CALIFORNIA Water Boards

EDMUND G. BROWN JR. GOVERNOR

MATTHEW RODRIQUEZ SECRETARY FOR ENVIRONMENTAL PROTECTION

State Water Resources Control Board

January 31, 2018

VIA DROP BOX

Heather Halsey, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: San Francisco Bay Regional Water Quality Control Board Response to Union City Test Claim 16-TC-03 (Order No. R2-2015-0049)

Dear Ms. Halsey,

The San Francisco Bay Regional Water Quality Control Board (Regional Water Board) resubmits this response to Test Claim 16-TC-03 (Claim) and supporting attachments. These attachments include the Regional Board's record for Order No. R2-2015-0049 (Permit or MRP 2.0) as well as petitions for review of the Permit filed with the State Water Resources Control Board (State Board) and the Regional Board's response to the petitions. The complete State Board record has not been included because the State Board has not taken any action related to the petitions or the Permit. If the Permit is modified by action of the State Board, the Regional Board, or a court, we will advise the Commission accordingly.

As anticipated in our January 16 and January 24, 2018 notices, we have reformatted the attachments to make them searchable, to remove password protections, and to add Bates Numbers; corrected minor errors in the index; and made changes to the brief to include an omitted argument (pp. 7-8), to refine some of the information in the permit table (pp. 22-31), to correct errors in citations, and to add citations to Bates Numbers.

The Test Claim arises from a National Pollutant Discharge Elimination System (NPDES) Permit (Permit or MRP 2.0) (Order No. R2-2015-0049). The Permit authorizes the discharge of stormwater runoff from the municipal separate storm sewer systems (MS4s) of 76 municipalities and local agencies in the San Francisco Bay Area (Bay Area) (collectively Permittees). The Regional Water Board issued the Permit pursuant to the requirements of the Clean Water Act[1],

[1] Federal Water Pollution Control Act (FWPCA; 33 USCA §§ 1251 *et seq.*). The federal Act is referred to herein as the Clean Water Act (CWA) and the code sections used are for the CWA, which differ from the United States Annotated Code.

its implementing regulations, and guidance from the United States Environmental Protection Agency (U.S. EPA).

The first section of the Clean Water Act states Congress's intent "that the discharge of pollutants into the navigable waters be *eliminated* by 1985." Fundamentally, the Clean Water Act prohibits *any* discharge into navigable waters.[2] Claimant even concedes that Section 402(p) of the Clean Water Act mandates that an MS4 permit "*shall* include a requirement to effectively *prohibit* non-storm water discharges into the storm sewers[3]." On its face, therefore, the Clean Water Act *prohibits all* non-storm water discharges into the storm sewers. No trash. No PCBs.[4] No mercury.

The Ninth Circuit noted that "Stormwater 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 … Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorous), *floatable trash*, used motor oil, raw sewage, pesticides, and other *toxic contaminants* into streams, rivers, lakes and estuaries across the United States."[5] The requirements to control trash, mercury and PCBs thus are at the heart of a stormwater program.

Over the past two hundred years, thousands of mercury- and PCBs-containing buildings have been built and millions of trash-creating residents have settled in the Bay Area. The Regional Water Board and Permittees recognize that achieving zero discharge into the storm sewers is not a threshold that the Permittees can reach instantaneously. A permit that is completely consistent with the Clean Water Act – prohibiting *any* discharge – would result in Clean Water Act citizen suits against every discharger – none of whom could comply with such a permit requirement for years. It is only by virtue of permit provisions – including those at issue here - that any discharger may discharge *at all.*[6] The Permit therefore, not unlike a compliance schedule, gives the dischargers time and assists in developing methodologies to reach the end goal established by the Clean Water Act. Through each iteration of the San Francisco Bay MS4 permit, dischargers have improved the water quality of the MS4 discharges, gaining ground toward the Clean Water Act's fundamental prohibition. Ironically, the Regional Water Board finds itself defending a permit that is more *lenient* than what the Clean Water Act actually requires. It is incomprehensible that complying with a *less stringent permit* than the strict prohibition in the Clean Water Act could impose *additional* costs to the dischargers not required by federal law. But that is what Claimant argues here.

The Test Claim seeks reimbursement by the State of California for expenses Claimant contends it has incurred or will incur in implementing a select few provisions of the Permit. Specifically,

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[2] CWA § 301, subd. (a).

[3] Test Claim, p. 5.3.

[4] Polychlorinated biphenyls are commonly referenced as "PCBs."

[5] *Environmental Defense Center, Inc. v. U.S. E.P.A.* (9th Cir. 2003) 344 F.3d 832, 840-841 (emphases added).

[6] CWA § 402, subd. (a)(1) and (2).

