TC-01, pages 742, 746-747, 1100, 1105, 1115, 1142, 1143-1154, 1155-1160, and 1161 (test claim permit, Parts VI.E.1.c., VI.E.3., and Attachments M, O, P, and Q, which incorporate by reference Part VI.E.3.).

[1040] Exhibit A, Test Claim 13-TC-01, page 1142. The following permittees are required to comply with the Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL: Los Angeles County Flood Control District and Signal Hill. (Exhibit A, Test Claim 13-TC-01, pages 1070-1071 (test claim permit, Attachment K).)

[1041] Exhibit A, Test Claim 13-TC-01, page 1143-1154, 1155-1160, 1071 et seq. The following permittees are required to comply with the Los Angeles Area Lakes TMDLs: Los Angeles County Flood Control District, County of Los Angeles, and the Cities of Los Angeles, Arcadia, Bradbury, Calabasas, Duarte, El Monte, Irwindale, Monrovia, Sierra Madra, and South El Monte. (Exhibit A, Test Claim 13-TC-01, pages 1169-1171 (test claim permit, Attachment K).)

The permittees in the San Gabriel River Management Area include the Cities of Azusa, Claremont, Irwindale, La Verne, Pomona, San Dimas, the County of Los Angeles, and Los Angeles County Flood Control District. (Exhibit A, Test Claim 13-TC-01, pages 1072-1073 (test claim permit, Attachment K).)

- Los Cerritos Channel Metals TMDL, effective March 17, 2010 (Attachment Q).[1042]
- San Gabriel River and Impaired Tributaries Metals and Selenium TMDL, effective March 26, 2007 (Attachment P).[1043]
- Malibu Creek Watershed Nutrients TMDL, effective March 21, 2003 (Attachment M).[1044]

The permittees have authority pursuant to their constitutional police powers[1045] and other statutory authority[1046] to impose property-related fees for the required activities.[1047] "[P]revention of water pollution is a legitimate governmental objective, in furtherance of which the police power may be exercised."[1048] These fees are subject to

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[1042] Exhibit A, Test Claim 13-TC-01, page 1161. The following permittees are required to comply with the Los Cerritos Channel Metals TMDL: Bellflower, Cerritos, Downey, Lakewood, County of Los Angeles, Los Angeles County Flood Control District, Paramount, and Signal Hill. (Exhibit A, Test Claim 13-TC-01, page 1074 (test claim permit, Attachment K).)

[1043] Exhibit A, Test Claim 13-TC-01, page 1161. The following permittees are required to comply with the San Gabriel River and Impaired Tributaries Metals and Selenium TMDL: Arcadia, Artesia, Azusa, Baldwin Park, Bellflower, Bradbury, Cerritos, Claremont, Covina, Diamond Bar, Downey, Duarte, El Monte, Glendora, Hawaiian Gardens, Industry, Irwindale, La Habra Heights, La Mirada, La Puente, La Verne, Lakewood, County of Los Angeles, and Los Angeles County Flood Control District, Monrovia, Norwalk, Pico Rivera, Pomona, San Dimas, Santa Fe Springs, South El Monte, Walnut, West Covina, and Whittier. (Exhibit A, Test Claim 13-TC-01, pages 1072-1073 (test claim permit, Attachment K).)

[1044] Exhibit A, Test Claim 13-TC-01, page 1105. The following permittees are required to comply with the Malibu Creek Watershed Nutrients TMDL: Agoura Hills, Calabasas, and Hidden Hills, County of Los Angeles, Los Angeles County Flood Control District, Malibu, and Westlake Village. (Exhibit A, Test Claim 13-TC-01, pages 1065-1066 (test claim permit, Attachment K).)

[1045] California Constitution, article XI, section 7.

[1046] See, e.g., Health and Safety Code section 5471 (fees for storm drainage maintenance and operation); Government Code sections 38902 (providing for sewer standby charges); 53750 et seq. (Proposition 218 Omnibus Implementation Act, describing procedures for adoption of assessments, fees and charges); 53751 (as amended in 2017, providing that fees for sewer services includes storm sewers).

[1047] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 561.

[1048] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 561, citing to *Freeman v. Contra Costa County Water Dist*. (1971) 18 Cal.App.3d 404, 408.

procedural and substantive requirements imposed by Propositions 218 and 26, which added and amended article XIII C and XIII D to the California Constitution.

a. The substantive and procedural requirements of articles XIII C and XIII D for property-related fees and Senate Bill 231.

Proposition 218, approved by voters in 1996, added articles XIII C and XIII D to the California Constitution and "is one of a series of voter initiatives restricting the ability of state and local governments to impose taxes and fees."[1049] Article XIII C concerns voter approval for many types of local taxes other than property taxes. Article XIII D addresses property-based taxes and fees.[1050] Specifically, article XIII D of the California Constitution "imposes certain substantive and procedural restrictions on taxes, assessments, fees, and charges 'assessed by any agency upon any parcel of property or upon any person as an incident of property ownership.'"[1051] For example, assessments and property-related fees are subject to notice and hearing requirements, and must meet a threshold of proportionality with respect to the amount of the exaction and the purposes to which it is put. Section 4, addressing assessments, provides:

> An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.[1052]

Once the amount of the proposed assessment is identified, notice must be mailed to the record owner of each parcel, stating the amount chargeable to the entire district, to the parcel itself, the reason for the assessment and the basis of the calculation, and the date, time and location of the public hearing on the proposed assessment. The notice must be in the form of a ballot, and at the public hearing the agency "shall consider all

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[1049] *Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, 380.

[1050] *Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, 381.

[1051] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1200 citing California Constitution, article XIII D, section 3.

[1052] California Constitution, article XIII D, section 4(a).

protests . . . and tabulate the ballots." If the majority of the returned ballots oppose the assessment, the agency "shall not impose" the assessment.[1053]

Similarly, section 6 provides for a proportionality requirement with respect to property-related fees and charges and imposes the following substantive requirements:

> A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:
>
> (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.
>
> (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
>
> (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.
>
> (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.
>
> (5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.[1054]

And section 6 provides for notice and a public hearing similarly to section 4; but, unlike section 4, section 6 does not expressly require the notice to inform parcel owners of their right to protest the proposed fee, nor is the notice required to be in the form of a ballot to be returned.[1055]

[1053] California Constitution, article XIII D, section 4(c); (d); (e).

[1054] California Constitution, article XIII D, section 6(b).

[1055] Compare California Constitution, article XIII D, section 6(a)(1)-(2) with article XIII D, section 4(a).

Section 6(c) also provides that *voter approval* is required for property-related fees and *charges other than* for water, sewer, and refuse collection services.[1056] This section is discussed further below, but for charges for water, sewer, and refuse collection services, voter approval is not required to impose or increase fees. The fees may be adopted, and are subject only to the voter protest provisions of article XIII D.

In 2010, the voters approved Proposition 26 to amend article XIII C, section 1 of the California Constitution to define a "tax" subject to the voters' approval as "any levy, charge, or exaction of any kind imposed by a local government, *except*" as stated.[1057] An exception to the definition of a tax includes "Assessments and property-related fees imposed in accordance with the provisions of Article XIII D."[1058] Thus, as long as local government complies with the substantive and procedural requirements of article XIII D (added by Proposition 218), then the revenues received are not considered proceeds of taxes, but revenue from "nontax" property-related fees and assessments. Article XIII C also makes clear that the burden is on local government to establish that the levy is not a tax, that the fee is reasonably related to the costs to government in the aggregate, and that the fee charged to the payors is reasonably related to the benefits received or burdens created by such payors as a part of the rate setting process.[1059]

Many of the limitations stated in Proposition 218 and article XIII D are not new, as most special assessment acts under prior law required notice and a public hearing, and many such acts also provided for majority protest of affected parcel owners to defeat a proposed assessment.[1060] Despite the existence of such limitations before Proposition 218, the court in *County of Placer v. Corin* held assessments were sufficiently distinct from taxes as to be outside the scope of articles XIII A and XIII B.[1061]

After Proposition 218 came the cases of *Apartment Ass'n of Los Angeles County, Richmond*, and *Bighorn-Desert View*.[1062] In each of these cases, the Court narrowly construed the procedural and substantive limitations of article XIII D. In *Apartment Ass'n*, the Court rejected a challenge under article XIII D, section 6 to the city's ordinance imposing fees on residential rental properties, finding the fees were not "imposed by an agency upon a parcel or upon a person as *an incident of property*

[1056] California Constitution, article XIII D, section 6(c).

[1057] California Constitution, article XIII C, section 1 (amended by the voters on Nov. 2, 2010, by Prop. 26).

[1058] California Constitution, article XIII C, section 1(e)(7).

[1059] California Constitution, article XIII C, section 1(e).

[1060] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 454, footnote 9.

[1061] *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 454, footnote 9.

[1062] *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830; *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409; and *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205.

ownership…"[1063] The Court held Proposition 218 imposes restrictions on taxes, assessments, fees, and charges only "when they burden landowners as *landowners*."[1064] The residential rental fee ordinance at issue "imposes a fee on its subjects by virtue of their ownership of a business-i.e., because they are landlords," and, thus, the fee was not subject to the requirements of article XIII D.[1065]

In *Richmond*, the District imposed a "capacity charge" on applicants for *new* water service connections, and thus could not prospectively identify the parcels to which the charge would apply; i.e., it could not have complied with the procedural requirements of notice and hearing under article XIII D, section 4. The Court held the impossibility of compliance with section 4 was one reason to find that the capacity charge was not an assessment, within the meaning of article XIII D.[1066] The Court also found the charge was to be imposed on applicants for new service, rather than users receiving service through existing connections, and that distinction is consistent with the overall intent of Proposition 218, to promote taxpayer consent.[1067] Accordingly, the Court concluded: "Because these fees are imposed only on the self-selected group of water service applicants, and not on real property that the District has identified or is able to identify, and because neither fee can ever become a charge on the property itself, we conclude that neither fee is subject to the restrictions that article XIII D imposes on property assessments and property-related fees."[1068]

In *Bighorn-Desert View*, the Court rejected a local initiative designed to impose a voter approval requirement on all future rate increases for water service,[1069] finding article XIII D, section 6's express *exemption* from voter approval for sewer, water, and refuse collection "would appear to embody the electorate's intent as to when voter-approval should be required, or not required."[1070] The Court concluded:

> [U]nder section 3 of California Constitution article XIII C, local voters by initiative may reduce a public agency's water rate and other delivery charges, but…[article XIII C, section 3] does not authorize an initiative to

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[1063] California Constitution, article XIII D, sections 2(e), 3, emphasis added; *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 841-842.

[1064] *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842, emphasis in original.

[1065] *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 842.

[1066] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 419.

[1067] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 420.

[1068] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 430.

[1069] *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205, 219.

[1070] *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205, 218-219.

> impose a requirement of voter preapproval for future rate increases or new charges for water delivery. In other words, by exercising the initiative power voters may decrease a public water agency's fees and charges for water service, but the agency's governing board may then raise other fees or impose new fees without prior approval. Although this power-sharing arrangement has the potential for conflict, we must presume that both sides will act reasonably and in good faith, and that the political process will eventually lead to compromises that are mutually acceptable and both financially and legally sound. (See *DeVita v. County of Napa, supra,* 9 Cal.4th at pp. 792–793, 38 Cal.Rptr.2d 699, 889 P.2d 1019 ["We should not presume ... that the electorate will fail to do the legally proper thing."].) We presume local voters will give appropriate consideration and deference to a governing board's judgments about the rate structure needed to ensure a public water agency's fiscal solvency, and we assume the board, whose members are elected (see Stats.1969, ch. 1175, § 5, p. 2274, 72B West's Ann. Wat.-Appen., *supra,* ch. 112, p. 190), will give appropriate consideration and deference to the voters' expressed wishes for affordable water service. The notice and hearing requirements of subdivision (a) of section 6 of California Constitution article XIII D will facilitate communications between a public water agency's board and its customers, and the substantive restrictions on property-related charges in subdivision (b) of the same section should allay customers' concerns that the agency's water delivery charges are excessive.[1071]

The Sixth District Court of Appeal in *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351 held "sewer," for purposes of the voter approval exemption in article XIII D, does *not* include storm sewers or storm drains.[1072] *City of Salinas* involved a challenge to a "storm drainage fee" imposed by the City of Salinas to fund its efforts "to reduce or eliminate pollutants contained in storm water, which was channeled into a drainage system separate from the sanitary and industrial waste systems," as required by the CWA.[1073] The fee was imposed on owners of developed parcels of property, and the amount "was to be calculated according to the degree to which the property contributed to runoff to the City's drainage facilities. That contribution, in turn, would be measured by the amount of the 'impervious area' on that parcel."[1074] Taxpayers challenged the imposition of the fee, arguing it was subject to voter approval under Proposition 218. The City argued the fee was exempt from the voter approval

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[1071] *Bighorn-Desert View Water Agency v. Verjill* (2006) 39 Cal.4th 205, 220-221.

[1072] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358-1359.

[1073] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1353.

[1074] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1353.

requirements because it was for "sewer" or "water" services under article XIII D, section 6(c). The court disagreed, and construed the term "sewer" narrowly, holding "sewer" referred solely to "sanitary sewerage" (i.e., the system that carries "putrescible waste" from residences and businesses), and did not encompass a sewer system designed to carry only stormwater.[1075] It also held the term "water services" meant "the supply of water for personal, household, and commercial use, not a system or program that monitors storm water for pollutants, carries it away, and discharges it into the nearby creeks, river, and ocean."[1076]

Thus, under the *City of Salinas* case, a local agency's charges on developed parcels to fund stormwater management were property-related fees not covered by Proposition 218's exemption for "sewer" or "water" services. Therefore, for local agencies to impose new or increased stormwater fees on property owners, an election and majority vote of the affected property owners or two-thirds of the electorate in the area was first required to affirmatively approve those fees.

That holding has since been the subject of legislation. In 2017, the Legislature enacted Senate Bill 231, which amended Government Code sections 53750 and 53751 to expressly overrule the 2002 *City of Salinas* case.[1077] Government Code section 53750(k) defines the term "sewer" for purposes of article XIII D as including systems that "facilitate sewage collection, treatment, or disposition for . . . drainage purposes, including . . . drains, conduits, outlets for . . . storm waters, and any and all other works, property, or structures necessary or convenient for the collection or disposal of . . . storm waters." Government Code section 53751 explains why the Legislature thinks the *City of Salinas* case is wrong:

> The court in *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351 failed to follow long-standing principles of statutory construction by disregarding the plain meaning of the term "sewer." Courts have long held that statutory construction rules apply to initiative measures, including in cases that apply specifically to Proposition 218 (see *People v. Bustamante* (1997) 57 Cal.App.4th 693; *Keller v. Chowchilla Water Dist.* (2000) 80 Cal.App.4th 1006). When construing statutes, courts look first to the words of the statute, which should be given their usual, ordinary, and commonsense meaning (*People v. Mejia* (2012) 211 Cal.App.4th 586, 611). The purpose of utilizing the plain meaning of statutory language is to spare the courts the necessity of trying to divine the voters' intent by resorting to secondary or subjective indicators. The court in *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98

[1075] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1357-1358.

[1076] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358.

[1077] Government Code sections 53750; 53751 (amended, Stats. 2017, ch. 536 (SB 231)).

Cal.App.4th 1351 asserted its belief as to what most voters thought when voting for Proposition 218, but did not cite the voter pamphlet or other accepted sources for determining legislative intent. Instead, the court substituted its own judgment for the judgment of voters.[1078]

Thus, as explained below, following Senate Bill 231, voter approval is no longer required for stormwater property-related fees.

b. Local government permittees have the authority to impose property-related fees for the new state-mandated requirements, which meet the substantive requirements of article XIII D, section 6(b).

The Commission finds that the permittees' have the legal authority to impose property-related stormwater fees to cover the costs to develop and submit a WMP or EWMP to achieve the WLAs contained in each U.S. EPA-established TMDL, as required by Part VI.E.1.c. and Attachments M, O, P, and Q, which incorporate by reference Part VI.E.3. of the test claim permit.

As indicated above, article XIII D, section 6, imposes the following substantive requirements for property-related fees:

> A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:
>
> (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.
>
> (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
>
> (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.
>
> (4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.
>
> (5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this

[1078] Government Code section 53751(f).