Claimant contests the trash load reduction provision (C.10) and mercury and PCB controls (included in Provisions C.3.j, C.11 and C.12).[7] There is also a prophylactic argument that monitoring provisions of C.8 are unfunded mandates. Claimant concedes that the MRP 2.0 adds nothing to the same requirements included in the 2009 version of the Permit (2009 MRP).[8]

To obtain reimbursement, Claimant must prove all of the following:

1. Claimant is required to use tax monies for Permit implementation. Here, 2017 legislation "reaffirms and reiterates" that municipalities are able to raise fees for all costs associated with implementing the Permit. Many other authorities and Permittees' own experience demonstrates this is true.
2. The costs are mandated by the State, rather than federal law, and must provide that any additional costs beyond the federal mandate are substantial and not *de minimis*. In fact, federal law requires each of the contested Permit provisions.
3. Either that (1) the program must carry out a governmental function of providing services to the public; or (2) the requirements, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the State. In this case, NPDES permits governing private entities contain similar provisions requiring that those entities manage stormwater to avoid discharges of trash, PCBs and mercury, and monitor and report on those efforts. The contested provisions of the Permit are not unique to municipalities.
4. That the requirements constitute a new or higher level of service. Claimant's own papers admit that numerous provisions were already required and evidence demonstrates that Claimant voluntarily chose to perform various activities.

In order to prevail, Claimant would have to prove that it meets *all* of the above criteria. Here, the evidence is to the contrary and the Commission therefore should reject the Test Claim.

I. Background

U.S. EPA is the federal agency responsible for administering the Clean Water Act. Pursuant to federal law, U.S. EPA authorized the Regional Water Board to issue NPDES permits, including the Permit here. Federal authority forms the entire legal basis for the Permit provisions.[9] The Permit regulates the discharge of stormwater runoff from the MS4s of 76 cities, counties and special districts. The Clean Water Act requires that local agencies must apply for and receive permits regulating discharges of pollutants from the MS4s to waters of the United States.[10]

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[7] Test Claim, p. 5.10.

[8] *Ibid.*

[9] See Item 467, MRP 2.0 Fact Sheet, Bates No. 83728 ("[T]his Permit implements federally-mandated requirements under CWA section 402, subdivision (p)(3)(B)") and 83724 ("The Basin Plan's comprehensive program requirements are designed to be consistent with federal regulations (40 CFR Parts 122-124) and are implemented through issuance of NPDES permits to owners and operators of MS4s").

[10] CWA § 402; *NRDC v. U.S. EPA* (9th Cir.) 966 F.2d 1292, 1295-96.

In response to the Clean Water Act amendments, the Regional Water Board issued municipal storm water Phase I permits to the entire county-wide urban areas of Santa Clara (1990), Alameda County (1991), Contra Costa County (1993), San Mateo County (1993), and the cities of Fairfield (1995), Suisun City (1995) and Vallejo (1998).[11] Starting in 2009, the Water Board began regulating Permittees under region-wide MS4 permits. That permit, the 2009 Municipal Regional Stormwater Permit (2009 MRP), regulated 76 municipalities and local agencies (Permittees) in the San Francisco Bay region.[12] Between 1987 and 2015, those permits were updated and refined to take into account EPA guidance and improved understanding of stormwater controls and monitoring.

To develop MRP 2.0, Regional Water Board staff worked with all municipalities to identify the common actions and controls in the plans and translated them into specific permit requirements in provisions for each of the base program elements. Regional Water Board Staff had approximately "100 meetings over two years with the Permittees, U.S. EPA, and other interests. These were both broad meetings about the entirety of the permit, as well as subject-specific work group meetings such as on PCBs, trash, or Green Infrastructure."[13] The resulting requirements specified applicability, scope, and minimum levels of effort required of actions and controls based on practicability, effectiveness, and costs of the actions and controls. As hoped, the resulting requirements also provided a tangible means of tracking and evaluating compliance with requirements and significantly reduced the burden of producing and reviewing annual reports.

On November 19, 2015, the Regional Water Board unanimously adopted Order No. R2-2015-0049, reissuing NPDES Permit No. CAS612008, and governing discharges from the MS4s of 76 jurisdictions and entities. As required by federal statute and regulations, the Permit contains requirements for the Permittees to take actions to reduce the flow of pollutants into waters in the San Francisco Bay region. The Permit is the fifth generation of municipal stormwater permits in the San Francisco Bay region, largely a continuation of the 2009 MRP, and therefore is colloquially referenced as "MRP 2.0."

While most requirements of MRP 2.0 are identical to the previous iteration, the Permit also contains new requirements pursuant to federal law, and adds implementation alternatives. These provisions incorporate key findings of the State Water Resources Control Board's (State Water Board's) issuance of State Water Board Order WQ 2015-0075 (Order WQ 2015-0075), pertaining to the Los Angeles MS4 (LA MS4). The Permit made only minimal adaptions and modifications from the 2009 MRP to require more targeted measures with documented success. In its comments on the draft Permit, U.S. EPA "underscore[d] [its] support for Water Board's position of including clear milestones and deadlines to evaluate pollutant-specific progress

[11] For more on the history of the earlier permit iterations, please see the Water Board's December 20, 2016 submission to the Commission.

[12] Item 721, 2009 MRP, Bates No. 109543-109833.

[13] Item 469, Nov. 18 Transcript, Bates No. 84006.

towards necessary water quality improvements and restoring beneficial uses."[14] The Permit provides minimum implementation levels (measurable outcomes), but allows Permittees flexibility to take into account the size of their respective jurisdictions and resources available to each. A number of permittees petitioned MRP 2.0 to the State Board, but as stated in nearly every petition Permittees filed, "the vast majority of MRP 2.0 was not the subject of significant dispute and is a tribute to an otherwise high level of cooperation between [Permittees] and the Regional Board staff." A number of Permittees petitioned the State Board, contesting MRP 2.0's adoption of numeric effluent limits (as opposed to narrative), the adequacy of the Permit's trash and various procedural issues.

Among other issues raised, and in contrast to Claimant's assertion that MRP 2.0 is an unfunded State mandate, San Francisco Baykeeper has also challenged the adequacy of monitoring provisions and the legality of the "safe harbor," claiming that the Regional Water Board failed to comply with federal authorities which require more *stringent* provisions. Specifically, Baykeeper claims the Regional Water Board:

> A. Improperly adopted safe harbor provisions in Section C.1 of the Permit that excuse compliance with the Permit's Receiving Water Limitations and Discharge Prohibitions for specific pollutants and receiving waters, in violation of the anti-backsliding requirements of the Federal WaterPollution Control Act, 33 U.S.C. § 1251 et seq. ("Clean Water Act" or "Act") (see 33 U.S.C. § 1342(o); 40 C.F.R. 122.44(l));
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> C. Failed to include monitoring provisions in Sections C.8 and C.10 of the Permit that "assure compliance with permit limitations" or "yield data which are representative of the monitored activity," in violation of the Clean Water Act (see 40 C.F.R. §§ 122.44(i)(1), 122.48(b));[15]

The State Water Board has not issued an order or held a hearing on the petition as of this writing.[16]

Most permittees have funded their stormwater programs via fees on inspection and redevelopment. Permittees' Annual Reports demonstrate that nearly all are in compliance.[17]

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[14] Item 729, U.S. EPA Letter to SF Water Board, Bates No. 110608.

[15] Item 666, Baykeeper Petition, Bates No. 104302.

[16] Permittees' Petitions to State Water Board are included as Items 657-668, starting at Bates No. 103750, and the Regional Water Board's Response to those Petitions is Item 656, Bates No. 103656.

[17] E.g., Item 884, Union City 2016-2017 Annual Report, Bates No. 131982-131984, 132016 (documenting compliance with green infrastructure requirements, including implementation of GI projects, and 74.35% trash load reduction); Item 727, Berkeley 2016-2017 Annual Report, Bates No. 110487 ("The City is currently in compliance with all requirements of the Order."); Item 857, Oakland 2016-2017 Annual Report, Bates No. 128106-128110, 128183 (demonstrating 74.7% trash reduction, completion of green infrastructure tasks); Clayton 2016-2017 Annual Report, Item 891, Bates No. 133632 ("I want to assure the board staff that the City of Clayton has done all the tasks required for FY 16-17 in the Annual Report…."); Item 910, Walnut Creek 2016-2017 Annual Report, at Bates No. 135417, 135456 (confirming approval of Green Infrastructure Framework/Work Plan and other GI-related tasks and 96.3% trash load reduction); Item 838, 2017 Foster City Annual Report, at Bates No. 125976 ("The Annual Report provides documentation of compliance activities during FY16/17 and related accomplishments."); Item 868, San Jose 2016-

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The seven permittees[18] not in compliance have plans to come into compliance. A better showing needs to demonstrate actual costs incurred from general funds before granting any of the test claims.[19]

II. The Fee Authority Exception Applies to the Test Claim

Claimant contends that, "[t]o the extent the Regional Water Board contends that the fee authority exception in section 17556, subdivision (d), is applicable to Union City's test claim …, the Regional Water Board bears the burden of proving the exception applies."[20] The Claimant states that it is "not aware of any state, federal or non-local agency funds that are or will be available to fund the MRP2 new activities at issue in this Test Claim" and further claims that it "has no authority to increase … revenue sources without seeking voter approval under Proposition 218."[21] In fact, the Claimant has fee authority, as the Legislature recently affirmed in Senate Bill 231, approved by the Governor October 6, 2017. Costs are not mandated by the State when the local agency has "authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.[22]

A. Senate Bill 231 Affirms Claimant's Ability to Increase Sewer Fees Without Voter Approval

Proposition 218 amended the California Constitution to require an election by impacted property owners for property-related fee increases.[23] Article XIII D, Section 6, subdivision (c) (referenced herein as Section 6), however, provides an exception to the election requirements "for fees or charges for sewer, water, and refuse collection services." Senate Bill 231 "reaffirms and reiterates" that the definition of "sewer" for purposes of Article XIII D includes "systems, all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate sewage collection, treatment, or disposition for sanitary *or drainage*

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2017 Annual Report, Bates No. 129469-129470, 129475, 129477-129478 (indicating compliance with trash load reduction, green infrastructure planning, and mercury and PCBs controls).

[18] These permittees are: Livermore, East Palo Alto, Pinole, Hercules, Unincorporated Alameda County, the City of Vallejo and Vallejo Sanitation and Flood Control District. See, e.g. City of Pinole 2017 Trash Addendum, Item 902, at Bates No. 134910 (plan to achieve compliance with trash provisions is already underway).