> article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.[1079]

In 2021, the Second District Court of Appeal addressed a challenge to the Commission's Decision in *Municipal Storm Water and Urban Runoff Discharges*, 03-TC-04, 03-TC-20, 03-TC-21, which required the local government permittees in the Los Angeles area to install and maintain trash receptacles at public transit stops owned by *other* public entities.[1080] The State contended the local governments could impose a fee on private property owners to pay for the cost of these requirements. However, the court determined that the State had not shown the fee would meet article XIII D's substantive requirements for property-related fees (i.e., that no fee or charge may be imposed for general government services that are available to the public at large in substantially the same manner as they are to property owners), and that common sense dictated the vast majority of persons who would use and benefit from trash receptacles at transit stops are not the owners of adjacent properties but rather pedestrians, transit riders, and other members of the general public, as follows.[1081]

> The state agencies have not satisfied their burden. Not only have the state agencies failed to cite to the record or authority to support the point that a fee imposed on property owners adjacent to transit stops could satisfy the substantive constitutional requirements, but common sense dictates that the vast majority of persons who would use and benefit from trash receptacles at transit stops are not the owners of adjacent properties but rather pedestrians, transit riders, and other members of the general public; any benefit to property owners in the vicinity of bus stops would be incidental. Even if the state agencies could establish that the need for the trash receptacles is in part attributable to adjacent property owners and that the property owners would use the trash receptacles (see Cal. Const., art. XIII D, § 6, subd. (b)(3)-(4)), the placement of the receptacles at public transit stops makes the "service available to the public at large in substantially the same manner as it is to property owners" (*id.*, art. XIII D, § 6, subd. (b)(3)). The state agencies, therefore, failed to establish that the local governments could impose on property owners adjacent to transit stops a fee that could satisfy these constitutional requirements.[1082]

[1079] California Constitution, article XIII D, section 6(b).

[1080] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546.

[1081] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 567-568.

[1082] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 568-569.

The claimants in this case urge the Commission to apply the *Los Angeles* case here.[1083]

However, in 2022, the Third District Court of Appeal in *Department of Finance v. Commission on State Mandates* (addressing the Commission's Decision in *Discharge to Stormwater Runoff*, 07-TC-09) revisited the 2021 case and the substantive requirements in article XIII D, section 6(b) regarding property-related fees to cover the costs of street sweeping required by the NPDES permit as part of the receiving water limitations and discharge prohibitions to keep pollutants out of local waters.[1084] The State acknowledged the general rule that the party claiming the applicability of an exception bears the burden of demonstrating that it applies. However, the State argued that this typical approach should not apply to the burden of showing fee authority under Government Code section 17556(d). The State argued "the inherent flexibility in permittees' police power means permittees may develop fees in any number of ways. Also, local governments like permittees have significantly more expertise and experience than the State agencies before us in designing, implementing, and defending local government fees. The State asserts that permittees' expertise means they should bear the burden on this point."[1085] The court agreed, and held as follows:

> We agree the State has the burden of establishing that permittees have fee authority, but that burden does not require the State also to prove permittees as a matter of law and fact are able to promulgate a fee that satisfies article XIII D's substantive requirements. The sole issue before us is whether permittees have "the authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program." (*Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401, 69 Cal.Rptr.2d 231.) The inquiry is an issue of law, not a question of fact. (*Ibid.*)[1086]

The court further held that requiring the State to show affirmatively how permittees can create a fee that meets the substantive requirements *where no fee yet exists* requires the State to effectively engage in the rulemaking process itself and asks the State to do more than establish permittees have the lawful authority to enact a fee, which is the sole issue under Government Code section 17556(d).[1087] The court held that unless there is

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[1083] Exhibit I, Claimants' Comments on the Draft Proposed Decision, pages 44-46.

[1084] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 583-586.

[1085] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 584.

[1086] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 584-585.

[1087] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 585. This finding is consistent with provisions in articles XIII C and XIII D, which state the burden is on the local agency to demonstrate compliance with the substantive rules *when a fee exists* and is legally challenged. Article XIII D, section 6(b), states that "In any legal action contesting the validity of a fee or charge, the burden shall be on the

a showing that a fee cannot meet the substantive requirements of article XIII D, section 6(b) as a matter of law or undisputed fact (as was the case in the 2021 *Department of Finance* case), then the finding that a fee would meet the substantive requirements is *implicit* in the determination that permittees have the right or power to levy a fee, as follows:

> The State has established that permittees have the right or power to levy a fee for the street cleaning condition pursuant to Public Resources Code section 40059. Implicit in that determination is that permittees have the right or power to levy a fee that complies with article XIII D's substantive requirements. Unless it can be shown on undisputed facts in the record or as a matter of law that a fee cannot satisfy article XIII D's substantive requirements, as was found in *Los Angeles Mandates II*, the establishment by the State of the local agencies' power or authority to levy a fee without voter approval or without being subject to other limitations establishes that a local government has sufficient fee authority for purposes of section 17556(d).[1088]

The court further explained the following:

> Although the court of appeal in *Los Angeles Mandates II* [i.e., the 2021 *Department of Finance* case] stated the state bore the burden to show that a fee for public trash receptacles could satisfy the substantive requirements, and that the state did not satisfy its burden, the court actually ruled that the local governments could not establish a fee that could meet the substantive requirements as a matter of law or undisputed fact. (*Los Angeles Mandates II, supra*, 59 Cal.App.5th at pp. 568-569, 273 Cal.Rptr.3d 619 ["common sense dictates" that fee would not meet requirements].) To require the State to show affirmatively how permittees can create a fee that meets the substantive requirements where no fee yet exists requires the State effectively to engage in the rulemaking process itself. That asks the State to do more than establish permittees have the lawful authority to enact a fee, which is the sole issue. To the extent *Los Angeles Mandates II* requires the State to prove more, we respectively

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agency to demonstrate compliance with this article*;"* and article XIII C, section 1(e), states "The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."

[1088] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 585.

disagree with its interpretation.[1089]

Similarly, here, there is no showing as a matter of law or fact that a fee cannot meet the substantive requirements of article XIII D, section 6(b). The requirements in this case are *not* like the requirement to place trash receptacles on transit property owned by other entities and not within the control of the permittees, as in the *Los Angeles Mandates II* case. The requirements at issue here (to develop and submit a WMP or EWMP to achieve the WLAs assigned to the jurisdictions of specific permittees pursuant to the U.S. EPA-established TMDLs) address waters and areas within the control of the permittees. Like street sweeping in the 2022 *Department of Finance* case, the requirements implement the receiving water limitations and discharge prohibitions required by the permit.[1090]

As indicated above, the courts have found that local government has the authority (i.e., the right and the power) to levy property-related fees for stormwater services under their police powers.[1091] And the California Stormwater Quality Association (CASQA) has provided information to local agencies on how they can properly develop property-related stormwater fees under section XIII D of the California Constitution, including elements incorporated into a stormwater fee for various types of parcels to cover the cost of reducing stormwater pollutant loading and public education.[1092] CASQA describes the typical apportionment of costs for stormwater services as follows:

> Proposition 218 requires that property-related fees "shall not exceed the proportional cost of the service attributable to the parcel." Therefore, it is essential to develop an apportionment of costs that best reflects the stormwater services provided by the municipality.
>
> Across the U.S., most stormwater fee structures are based on the amount of impervious surface on a parcel, which is proportional to the amount of rainwater that runs off a parcel. This is a straight forward method, although impervious surface data may be difficult of expensive to obtain. Rate-setting consultants have experience working around this issue with sampling and statistical approaches, which can satisfy the Proposition 218 "proportionality" test.
>
> The majority of stormwater rate structures utilize an equivalent residential unit (ERU) as a basis for fees. ERUs estimate the average or median characteristics for a residential property. For stormwater, land use, impervious surface cover, or total size are possible metrics. Once

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[1089] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 585.

[1090] Exhibit A, Test Claim 13-TC-01, pages 623-625, 628-629, 639-640.

[1091] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 561.

[1092] Exhibit L (3), CASQA, Fee Study and Ordinance.

established based on a sample of properties, each parcel in a municipality can be assigned an individual number of ERUs, which is multiplied by the base residential rate to establish the individual fee. With the ERUs assigned and totaled, the revenue requirement is divided by the total number or ERUs to establish the base residential rate.

Most municipalities are bound to an NPDES permit requiring them to reduce stormwater pollutant loading as well as other objectives such as green infrastructure development and public education. These elements could be incorporated into the stormwater fees for various types of parcels.

It is worth noting that Proposition 218's strict requirements on a fair apportionment method means that a municipality should create a thorough administrative record of how the rate and studies upon which it relies would need to be clearly referenced.[1093]

Moreover, as explained in the next section, with the amendment by Senate Bill 231 to Government Code sections 53750 and 53751, voter approval is not required by the California Constitution to impose or increase property-related fees for stormwater costs beginning January 1, 2018. Instead, any new or increased fee is subject only to the voter protest provisions of article XIII D.

Therefore, the Commission finds that local government permittees have the authority to impose property-related fees for the new state-mandated requirements, which meet the substantive requirements of article XIII D, section 6.

c. The courts have held Government Code section 17556(d) does not apply to deny a claim when voter approval of the property-related stormwater fee is required under article XIII D (Proposition 218). However, Government Code section 17556(d) applies to deny a claim when the voter protest provisions of article XIII D (Proposition 218) apply.