[19] There are a number of issues with the claimed costs. For example, Claimant identifies the purchase of a new Vactor truck to replace its old one as a cost associated with compliance. (Test Claim, pp. 5.13-5.14.) Claimant states that the cost was about $432,000 for the new truck, implicitly assigning this cost to MRP 2.0 requirements. They then indicate the new truck would be used about 3 months/year for trash capture device cleanout (and presumably 9 months/year for other projects), but do not pro-rate the costs. This is but one example of the types of questions that are not briefed here and should be resolved at the parameters and guidelines stage of the Commission's process. (Cal. Code Regs., tit. 2, § 1183.8) Should the Commission prefer that the Regional Water Board provide briefing on that issue before the P&G stage, the Regional Water Board respectfully requests an opportunity to do so.

[20] Test Claim, p. 5.7.

[21] Test Claim, pp. 5.23-5.24.

[22] See Gov. Code, § 17556, subd. (d).

[23] Cal. Const. §§ XIII C and D.

purposes, including lateral and connecting sewers, interceptors, trunk and outfall lines, sanitary sewage treatment or disposal plants or works, drains, conduits, outlets for *surface or storm waters*, and any and all other works, property, or structures necessary or convenient for the collection or disposal of sewage, industrial waste, *or surface or storm waters*."[24]

To the extent Claimant relies on *Howard Jarvis Taxpayers Ass'n v. City of Salinas* (2002) 98 Cal.App.4th 1351 as precluding the ability of a municipality to raise fees related to stormwater, the Legislature statutorily overturned that court's interpretation, finding that the court "failed to follow long-standing principles of statutory construction by disregarding the plain meaning of the term 'sewer,' and improperly substituted its own judgment for the judgment of voters.[25]

Accordingly, Claimant has the ability to increase sewer fees or charges without voter approval to cover any increased costs of implementing the permit.

B. The Permittees May Also Levy Regulatory Fees

The permittees are capable of crafting fees to cover the trash, mercury, PCB and green infrastructure provisions. The Supreme Court has validated the adoption of regulatory fees, providing they are not levied for unrelated revenue purposes.[26] It is reasonable to collect fees from developers for the costs associated with implementing the mercury, PCBs and green infrastructure provisions. Similarly, the costs of full trash capture can be allocated to businesses responsible for generating high trash areas. Asking these entities to bear the costs directly related to their activities "is comparable in character to similar police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations."[27] Permittees' police power is "broad enough to include mandatory remedial measures to mitigate the *past, present or future* adverse impact of the fee payer's operations" in situations, like those present here, where there is a causal connection or nexus between the adverse effects and the fee payer's activities.[28]

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[24] Gov. Code, § 53750, subd. (f) and § 53751, subd. (i), added by Stats. 2017, Ch. 536, § 2 (emphasis added). The Legislature noted the numerous authorities predating Proposition 218 that use this same definition, including (1) Section 230.5 of the Public Utilities Code, added by Chapter 1109 of the Statutes of 1970; (2) Section 23010.3, added by Chapter 1193 of the Statutes of 1963; (3) The Street Improvement Act of 1913; (4) *L.A. County Flood Control Dist. v. Southern Cal. Edison Co*. (1958) 51 Cal.2d 331("no distinction has been made between sanitary sewers and storm drains or sewers"); (5) Many other cases where the term "sewer" has been used interchangeably to refer to both sanitary and storm sewers including, but not limited to, *County of Riverside v. Whitlock* (1972) 22 Cal.App.3d 863, *Ramseier v. Oakley Sanitary Dist*. (1961) 197 Cal.App.2d 722, and *Torson v. Fleming* (1928) 91 Cal.App. 168; and (6) Dictionary definitions of sewer, which courts have found to be an objective source for determining common or ordinary meaning, including Webster's (1976), American Heritage (1969), and Oxford English Dictionary (1971).

[25] *Id.,* subd. (f).

[26] *Sinclair Paint Co. v. State Bd. Of Equalization* (1997) 15 Cal.4th 866, 876-77. See also *Cal. Farm Bur. Federation v. State Water Resources Control Bd.* (2011) 51 Cal. 4th 421, 437-438; *California Association of Professional Scientists v. Department of Fish and Game* (2000) 79 Cal.App.4th 935, 945 (distinguishing regulatory fees from taxes); *Schmeer v. County. of Los Angeles* (2013) 213 Cal. App. 4th 1310, 1326 (finding plastic bag charge retained by businesses not to be a tax).

[27] *Sinclair Paint Co., supra,* 15 Cal.4th at 877.

[28] *Id* at p. 877-878. Examples of non-tax fees within the police power of municipalities to impose include: single-use carryout bag ordinances charging fee for use of plastic or paper bags (e.g., Item 868, San Jose 2017 Annual Report, Bates No. 129616; Item 864, 2016-2017 Santa Clara Annual Report, Bates No. 129336); fines for violations of

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Public Resources Code section 40059, subdivision (a)(1), and Health and Safety Code section 5471 provide additional authority to charge fees for the costs associated with the contested provisions. Public Resources Code section 40059, subdivision (a)(1), confers fee authority on the permittees; "[a]spects of solid waste handling . . . are a local concern."[29] As discussed above, Permittees each have authority to regulate handling of waste that is generated and collected within their jurisdictions.