The court in *Paradise Irrigation District* (a challenge to the Commission's Decision in *Water Conservation,* 10-TC-12/12-TC-01) held, in the context of water services, the *voter protest* requirements of Proposition 218 do not divest local agencies of their authority to impose fees sufficient as a matter of law pursuant to Government Code section 17556(d) and, thus, when even when the voter protest provisions apply, there are no costs mandated by the state.[1094] In *Paradise Irrigation District*, the Third District Court of Appeal observed:

> This case takes up where *Connell* left off, namely with the question of whether the passage of Proposition 218 undermined water and irrigation districts' authority to levy fees so that they are entitled to subvention for

[1093] Exhibit L (3), CASQA, Fee Study and Ordinance, pages 2-3.

[1094] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 189.

> state-mandated regulations requiring water infrastructure upgrades. The Water and Irrigation Districts do not argue this court wrongly decided *Connell, supra,* 59 Cal.App.4th 382, 69 Cal.Rptr.2d, but only that the rule of decision was superseded by Proposition 218. Consequently, we proceed to examine the effect of Proposition 218 on the continuing applicability of *Connell.*[1095]

Ultimately the court preserved and followed the rule of *Connell*, finding, based in large part on a discussion of *Bighorn-Desert View*, "Proposition 218 implemented a power-sharing arrangement that does not constitute a revocation of the Water and Irrigation Districts' fee authority."[1096] The court held, "[c]onsistent with the California Supreme Court's reasoning in *Bighorn*, we presume local voters will give appropriate consideration and deference to state mandated requirements relating to water conservation measures required by statute."[1097] In addition, the court held "[w]e also reject the Water and Irrigation Districts' claim that, as a matter of practical reality, the majority protest procedure allows water customers to defeat the Districts' authority to levy fees."[1098] However, the court said, "[w]e adhere to our holding in *Connell* that the inquiry into fee authority constitutes an issue of law rather than a question of fact."[1099] The court found water service fees, being expressly exempt from the voter approval provisions of article XIII D, section 6(c), therefore do not require voter preapproval, as would new taxes.[1100] In addition, the court followed and relied upon *Bighorn-Desert View*'s analysis of a power-sharing relationship between local agencies and their constituents, including the presumption "local voters will give appropriate consideration and deference to a governing board's judgments about the rate structure needed to ensure a public water agency's fiscal solvency…" and the notice and hearing requirements of article XIII D, section 6(a) "will facilitate communications between a public water agency's board and its customers, and the substantive restrictions on property-related charges in subdivision (b) of the same section should allay customers'

[1095] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 189.

[1096] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194-195.

[1097] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

[1098] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

[1099] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

[1100] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 192.

concerns that the agency's water delivery charges are excessive."[1101] Accordingly, the court found that power-sharing arrangement "does not undermine the fee authority that the districts have," and the majority protest procedure of article XIII D, section 6(a) "does not divest the Water and Irrigation Districts of their authority to levy fees."[1102] The court noted statutory protest procedures already existed, and "the possibility of a protest under article XIII D, section 6 does not eviscerate the Water and Irrigation Districts' ability to raise fees to comply with the Water Conservation Act."[1103] Thus, the court found Government Code section 17556(d) still applies to deny a claim when the fee authority is subject to voter protest under article XIII D, section 6(a).

Conversely, in 2022, the Third District Court of Appeal addressed the *voter approval* issue in *Department of Finance v. Commission on State Mandates* (*Discharge of Stormwater Runoff*) and found that Government Code section 17556(d) does not apply when voter approval is required and, thus, there are costs mandated by the state for new requirements mandated by a stormwater permit issued by the San Diego Regional Water Quality Control Board.[1104] The court's reasoning is as follows:

> The State contends the reasoning in *Paradise Irrigation Dist*. applies equally here where article XIII D requires the voters to preapprove fees. It argues that as with the voter protest procedure, under article XIII D permittees' governing bodies and the voters who elected those officials share power to impose fees. The governing bodies propose the fee, and the voters must approve it. The "fact that San Diego property owners could theoretically withhold approval—just as a majority of the governing body could theoretically withhold approval to impose a fee—does not 'eviscerate' San Diego's police power; that power exists regardless of what the property owners, or the governing body, might decide about any given fee."
>
> The State's argument does not recognize a key distinction we made in *Paradise Irrigation Dist*.: water service fees were not subject to voter approval. We contrasted article XIII D's protest procedure with the voter-approval requirement imposed by Proposition 218 on new taxes. Under article XIII C, no local government may impose or increase any general or special tax "unless and until that tax is submitted to the electorate and approved" by a majority of the voters for a general tax and by a two-thirds

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[1101] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 192-193.

[1102] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

[1103] *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194.

[1104] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 581.

vote for a special tax. (Cal. Const., art. XIII C, § 2, subds. (b), (d).) Under article XIII D, however, water service fees do not require the consent of the voters. (Cal. Const., art. XIII D, § 6, subd. (c).) (*Paradise Irrigation Dist., supra*, 33 Cal.App.5th at p. 192, 244 Cal.Rptr.3d 769.) The implication is the voter approval requirement would deprive the districts of fee authority.

Since the fees in *Paradise Irrigation Dist*. were not subject to voter approval, the protest procedure created a power sharing arrangement like that in *Bighorn* which did not deprive the districts of their fee authority. In *Bighorn*, the power-sharing arrangement existed because voters could possibly bring an initiative or referendum to reduce charges, but the validity of the fee was not contingent on the voters preapproving it. In *Paradise Irrigation Dist.*, the power-sharing arrangement existed because voters could possibly protest the water fee, but the validity of the fee was not contingent on voters preapproving the fee. The water fee was valid unless the voters successfully protested, an event the trial court in *Paradise Irrigation Dist*. correctly described as a "speculative and uncertain threat." (*Paradise Irrigation Dist., supra*, 33 Cal.App.5th at p. 184, 244 Cal.Rptr.3d 769.)

Here, a fee for stormwater drainage services is *not* valid unless and until the voters approve it. For property-related fees, article XIII D limits permittees' police power to proposing the fee. Like article XIII C's limitation on local governments' taxing authority, article XIII D provides that "[e]xcept for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area." (Cal. Const., art. XIII D, § 6, subd. (c).) The State's argument ignores the actual limitation article XIII D imposes on permittees' police power. Permittees expressly have no authority to levy a property-related fee unless and until the voters approve it. There is no power sharing arrangement.

This limitation is crucial to our analysis. The voter approval requirement is a primary reason Section 6 exists and requires subvention. As stated earlier, the purpose of Section 6 "is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose." (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81, 61 Cal.Rptr.2d 134, 931 P.2d 312.) And what are those limitations? Voter approval requirements, to name some.

Articles XIII A and XIII B "work in tandem, together restricting California

governments' power both to levy and to spend for public purposes." (*City of Sacramento, supra*, 50 Cal.3d at p. 59, fn. 1, 266 Cal.Rptr. 139, 785 P.2d 522.) Article XIII A prevents local governments from levying special taxes without approval by two-thirds of the voters. (Cal. Const., art. XIII A, § 4.) It also prevents local governments from levying an ad valorem tax on real and personal property. (Cal. Const., art. XIII A, § 1.) Article XIII B, adopted as the "next logical step" to article XIII A, limits the growth of appropriations made from the proceeds of taxes. (Cal. Const., art. XIII B, §§ 1, 2, 8; *City Council v. South* (1983) 146 Cal.App.3d 320, 333-334, 194 Cal.Rptr. 110.) And, as stated above, article XIII C extends the voter approval requirement to local government general taxes. (Cal. Const., art. XIII C, § 2, subd. (b).)

Subvention is required under Section 6 because these limits on local governments' taxing and spending authority, especially the voter approval requirements, deprive local governments of the authority to enact taxes to pay for new state mandates. They do not create a power-sharing arrangement with voters. They limit local government's authority to proposing a tax only, a level of authority that does not guarantee resources to pay for a new mandate. Section 6 provides them with those resources.

Article XIII D's voter approval requirement for property-related fees operates to the same effect. Unlike the owner protest procedure at issue in *Paradise Irrigation Dist.*, the voter approval requirement does not create a power sharing arrangement. It limits a local government's authority to proposing a fee only; again, a level of authority that does not guarantee resources to pay for a state mandate. Section 6 thus requires subvention because of Article XIII D's voter approval requirement. Contrary to the State's argument, *Paradise Irrigation Dist*. does not compel a different result.[1105]

The Water Boards disagree with the court's ruling in the *2022 Department of Finance* case and contend that the reasoning in *Paradise Irrigation District* should be extended to Proposition 218 pre-approval requirements.[1106] However, the Commission is required by law to follow the 2022 *Department of Finance* case and find that Government Code section 17556(d) does not apply to deny a claim when voter approval of the fee is required under article XIII D (Proposition 218).[1107] Pursuant to the decision

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[1105] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581.

[1106] Exhibit J, Water Boards' Comments on the Draft Proposed Decision, page 13.

[1107] *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455 ("Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction.").

in *Paradise Irrigation District*, Government Code section 17556(d) applies to deny a claim when the voter protest provisions of article XIII D (Proposition 218) apply.

> d. From December 28, 2012, through December 31, 2017, voter approval of stormwater fees is required pursuant to the decision in the *City of Salinas* and, thus, Government Code section 17556(d) does not apply and there are costs mandated by the state for new state-mandated requirements. Beginning January 1, 2018, when property-related fees are subject only to the voter protest provisions of article XIII D, section 6 of the California Constitution, then Government Code section 17667(d) applies, and there are no costs mandated by the state.

As indicated above, the court in *City of Salinas* held a local agency's charges on developed parcels to fund stormwater management were property-related fees that were not covered by Proposition 218's exemption for "sewer" or "water" services. Therefore, for local agencies to impose new or increased stormwater fees on property owners, an election and majority vote of the affected property owners or two thirds of the electorate in the area was first required to affirmatively approve those fees.[1108] When voter approval of fees are required, then Government Code section 17556(d) does not apply and there are costs mandated by the state.[1109]

However, Government Code sections 53750 and 53751, as amended by Senate Bill 231, superseded the holding in *City of Salinas* and defined "sewer" to include stormwater sewers subject only to the voter protest provisions of article XIII D.[1110] These provisions became effective January 1, 2018.

The claimants contend the Senate Bill 231 conflicts with Proposition 218 and is therefore unconstitutional.[1111]

The Commission is required to presume statutes are constitutional. Article III, section 3.5 of the California Constitution prohibits administrative agencies, such as the Commission, from refusing to enforce a statute or from declaring a statute unconstitutional (as requested by the claimants). Article III, section 3.5 states, in relevant part, the following:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

[1108] *Howard Jarvis Taxpayers' Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351, 1358-1359.

[1109] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 579-581.

[1110] Government Code sections 53750; 53751 (amended, Stats. 2017, ch. 536 (SB 231)).

[1111] Exhibit I, Claimants' Comments on the Draft Proposed Decision, pages 37-43.

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

[¶]

The Commission also finds, pursuant to the decision of the Third District Court of Appeal, Government Code sections 53750 and 53751, absent a clear and unequivocal statement to the contrary, operate *prospectively* beginning January 1, 2018.[1112]

Accordingly, the claimants do not have fee authority sufficient as a matter of law to cover the costs of the new state-mandated activities to develop and submit a WMP or EWMP for the U.S. EPA-adopted TMDLs in accordance with Part VI.E.1.c. and Attachments M, O, P, and Q (which incorporate by reference Part VI.E.3. of the test claim permit) from December 28, 2012, through December 31, 2017, when voter approval of stormwater fees is required, and there are costs mandated by the state during that time. However, reimbursement is not required to the extent the claimants received fee revenue and used that revenue to pay for the state-mandated activities, or used any other revenues, including but not limited to grant funding, assessment revenue, and federal funds, that are *not* the claimants' proceeds of taxes.[1113]

Pursuant to Government Code sections 53750 and 53751 and the decision in *Paradise Irrigation District*, there are no costs mandated by the state for these activities beginning January 1, 2018.

3. The Claimants Have the Authority to Impose Regulatory Fees Sufficient as a Matter of Law to Cover the Costs of the Requirements Imposed by Part VI.D.7.d.iv.1.a., b., c., and Attachment E, Part X., of the Test Claim Permit, as well as Part VI.D.6.b., d., and e., and Part VI.D.8.g.i., and ii., VI.D.8.h., VI.D.8.i.i., ii, iv., and v., VI.D.8.j., and VI.D.8.l.i., and ii.

The Commission also finds that the permittees have the legal authority to impose or increase regulatory fees to pay for the following land development and inspection requirements imposed by Part VI.D.7.d.iv.1.a., b., c., and Attachment E, Part X., of the test claim permit:

[1112] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 573-577.

[1113] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 (Reimbursement is required only when "the costs in question can be recovered solely from tax revenues."). See also, *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283; *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189; *Bell Community Redevelopment Agency v. Woosley* (1985) 169 Cal.App.3d 24, 32; *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 986-987; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281.

a. Implement a GIS or other electronic system for tracking projects that have been conditioned for post-construction BMPs, which "should contain" such information as project identification, acreage, BMP type and description, BMP locations, dates of acceptance and maintenance agreement, inspection dates and summaries and corrective action.[1114]

b. Maintain a database providing the following information for each new development and re-development project approved by the permittee on or after the effective date of the test claim permit:

   1. Name of the Project and Developer
   2. Project location and map (preferably linked to the GIS storm drain map)
   3. Date of Certificate of Occupancy
   4. 85th percentile storm event for the project design (inches per 24 hours)
   5. 95th percentile storm event for projects draining to natural water bodies (inches per 24 hours)
   6. Other design criteria required to meet hydromodification requirements for drainages to natural water bodies
   7. Project design storm (inches per 24-hours)
   8. Project design storm volume (gallons or MGD)
   9. Percent of design storm volume to be retained on site
   10. Design volume for water quality mitigation treatment BMPs, if any
   11. If flow through water quality treatment BMPs are approved, provide the one year, one-hour storm intensity as depicted on the most recently issued isohyetal map published by the Los Angeles County Hydrologist
   12. Percent of design storm volume to be infiltrated at an off-site mitigation or groundwater replenishment project site
   13. Percent of design storm volume to be retained or treated with biofiltration at an off-site retrofit project
   14. Location and maps (preferably linked to the GIS storm drain map required in Part VII.A of this MRP) of off-site mitigation, groundwater replenishment, or retrofit sites
   15. Documentation of issuance of requirements to the developer.[1115]

c. Inspect all development sites upon completion of construction and before issuance of occupancy certificates to ensure proper installation of LID (low

[1114] Exhibit A, Test Claim 13-TC-01, page 713 (test claim permit, Part VI.D.7.d.iv.1.a.).

[1115] Exhibit A, Test Claim 13-TC-01, pages 842-843 (Attachment E, Part X, Monitoring and Reporting Program).

impact development) measures, structural BMPs, treatment control BMPs, and hydromodification control BMPs.[1116]

d. Develop a post-construction BMP maintenance inspection checklist.[1117]

e. *Except* for the post-construction inspections for critical commercial and industrial facilities required by Part 4.C.2. of the prior permit (Order 01-182) (which is not new), inspect the remaining new development or redevelopment projects, at least once every two years after project completion, post-construction BMPs to assess operation conditions with particular attention to criteria and procedures for post-construction treatment control and hydromodification control BMP repair, replacement, or re-vegetation.[1118]

In addition, and as a separate ground for denial, the claimants have the permittees have the legal authority to impose or increase regulatory fees to pay for the requirements imposed by Part VI.D.6.b., d., and e. (requiring permittees to maintain an updated watershed-based inventory in electronic format of all industrial and commercial facilities that are critical sources of stormwater pollution and inspect such facilities as specified) and for the similar requirements imposed for the Development Construction Program in Part VI.D.8. and, thus, there are no costs mandated by the state for these activities pursuant to Government Code section 17556(d) as explained below.[1119]

Article XI, section 7 of the California Constitution provides: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[1120] Interpreting this provision, and its predecessor, the courts have held that a local legislative body with police power "has a wide discretion" and its laws or ordinances "are invested with a strong presumption of validity."[1121] The courts have held that "the power to impose valid regulatory fees does not depend on legislatively authorized taxing power but exists pursuant to the direct grant of police power under article XI, section 7, of the California Constitution."[1122] Accordingly, ordinances or laws regulating legitimate businesses or other activities within a city or county, as well as regulating the development and use of real property,

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[1116] Exhibit A, Test Claim 13-TC-01, page 713 (test claim permit, Part VI.D.7.d.iv.1.b.).

[1117] Exhibit A, Test Claim 13-TC-01, pages 713-714 (test claim permit, Part VI.D.7.d.iv.1.c.).

[1118] Exhibit A, Test Claim 13-TC-01, page 714 (test claim permit, Part VI.D.7.d.iv.1.c.).

[1119] Exhibit A, Test Claim 13-TC-01, pages 690-693, 715-722.

[1120] California Constitution, article XI, section 7.

[1121] *Marblehead Land Co. v. City of Los Angeles* (1931) 47 F.2d 528, 532.