Similarly, Health and Safety Code section 5471, subdivision (a), gives the permittees fee authority for "services . . . furnished . . . in connection with . . . storm drainage." This authority is consistent with the above discussion concerning the Legislature's ratification of existing fee authority over matters pertaining to managing the storm system and protecting beneficial uses of the receiving waters.

C. Subvention Is Not Required Here, Where Claimant Has the Ability to Fund Additional Costs, if Any, of Implementing MRP 2.0.

Subvention is only required if expenditure of tax monies is required, and not if the costs can be reallocated or funded through service charges, fees, or assessments.[30] Subvention of funds is only required if expenditure of tax monies is required, and not if the costs are simply reallocated or funded through other means.[31]

In the case of the LA MS4 permit, the Supreme Court noted the Commission's conclusion that although the inspection requirements were new programs or higher levels of service, it found that the claimants in that case were not entitled to state reimbursement for the costs of

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prohibitions on use of foam/polystyrene food containers (e.g., Item 868, San Jose 2016-2017 Annual Report, Bates No. 129617-129619); hazardous waste disposal fees for businesses that generate less than 100 kg of waste per month (Item 874, SCVURPPP 2016-2017 Annual Report, Bates No. 130322; Item 877, SMCWPPP 2016-2017 PCBs Control Measure Plan, Bates No. 131415); vehicle registration fees used to fund combined road safety/green infrastructure projects (Item 877, SMCWPPP 2016-2017 Annual Report, Bates No. 131083). See also generally, Item 874, SCVURPPP 2016-2017 Annual Report, Bates No. 130251 (describing effort to "develop a guidance memorandum on possible options for funding mechanisms to design, construct, and maintain prioritized GI projects, including in-lieu fees and alternative compliance, in order to assist co-permittees with the local funding options section of their GI Plans."); Item 841, 2016-2017 Fairfield-Suisun Urban Runoff Management Annual Report, Bates No. 126356 (evaluating funding options "such as a potential GI impact fee that would be assessed.")

[29] Pub. Resources Code, § 40059, subd. (a)(1).

[30] See Gov. Code, § 17556, subd. (d) (costs not mandated by the state when the local agency has "authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service"); *County of Los Angeles v. Comm'n on State Mandates*, *supra*, 110 Cal.App.4th at p. 1189 ("in order for a state mandate to be found, the local governmental entity must be required to expend the proceeds of its tax revenues"); *Redevelopment Agency v. Comm'n on State Mandates* (1997) 55 Cal.App.4th 976, 987 ("No state duty of subvention is triggered where the local agency is not required to expend its proceeds of taxes").

[31] See Gov. Code, § 17556, subd. (d).

compliance with the inspection requirements because "they could levy fees to cover the costs of the required inspections."[32]

> The Commission also finds that the remainder of the permit (parts 4C2a, 4C2b & 4E) does not impose costs mandated by the state … because the claimants have fee authority (under Cal. Const. article XI, § &) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit.[33]

In the originating action, the Commission issued a Final Statement of Decision in a stormwater permit Test Claim filed by the County of Los Angeles and several additional co-permittee test claimants.[34] In the Commission's Statement of Decision, the Commission found that all but one of the challenged provisions issued by the Los Angeles Water Board in its MS4 permit did not qualify as unfunded state mandates as they did "not impose costs mandated by the state within the meaning of article XIII B, Section 6 of the California Constitution because the claimants have fee authority (under Cal. Const. article XI, § 7) within the meaning of Government Code section 17556, subdivision (d), sufficient to pay for the activities in those parts of the permit."[35]

Similarly, in this case, Claimant is not *required* to use taxes to pay for the costs of the programs, and can levy fees, such as inspection, trash, or permitting fees, in addition to sewer fees.[36] At the April 2017 Stormwater Finance Forum in Oakland, John Bliss of SCI Consulting, gave a presentation about how to implement stormwater control projects by imposing trash- and sewer-related fees or surcharges that would be exempt from the balloting required under Proposition 218. His presentation advocated funding a variety of stormwater-related programs in this way, including street sweeping, installing and maintaining full trash capture devices, and maintain catch basins.[37]

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[32] *Dept. of Finance v. Comm'n on State Mandates* (2016) 1 Cal.5th 749, 761. The Supreme Court's decision concerning the construction of the "maximum extent practicable" (MEP) requirement of Clean Water Act section 402(p)(3)(B)(iii), as it related to certain contested provisions of the LA MS4 permit. This decision is referenced herein as *Department of Finance*.

[33] Statement of Decision re. Case Nos. 03-TC-04, 03-TC-19, 03-TC-20 and 03-TC-21 (July 31, 2009), p. 1. See also Commission on State Mandates' Parameters and Guidelines and Decision Re. Test Claims 03-TC-04, 03-TC-20 and 03-TC-21 (providing guidance concerning reimbursement of costs for trash receptacles but omitting any recovery of costs for inspections); and Final Statement of Decision, San Diego Region Permit, 07-TC-09, March 30, 2010, pp. 102-105 (provisions in the permit were nonreimbursable where the co-permittees had the ability to impose fees on the development community).

[34] Municipal Storm Water and Urban Runoff Discharges, 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21 (Los Angeles Regional Water Quality Control Board Order No. 01-182 (July 31, 2009) (County of Los Angeles Test Claim).

[35] County of Los Angeles Test Claim, Statement of Decision, p. 2.

[36] For a general overview of funding mechanisms that have been employed by municipalities, see Item 705, Black and Veatch 2005 Stormwater Utility Survey, Bates No. 107813 (72% cited stormwater user fees as major [at least 90% of total income] revenue sources and the majority of utilities resported funding was adequate to meet all or most needs). (See also Item 677, Agenda for Stormwater Financing Forum, Bates No. 106470-106472 [identifying ways to pay for stormwater controls].)

[37] Item 679, Bliss Presentation, Bates No. 106486-106509.

As described in the PCBs TMDL Staff Report, "urban runoff management agencies are expected to conduct or cause to be conducted a program to manage PCBs in building materials through their inspection programs."[38] In addition, Claimant may impose the cost of of storm drain connections on new development.[39] Mercury treatment requirements in MRP 2.0 were based on levels achievable via new and redevelopment controls, which are excluded from a mandate claim.[40] For other Provisions, cities can and do adopt fees from their residents and businesses that fund their stormwater programs. For example, the City of Alameda has adopted fees for implementation of their programs[41] and Palo Alto raised its stormwater fee.[42]

Union City's own test claim is weakened by the documentation it submitted, indicating that it has paid for many of its stormwater improvements with grant funding and has thus avoided having to levy such a fee.[43] Claimant cites several green streets projects, which were supported, in part, by State grants.[44] Claimant received a Proposition 84 grant for $3 million for the H Street green street improvements,[45] and $3 million for the South Decoto Green Streets.[46] Moreover, these project costs are not necessarily representative of what an ordinarygreen infrastructure retrofit might cost, because they are pilot/demonstration-scale projects that incorporated significant elements that would not have been incorporated in projects where cost was a leading concern.[47]

Other municipalities have found ways to fund compliance with their permit obligations. For example, the City of Oakland has, since 2006, had an "Excess Litter Fee" for defined types of typically high-trash generating busisnesses, such as fast food restaurants.[48] Eligible

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[38] Item 685, PCBs TMDL Staff Report, Bates No.106610.

[39] See, e.g., Item 702, San Jose website (describing fee schedule for storm drain connections), Bates No. 107804. In its Final Statement of Decision in 07-TC-09, issued March 30, 2010, the Commission found that the Copermittees have authority to fund these programs. In that case, the claimants cross-petitioned, seeking a writ of mandate overturning the Commission's determination. The trial court has not resolved these issues.

[40] Item 467, MRP 2.0, Provision C.11, Bates No. 83813-83820.

[41] See, e.g., Item 703, Alameda website (describing stormwater fee structure), Bates No. 107805-107806.

[42] See Item 704, Mercury News article, Bates No. 107807-107808.

[43] Test Claim, p. 5.23

[44] Test Claim, p. pp. 5.18-19.

[45] Test Claim, p. 5.23. See also Item 724, Round 1 Proposition Grant Award List, Bates No. 110226; Item 726, Round 2 Proposition Grant Award List, Bates No. 110485.

[46] Test Claim, p. 5.23. See also Item 724, Round 2 Proposition 2 Grant Award List, Bates No. 110226.

[47] Claimant attempts to discount the significance of the grants in the accounting presented to the Commission, stating without support that it is "unlikely the City will be able to avail itself of future grant opportunities" and that "there are no other nonlocal agency funds that are or will be available to the City to pay for these increased costs." Test Claim, pp. 5.23-5.24. However the test of whether or not a program is reimbursable or a state mandate does not require the non-availability of "nonlocal agency funds." Finally, Claimant chose to do more expensive designs than the minimum required by the Permit. (See Item 723, Bates No. 109928, 109951, 109953 and Item 725, Bates No. 110243, 110246.) Regardless, the appropriate time for briefing these matters in detail is in the parameters and guidelines phase. (Cal. Code Regs., tit. 2, § 1183.8.)

[48] Item 673, 2016-2017 Oakland Annual Report, p. 106241.

businesses may reduce their fees by participating in a Business Improvement District (BID) and may be exempt from the fees if the BID has an adequate litter control program.[49]

Oakland's BIDs and Community Benefit Districts (CBDs), which cover 650 acres, are additional means of funding street cleaning, trash management, and green infrastructure.[50] Participating businesses vote to pay an additional assessment to fund maintenance and beautification projects within the district. There are currently more than 10 BIDs and CBDs in Oakland, with several more planned.[51] As one example, the Jack London Square BID has an annual budget of approximately $780,000 to fund "intensive cleaning of sidewalks, gutters, and fixtures in the public right-of way," graffiti removal, pressure washing of the 880 underpass, and planting of the street medians.[52] The Lake Merritt/Uptown CBD installed trash cans, planted medians, and organizes patrols for litter and graffiti removal.[53] The Temescal BID removed litter and debris, landscaped and installed and maintained planters.[54] At a forum on stormwater finance held by U.S. EPA in Oakland on April 5, 2017, Leslie Estes of the City of Oakland gave a presentation describing how to use litter fees and BIDs to fund stormwater improvements.[55]

Other jurisdictions have been equally successful. For instance, the City of Richmond partnered with Caltrans to install two high-density separators, a type of full-trash capture device, in areas that drained parts of Interstate 580. Caltrans funded the cost of installing the devices, a total of $2.3 million.[56] The City's September 30, 2017 Annual Report indicated that both of these full trash capture devices had been installed, and that Richmond had achieved 88% trash reduction as a result.[57] Atherton is receiving funding from Caltrans for green infrastructure.[58] San Jose was awarded $4 million to fund three green infrastructure projects.[59] The City and County governments in San Mateo County used $2 million in vehicle registration fees to fund grants for projects incorporating green infrastructure into road safety improvements.[60] The City of Half Moon Bay identified numerous funding sources for its green infrastructure projects, including

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[49] Item 673, 2016-2017 Oakland Annual Report, Bates No. 106242.