[1122] *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 662 (in which a taxpayer challenged a county ordinance that imposed new and increased fees for county services in processing subdivision, zoning, and other land-use applications that had been adopted without a two-thirds affirmative vote of the county electors).

have generally been upheld.[1123] In addition, "[t]he services for which a regulatory fee may be charged include those that are "'incident to the issuance of [a] license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement.'"[1124] The courts also hold that water pollution prevention is a valid exercise of government police power.[1125] A number of provisions in the Government Code also provide express authority to impose or increase regulatory fees,[1126] and fees for development of real property.[1127]

Thus, there is no dispute that the copermittees have the legal authority, both statutory and constitutional (recognized in case law), to impose fees, including regulatory and development fees.[1128] The issue in dispute is only whether Propositions 26 and 218 imposes procedural and substantive restrictions that so weaken that authority as to render it insufficient, within the meaning of Government Code section 17556(d).

For purposes of background, Proposition 13 (1978) added article XIII A to the California Constitution, with the intent to limit local governments' power to impose or increase

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[1123] See *Ex parte Junqua* (1909) 10 Cal.App. 602 (police power "embraces the right to regulate any class of business, the operation of which, unless regulated, may, in the judgment of the appropriate local authority, interfere with the rights of others…."); *Sullivan v. City of Los Angeles Dept. of Building & Safety* (1953) 116 Cal.App.2d 807 (recognizing broad power to regulate not only nuisances but things or activities that may become nuisances or injurious to public health); *California Building Industry Ass'n v. City of San Jose* (2015) 61 Cal.4th 435 (recognizing broad authority of municipality to regulate land use).

[1124] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 562, citing to *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[1125] *Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408.

[1126] See, e.g., Government Code section 37101 ("The legislative body may license, for revenue and regulation, and fix the license tax upon, every kind of lawful business transacted in the city.").

[1127] Government Code section 66001 (providing for development fees under the "Mitigation Fee Act," requiring local entity to identify the purpose of the fee and the uses to which revenues will be put, to determine a reasonable relationship between the fee's use and the type of project or projects on which the fee is imposed).

[1128] See also, *Ayers v. City Council of City of Los Angeles* (1949) 34 Cal.2d 31 (Upholding conditions imposed by the City on subdivision development, in the absence of any clear restriction or limitation on the City's police power); *Associated Home Builders etc. Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633 (Upholding state statute and local ordinance requiring dedication or in-lieu fees for parks and recreation as a condition of subdividing for residential building).

taxes.[1129] Proposition 13 generally limited the rate of any ad valorem tax on real property to one percent; limited increases in the assessed value of real property to two percent annually absent a change in ownership; and required that any changes in state taxes enacted to increase revenues and special taxes imposed by local government must be approved by a two-thirds vote of the electors.[1130] Proposition 13, however, did not define "special taxes," and a series of judicial decisions tried to define the difference between fees and taxes, and diminished Proposition 13's import by allowing local governments to generate revenue without a two-thirds vote.[1131]

In 1996, Proposition 218 added article XIII C to ensure and reiterate voter approval requirements for general and special taxes, because it was not clear whether Proposition 62, which enacted statutory provisions to ensure that all new local taxes be approved by a vote of the local electorate, bound charter jurisdictions.[1132] As added by Proposition 218, article XIII C defined all taxes as general or special, and provided that special districts have no power to impose general taxes; and for any other local government, general taxes require approval by a majority of local voters, and special taxes require a two-thirds majority voter approval.[1133]

Interpreting the newly-reiterated limitation on local taxes, the Court in *Sinclair Paint* held that a statute permitting the Department of Health Services to levy fees on manufacturers and other persons contributing to environmental lead contamination, in order to support a program of evaluation and screening of children, imposed bona fide *regulatory fees*, and not, as alleged by plaintiffs, a special tax that would require voter approval under articles XIII A and XIII C.[1134] The Court noted with approval *San Diego Gas & Electric*, in which the air district was permitted to recover costs of its operations, which are not reasonably identifiable with specific industrial polluters, against all monitored polluters according to an emissions-based formula, and those fees were not held to constitute a special tax.[1135] The *Sinclair Paint* Court cited with approval the court of appeal's finding that "A reasonable way to achieve Proposition 13's goal of tax relief is to shift the costs of controlling stationary sources of pollution from the tax-paying

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[1129] *County of Fresno v. State of California* (1991) 53 Cal.3d 482.

[1130] *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1317.

[1131] *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1317-1319.

[1132] *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 258-259.

[1133] See Exhibit L (4), Excerpts from Voter Information Guide, November 1996 General Election.

[1134] *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 870; 877.

[1135] *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1148.

public to the pollution-causing industries themselves…"[1136] The *Sinclair Paint* Court thus held: "In our view, the shifting of costs of providing evaluation, screening, and medically necessary follow-up services for potential child victims of lead poisoning from the public to those persons deemed responsible for that poisoning is likewise a reasonable police power decision."[1137]

In 2010, the voters adopted Proposition 26, partly in response to *Sinclair Paint*. Proposition 26 sought to broaden the definition of "tax," (and accordingly narrow the courts' construction of permissible non-tax fees). However, Proposition 26 largely *codifies* the analysis of *Sinclair Paint*, in its articulation of the various types of fees and charges that are *not* deemed "taxes."[1138] Thus, while Proposition 13 led a series of increasing restrictions on the imposition of new taxes, after *Sinclair Paint*, and Propositions 218 and 26, local governments have the power, subject to varying limitations, to impose or increase (1) general taxes [with voter approval];[1139] (2) special taxes [with *two-thirds* voter approval];[1140] and (3) levies, charges, or exactions that are not "taxes," pursuant to the exceptions stated in article XIII C, section 1(e), which include:

> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
>
> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
>
> (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
>
> (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

[1136] *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 879 (quoting *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1148).

[1137] *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 879.

[1138] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210, footnote 7 citing *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 262 and footnote 5.

[1139] California Constitution, article XIII C, section 2.

[1140] California Constitution, article XIII C, section 2.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.[1141]

The plain language of article XIII C, section 1(e) thus describes certain categories of fees or exactions that are not taxes, including fees or charges for a benefit conferred or privilege granted,[1142] and fees or charges for a government service or product provided to the payor and not others.[1143] Both of these could be described as "user" fees, or otherwise described as fees for a government service or benefit. In addition, section 1(e) provides for regulatory fees (including those for inspections),[1144] development fees,[1145] and assessments or property-related fees or charges adopted in accordance with article XIII D.[1146] In each case, the local government bears the burden to establish that the fee or charge is not a tax, including that "the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."[1147]

Although the limitations of article XIII C, section 1(e) may be newly expressed in the Constitution (i.e., added in 2010 by Proposition 26), the concepts that regulatory fees must be reasonably related to a legitimate public purpose, and in some way proportional to the activity being regulated, are not at all new. The California Supreme Court described the history of such fees in *United Water Conservation Dist.*, saying, "the language of Proposition 26 is drawn in large part from pre-Proposition 26 case law distinguishing between taxes subject to the requirements of article XIII A, on the one

[1141] California Constitution, article XIII C, section 1(e).

[1142] California Constitution, article XIII C, section 1(e)(1).

[1143] California Constitution, article XIII C, section 1(e)(2).

[1144] California Constitution, article XIII C, section 1(e)(3).

[1145] California Constitution, article XIII C, section 1(e)(6).

[1146] California Constitution, article XIII C, section 1(e)(7).

[1147] California Constitution, article XIII C, section 1(e).

hand, and regulatory and other fees, on the other."[1148] The Court also noted: "*Sinclair Paint*, from which the relevant article XIII C requirements are derived, made clear that the aggregate cost inquiry and the allocation inquiry are two separate steps in the analysis."[1149] Accordingly, the Court upheld the court of appeal's finding that the conservation charges did not exceed the reasonable cost of the regulatory activity in the aggregate,[1150] but presumed "each requirement to have independent effect,"[1151] and remanded the matter for consideration of the latter issue.

Similarly, in *San Diego County Water Authority*, the First District Court of Appeal upheld non-property-related rates charged for conveying water from the Colorado River based on a two-part test.[1152] The rates were held to satisfy both the express requirements of article XIII C, section 1(e)(2): "a specific service (use of the conveyance system) directly to the payor (a member agency) that is not provided to those not charged and which does not exceed the reasonable costs . . . of providing the service"; and the more general test of *Sinclair Paint*: "[the volumetric rates] bear a fair and reasonable relationship to the benefits it receives from its use of the conveyance system."[1153]

Moreover, the courts have found that regulatory fees are flexible, and the Third District Court of Appeal in *California Assn. of Prof. Scientists v. Department of Fish & Game (Professional Scientists)* has identified the following general rules:

> General principles have emerged. Fees charged for the associated costs of regulatory activities are not special taxes under an article XIII A, section 4 analysis if the " ' "fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and [they] are not levied for unrelated revenue purposes." ' " (Citation omitted.) "A regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation." (Citation omitted.) "Such costs ... include all those incident to the issuance of the license or permit, investigation, inspection,

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[1148] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210, footnote 7 citing *Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 262 and footnote 5.