[50] *Id.*, Bates No. 105943, 105951-105952.

[51] *Id.*, Bates No. 106245-106246

[52] Item 681, Screenshot, Jack London BID FAQs, Bates No. 106517-106518.

[53] *Id.*, Screenshot Lake Merritt BID, Bates No. 106519-106520;

[54] *Id.*, Screenshot Temescal BID, Bates No. 106523.

[55] Item 677, Stormwater Finance Forum Agenda, Bates No. 106472; Item 678, Estes Powerpoint, "Alternative Funding for Oakland Clean Water," Bates No. 106473-106485.

[56] Item 676, "Revised Plan and Schedule for Implementation of Additional Trash Load Reduction Control Actions to 70% by July 1, 2017" (March 2017). Bates No. 106463.

[57] Item 674, 2016-2017 Richmond Annual Report, Bates No. 106343; Item 676, Bates No. 106463.

[58] Item 822, 2016-2017 Annual Report, Bates No. 124543.

[59] Item 866, San Jose Annual Report, p. i-3.

[60] Item 877, 2016-2017 SMCWPPP Annual Report, Bates No. 131056, 131069, 131083.

federal, state and local grants, Measure A and J funds, the gas tax, vehicle registration taxes, and development impact fees.[61]

Claimants have not demonstrated that they are precluded from establishing or raising fees to cover any increased costs to comply with the Permit. Whether circumstances make it difficult to assess fees is not relevant to the inquiry.[62] Claimant must establish that it is required to use tax monies to pay for implementation of permit provisions.[63] Here, the Legislature unequivocally proclaimed that Claimant has always had the ability to raise fees. Evidence of other similarly-situated municipalities demonstrates overwhelmingly that Claimant is able to raise any necessary funds to comply with MRP 2.0. There is no unfunded State mandate in these circumstances.

III. The Contested Permit Provisions Are Compelled by Federal Law.

Claimant concedes that if a permit requirement "is compelled by federal law, the state must implement a federal mandate and no reimbursement is required."[64] Claimant is correct; MRP 2.0 cannot be an unfunded State mandate if it imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government.[65] Here, the Clean Water Act and its regulations require the Permit itself and federal law compels each of the contested provisions. The contested provisions of MRP 2.0 cannot be unfunded State mandates because they: 1) include provisions required by TMDLs; 2) are required Basin Plan Prohibitions approved by U.S. EPA; 3) are required by the Clean Water Act and 4) are mandated by other federal statutes. These are separate, independent federal requirements.

A. MRP 2.0 Provisions C.3.j, C.11.c, C.12.a, C.12.c, C.12.d, and C.12.e Implement A Federal Mandate

Provisions C.3.j, C.11.c, C.12.a, C.12.c, C.12.d, and C.12.e implement the Total Maximum Daily Load requirements under Clean Water Act section 1313, subdivision (d) (Section 303(d)). Section 303(d) requires states to determine which water bodies are not meeting applicable water quality standards, meaning that the water bodies are "impaired" for a particular pollutant, and to develop a "total maximum daily load" (TMDL) for that pollutant.

A TMDL establishes load allocations for the sources of the pollutant; achievement of these load allocations will ensure that water quality standards within the waterbody are met. In other

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[61] Item 842, 2016-2017 Half Moon Bay Annual Report, Bates No. 126,610-126611.

[62] *Connell v. Sup. Ct.* (1997) 59 Cal.App.4th 382, 398 (where statute on its face authorized water districts to levy fees sufficient to pay the costs associated with a regulatory change, there was no right to reimbursement); *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 812 ("to the extent a local agency… 'has the authority' to charge for the mandated program or increased level of service, that charge cannot be recovered as a state mandated cost").

[63] Gov. Code §§ 17553, subd. (b)(1)(F) [test claim must identify funding sources, including general purpose funds available for this purpose, special funds and fee authority]; and Gov. Code § 17556, subd. (d).

[64] Test Claim, p. 5.9.