[1149] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1210.

[1150] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1212.

[1151] *City of San Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1214 citing *Dix v. Superior Court* (1991) 53 Cal.3d 442, 459.

[1152] *San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1153.

[1153] *San Diego County Water Authority v. Metropolitan Water Dist. of Southern California* (2017) 12 Cal.App.5th 1124, 1153.

> administration, maintenance of a system of supervision and enforcement." (Citation omitted.) Regulatory fees are valid despite the absence of any perceived "benefit" accruing to the fee payers. (Citation omitted.) Legislators "need only apply sound judgment and consider 'probabilities according to the best honest viewpoint of informed officials' in determining the amount of the regulatory fee." (Citation omitted).[1154]

As indicated by the court in *Professional Scientists,* regulatory fees can include all those costs "incident to the issuance of the license or permit, investigation, inspection, administration, maintenance of a system of supervision and enforcement."[1155] In *United Business Commission v. City of San Diego*, the court explained that regulatory fees include "all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed" and that the following incidental costs are properly included in a regulatory fee: "inspection of hazards, travel time, office supplies, telephone expenses, overhead, and clerk's time"[1156]

The 2021 *Department of Finance* decision of the Second District Court of Appeal found that the local agencies subject to an NPDES permit issued by the Los Angeles Regional Water Quality Control Board had the authority under their police powers to charge regulatory fees to periodically inspect commercial and industrial facilities to ensure compliance with various environmental regulatory requirements:

> We agree with the Commission that, based upon the local governments' constitutional police power and their ability to impose a regulatory fee that (1) does not exceed the reasonable cost of the inspections, (2) is not levied for unrelated revenue purposes, and (3) is fairly allocated among the fee payers, the local governments have such authority.[1157]

The court also disagreed with the argument that such a fee would be duplicative of the fee charged by the Regional Board for inspections, which would then prohibit local government from charging a regulatory fee for the required inspections.[1158] The court held that the permit's inspection requirements and the Water Code section that requires the Regional Board to inspect were not duplicative and can be applied without conflict: "the local governments can impose and collect a fee to cover the reasonable costs of

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[1154] *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[1155] *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 945.

[1156] *United Business Commission v. City of San Diego* (1979) 91 Cal.App.3d 156, 166, footnote 2.

[1157] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 552, 546, 562-563.

[1158] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 552, 563.

the particular inspections they are required to undertake and the Regional Board can fulfill its expenditure requirements by addressing 'stormwater inspection and regulatory compliance issues' in other ways."[1159] Thus, this factor would not defeat local government's authority to impose a regulatory fee for the inspections.

Even though the imposition of the fee may be difficult, the court held that local governments have the authority to impose the fee and, thus, reimbursement under article XIII B, section 6 was not required:

> The local governments also argue that a fee that must be no more than necessary to cover the reasonable costs of the inspections "would be difficult to accomplish." They refer to problems that would arise from a general business license fee on all businesses, including those not subject to inspection, and to charging fees for inspections in years in which no inspection would take place. Even if we assume that drafting or enforcing a law that imposes fees to pay for inspections would be difficult, the issue is whether the local governments have the authority to impose such a fee, not how easy it would be to do so. (*Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401, 69 Cal.Rptr.2d 231.) As explained above, the police powers provision of the constitution and the judicial authorities we have cited provide that authority.[1160]

In addition, the Third District Court of Appeal recently held in *Department of Finance v. Commission on State Mandates* that regulatory fees properly included the costs of creating low impact development (LID) and hydromodification plans for new development and redevelopment projects, which were "incident to the development permit which permittees will issue to priority development projects and the administration of permittees' pollution abatement program."[1161] The court rejected arguments from the County and cities that the costs of creating the plans could not be recovered through regulatory fees, and thus voter approval would be required, since the amount of the fee would exceed the reasonable costs of providing the services for which it is charged, and the amount of the fee would not bear a reasonable relationship to the burdens created by the feepayers' activities or operations, primarily because the costs were incurred before any priority development project was proposed.[1162] The court also rejected arguments that the County and cities could not legally levy a fee to recover the cost of preparing the plans because those planning actions benefit the

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[1159] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 552, 563.

[1160] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 564-565.

[1161] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[1162] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 587-590.

public at large and, thus, would constitute a tax.[1163] The court found that local government has fee authority sufficient as a matter of law to cover the costs of the hydromodification management plan and LID requirements within the meaning of Government Code section 17556(d) and, thus, there were no costs mandated by the state for these activities based on the following findings:

- Creating the hydromodification management plans and the LID requirements constitute costs incident to the development permit which permittees will issue to priority development projects and the administration of permittees' pollution abatement program. "Setting the fee will not require mathematical precision. Permittees' legislative bodies need only "consider 'probabilities according to the best honest viewpoint of [their] informed officials' " to set the amount of the fee."[1164]
- There was no evidence that the permittees could not levy a fee that would bear a reasonable relationship to the burdens created by future priority development. "A regulatory fee does not become a tax simply because the fee may be disproportionate to the service rendered to individual payors . . . The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors." The fee just has to be related to the overall cost of the governmental regulation.[1165]
- The court rejected the claimants' argument that they could not legally levy a fee to recover the cost of preparing the plans because those planning actions benefit the public at large, relying *Newhall County Water Dist. v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430, 1451. Proposition 26 states a levy is not a tax where, among other uses, it is imposed "for a specific government service provided directly to the payor *that is not provided to those not charged* ...."[1166] However, the court found that the service provided directly to developers of priority development projects was the preparation, implementation, and approval of water pollution mitigations applicable only to their projects. Unlike in *Newhall*, that service was not provided to anyone else, and only affected priority project developers charged for the service. The service would not be provided to those

[1163] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 592-593.

[1164] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[1165] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[1166] See, for example, *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 569, where the court held that article XIII D prohibits MS4 permittees from charging property owners for the cost of providing trash receptacles at public transit locations in part because service was made available to the public at large.

not charged.[1167]

Accordingly, there is no reason to believe that article XIII C imposes any greater limitation on local governments' authority under their police power to impose reasonable regulatory fees and other fees than existed under prior law. Article XIII C makes clear that the burden is on the local government to establish that the levy is not a tax, that the fee is reasonably related to the costs to government in the aggregate, and that the fee charged to the payors is reasonably related to the benefits received or burdens created by such payors as a part of the rate setting process.[1168] It is not the burden of the state to make this showing on behalf of local government.

Here, the required activities to implement a GIS or other electronic system to track projects considered for post-construction BMPs, maintain a database for new development and redevelopment projects approved by the permittee, inspect development sites for the proper installation of LID and hydromodification measures, develop a post-construction BMP maintenance inspection checklist, and inspect projects after completion every two years for post construction BMPs pursuant to Part VI.D.7.d.iv.1.a., b., c. and Attachment E, Part X, of the test claim permit, and the similar requirements imposed by Parts VI.D.6.b., d., and e., and VI.D.8., are "incident to the development permit[s] which permittees will issue to priority development projects and the administration of permittees' pollution abatement program."[1169]

The proposed fee would be imposed as a condition for approving new real property development and based on the developer's application for government approval to proceed with the development. The fees would be not levied for unrelated revenue purpose, can be fairly allocated among the fee payers, and the service is not provided to those not charged.[1170] Such fees are not taxes under Proposition 26 when they are charges imposed as a condition of property development.[1171]

In addition, there is no evidence in the record indicating that the claimants cannot levy a fee that will bear a reasonable relationship to the burdens created by future priority development. "A regulatory fee does not become a tax simply because the fee may be

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[1167] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 592-593.

[1168] California Constitution, article XIII C, section 1(e).

[1169] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 590.

[1170] *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 562-563, citing *California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1046, which cited *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 881; see also *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 588.

[1171] California Constitution, article XIII C, section 1(e)(6).

disproportionate to the service rendered to individual payors.[1172] The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors.[1173] Thus, permissible fees must be related to the overall cost of the governmental regulation. They need not be finely calibrated to the precise benefit each individual fee payor might derive, or the precise burden each payer may create. What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used for general revenue collection. "An excessive fee that is used to generate general revenue becomes a tax."[1174] And "No one is suggesting [that the claimants] levy fees that exceed their costs."[1175]

Based on the foregoing, the Commission finds that article XIII C of the California Constitution does not render local government's authority to impose regulatory fees insufficient as a matter of law within the meaning of Government Code section 17556(d) and, therefore, there are no costs mandated by the state for the requirements imposed by Part VI.D.7.d.iv.1.a., b., c., and Attachment E, Part X, of the test claim permit, and no costs mandated by the state for Parts VI.D.6.b., d., and e. and VI.D.8.

V. Conclusion

Based on the foregoing analysis, the Commission partially approves this Test Claim and finds that Part VI.E.1.c. and Attachments M, O, P, and Q, which incorporate by reference Part VI.E.3. of the test claim permit, impose a reimbursable state mandated program for the pro rata costs to develop and submit a WMP or EWMP for only the U.S. EPA-adopted TMDLs identified below and in accordance with Part VI.E.3., as follows:

a. Each Permittee subject to one of the U.S. EPA-adopted TMDLs identified below shall propose BMPs to achieve the WLAs contained in the applicable U.S. EPA-established TMDL, and a schedule for implementing the BMPs that is as short as possible, in a WMP or EWMP.

b. Each Permittee subject to one of the U.S. EPA-adopted TMDLs identified below may either individually submit a WMP or may jointly submit a WMP or EWMP with other Permittees subject to the WLAs contained in the U.S. EPA-established TMDL.

c. At a minimum, each Permittee subject to one of the U.S. EPA-adopted TMDLs identified below shall include the following information in its WMP or EWMP, relevant to each applicable U.S. EPA-established TMDL:

[1172] *Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 194.

[1173] *California Assn. of Prof. Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 948.

[1174] *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 438.

[1175] *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 402.

- Available data demonstrating the current quality of the Permittee's MS4 discharge(s) in terms of concentration and/or load of the target pollutant(s) to the receiving waters subject to the TMDL;
- A detailed description of BMPs that have been implemented, and/or are currently being implemented by the Permittee to achieve the WLA(s), if any;
- A detailed time schedule of specific actions the Permittee will take in order to achieve compliance with the applicable WLA(s);
- A demonstration that the time schedule requested is as short as possible, taking into account the time since USEPA establishment of the TMDL, and technological, operation, and economic factors that affect the design, development, and implementation of the control measures that are necessary to comply with the WLA(s); and
- If the requested time schedule exceeds one year, the proposed schedule shall include interim requirements and numeric milestones and the date(s) for their achievement.

d. Each Permittee subject to a WLA in a TMDL established by U.S. EPA-identified below shall submit a draft of a WMP or EWMP to the Regional Water Board Executive Officer for approval per the schedule Part VI.C.4.[1176]

These requirements apply only to the following U.S. EPA-adopted TMDLs:

- Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL (effective March 26, 2012 (Attachment O)).[1177]
- Los Angeles Area Lakes TMDLs, effective March 26, 2012 (Attachment O for the TMDLs Los Angeles River Watershed Management Area, which include the following: Lake Calabasas Nutrient; Echo Park Lake PCBs, Chlordane, and Dieldrin; and Legg Lake Nutrient Peck Road Park Lake Nutrient, PCBs, Chlordane, DDT, and Dieldrin; and Attachment P for the TMDLs in the San Gabriel River Watershed Management Area, which include the Puddingstone Reservoir Nutrient, Mercury, PCBs, Chlordane, Dieldrin, DDT TMDLs.)[1178]

[1176] Exhibit A, Test Claim 13-TC-01, pages 742, 746-747, 1100, 1105, 1115, 1142, 1143-1154, 1155-1160, and 1161 (test claim permit, Parts VI.E.1.c., VI.E.3., and Attachments M, O, P, and Q, which incorporate by reference Part VI.E.3.).

[1177] Exhibit A, Test Claim 13-TC-01, page 1142. The following permittees are required to comply with the Long Beach City Beaches and Los Angeles River Estuary Bacteria TMDL: Los Angeles County Flood Control District and Signal Hill. (Exhibit A, Test Claim 13-TC-01, pages 1070-1071 (test claim permit, Attachment K).)

[1178] Exhibit A, Test Claim 13-TC-01, page 1143-1154, 1155-1160, 1071 et seq. The following permittees are required to comply with the Los Angeles Area Lakes TMDLs: Los Angeles County Flood Control District, County of Los Angeles, and the Cities of Los Angeles, Arcadia, Bradbury, Calabasas, Duarte, El Monte, Irwindale, Monrovia, Sierra

- Los Cerritos Channel Metals TMDL, effective March 17, 2010 (Attachment Q).[1179]
- San Gabriel River and Impaired Tributaries Metals and Selenium TMDL, effective March 26, 2007 (Attachment P).[1180]
- Malibu Creek Watershed Nutrients TMDL, effective March 21, 2003 (Attachment M).[1181]

Reimbursement for these activities is denied beginning January 1, 2018, because the claimants have fee authority sufficient as a matter of law to cover the costs of these activities pursuant to Government Code section 17556(d) and, thus, there are no costs mandated by the state.

In addition, reimbursement for these mandated activities from any source, including but not limited to, state and federal funds, any service charge, fees, or assessments to offset all or part of the costs of this program, and any other funds that are not the claimant's proceeds of taxes that are used to pay for the mandated activities, shall be identified and deducted from any claim submitted for reimbursement.

Madra, and South El Monte. (Exhibit A, Test Claim 13-TC-01, pages 1169-1171 (test claim permit, Attachment K).)

The permittees in the San Gabriel River Management Area include the Cities of Azusa, Claremont, Irwindale, La Verne, Pomona, San Dimas, the County of Los Angeles, and Los Angeles County Flood Control District. (Exhibit A, Test Claim 13-TC-01, pages 1072-1073 (test claim permit, Attachment K).)

[1179] Exhibit A, Test Claim 13-TC-01, page 1161. The following permittees are required to comply with the Los Cerritos Channel Metals TMDL: Bellflower, Cerritos, Downey, Lakewood, County of Los Angeles, Los Angeles County Flood Control District, Paramount, and Signal Hill. (Exhibit A, Test Claim 13-TC-01, page 1074 (test claim permit, Attachment K).)

[1180] Exhibit A, Test Claim 13-TC-01, page 1161. The following permittees are required to comply with the San Gabriel River and Impaired Tributaries Metals and Selenium TMDL: Arcadia, Artesia, Azusa, Baldwin Park, Bellflower, Bradbury, Cerritos, Claremont, Covina, Diamond Bar, Downey, Duarte, El Monte, Glendora, Hawaiian Gardens, Industry, Irwindale, La Habra Heights, La Mirada, La Puente, La Verne, Lakewood, County of Los Angeles, and Los Angeles County Flood Control District, Monrovia, Norwalk, Pico Rivera, Pomona, San Dimas, Santa Fe Springs, South El Monte, Walnut, West Covina, and Whittier. (Exhibit A, Test Claim 13-TC-01, pages 1072-1073 (test claim permit, Attachment K).)

[1181] Exhibit A, Test Claim 13-TC-01, page 1105. The following permittees are required to comply with the Malibu Creek Watershed Nutrients TMDL: Agoura Hills, Calabasas, and Hidden Hills, County of Los Angeles, Los Angeles County Flood Control District, Malibu, and Westlake Village. (Exhibit A, Test Claim 13-TC-01, pages 1065-1066 (test claim permit, Attachment K).)

All other sections, activities, and costs pled in the Test Claim are denied.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On January 30, 2026, I served the:

- **Current Mailing List dated January 26, 2026**
- **Corrected Decision issued January 30, 2026**
- **Claimants' Late Comments on the Draft Proposed Decision and Parameters and Guidelines filed January 29, 2026**

  California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2012-0175, 13-TC-01 and 13-TC-02
  County of Los Angeles; Los Angeles County Flood Control District; and the Cities of Agoura Hills, Bellflower, Beverly Hills, Carson, Cerritos, Commerce, Downey, Huntington Park, Lakewood, Manhattan Beach, Norwalk, Pico Rivera, Rancho Palos Verdes, Redondo Beach, Santa Fe Springs, Signal Hill, South El Monte, Vernon, Westlake Village, and Whittier, Claimants

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 30, 2026 at Sacramento, California.

Jill Magee

Jill Magee
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 1/26/26

Claim Number: 13-TC-01 and 13-TC-02

Matter: California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2012-0175

Claimants: City of Agoura Hills
City of Bellflower
City of Beverly Hills
City of Carson
City of Cerritos
City of Commerce
City of Downey
City of Huntington Park
City of Lakewood
City of Manhattan Beach
City of Norwalk
City of Pico Rivera
City of Rancho Palos Verdes
City of Redondo Beach
City of Santa Fe Springs
City of Signal Hill
City of South El Monte
City of Vernon
City of Westlake Village
City of Whittier
County of Los Angeles
Los Angeles County Flood Control District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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