[65] Gov. Code, § 17556, subd. (c).

words, load allocations are required to be "established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality."[66] TMDLs proposed by the Regional Water Board must be approved by U.S. EPA before they become effective.[67] Once U.S. EPA approves a TMDL for a waterbody, any NPDES permit, including an MS4 permit, must include effluent limits "consistent with the assumptions and requirements of any available wasteload allocations."[68]

TMDLs also include an Implementation Plan, a road map for how the Regional Water Board anticipates that the load allocations will be met. The Implementation Plan is, like the TMDL itself, submitted to EPA for approval, and included in the San Francisco Water Quality Control Plan (Basin Plan).[69]

The water quality of San Francisco Bay is impaired by both mercury and polychlorinated biphenyls (PCBs). Therefore, in 2008 the Regional Water Board developed, and EPA approved, TMDLs for mercury and PCBs designed to reduce the input, or loads, of mercury and PCBs, respectively, to San Francisco Bay. The TMDLs and their Implementation Plans are part of the Basin Plan.[70] Both TMDLs require municipal stormwater agencies to take aggressive action to reduce mercury and PCBs in stormwater discharges and envision that these load reductions will be implemented in successive municipal stormwater permits. Both TMDLS recognized that identification of control measures that will effectively implement the load allocations will be a process of trial and error, and will not be possible within one permit term.[71] U.S. EPA echoed this in its comments on the draft permit, stating, "EPA supports the Water Board's inclusion of specific numeric mercury and PCB milestones and deadlines within this permit cycle."[72] EPA noted that these numeric milestones were consistent with federal guidance and recognized that the "pollutant-specific values are interim milestones to achieve step-wise progress in this permit as well as to measure progress towards attaining the final TMDL wasteload allocations (mercury in 2028 and PCBs in 2030)…."[73] Accordingly, the TMDL provisions in the permit, described below, are (1) required pursuant to 303(d); (2) even if not a federal mandate, are not part of a new program and do not impose a higher level of service, and are not unique to local governments.[74]

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[66] 33 U.S.C. § 1313, subd. (d)(1)(C)

[67] 33 U.S.C. § 1313(d)(2

[68] 40 C.F.R. § 122.44, subd. (d)(1)(vii)(B).)

[69] See Item 686, Basin Plan Sections 7.2.2 and 7.2.3.

[70] See Item 686, Basin Plan sections 7.2.2 (Mercury TMDL), Bates No. 106686-106705; and 7.2.3 (PCBs), Bates No. 106705-106717.

[71] Item 685, PCBs TMDL Staff Report, Bates No. 106609-106611.

[72] Item 729, U.S. EPA Letter to SF Water Board, Bates No. 110608.

[73] *Ibid.*

[74] In the LA MS4 case, the Commission determined that the permit requirement pertaining to trash receptacles was a reimbursable state mandate, but specifically noted that those local agencies subject to the requirements were not subject to a trash TMDL. (Statement of Decision re. Case Nos. 03-TC-04, 03-TC-19, 03-TC-20 and 03-TC-21 (July 31, 2009), p. 1.) Notably, the Supreme Court's *Department of Finance* decision has no impact on this analysis.

1. TMDL Provisions in the Permit

In accordance with federal law, the Regional Water Board implemented the TMDLs for mercury and PCBs through MRP 2.0 provisions in C.3, C.11, and C.12, as described below:

> [T]he Water Board has found that there is a reasonable potential that municipal stormwater discharges cause or may cause or contribute to an excursion above water quality standards for the following pollutants: mercury [and] PCBs…in San Francisco Bay segments…. In accordance with CWA section 303(d), the Water Board is required to establish Total Maximum Daily Loads (TMDLs) for these pollutants to these waters to gradually eliminate impairment and attain water quality standards. Therefore, pollutant control actions and further pollutant impact assessments by the Permittees are warranted and required pursuant to this Order.[75]

> The [Green Infrastructure] Plan is intended to serve as an implementation guide and reporting tool during this and subsequent Permit terms to provide reasonable assurance that urban runoff TMDL wasteload allocations (e.g., for the San Francisco Bay mercury and PCBs TMDLs) will be met, and to set goals for reducing, over the long term, the adverse water quality impacts of urbanization and urban runoff on receiving waters.[76]

> The [green infrastructure planning and tracking] methods shall also address tracking needed to provide reasonable assurance that wasteload allocations for TMDLs, including the San Francisco Bay PCBs and mercury TMDLs, and reductions for trash, are being met.[77]

> The [mercury control] provisions implement the urban runoff requirements of the San Francisco Bay and Guadalupe River Watershed mercury TMDLs and reduce mercury loads to make substantial progress toward achieving the urban runoff mercury load allocations established for the TMDLs. The aggregate, regionwide, urban runoff wasteload allocation from the San Francisco Bay mercury TMDL is 82 kg/yr. The TMDL implementation plan calls for attainment of the allocation by February 2028 and, as a way to measure progress, attainment of an interim loading milestone by February 2018 of 120 kg/yr, halfway between the 2003 estimated load, 160 kg/yr, and the aggregate allocation.[78]

> The Permittees shall implement sufficient green infrastructure projects so that mercury loads are collectively reduced by 48 g/yr by June 30, 2020, which shall be extended to December 31, 2020, if the Permittees provide documentation that

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[75] Item 467, MRP 2.0, Finding 11, Bates No. 83561.
[76] *Id.*, Provision C.3.j, Bates No. 83601-83606.
[77] *Id.*, Provision C.3.j.iv, Bates No. 83606.
[78] *Id.*, Provision C.11, Bates No. 83665-83670.

> control measures that will attain the load reduction will be implemented by December 31, 2020.[79]
>
> The provisions implement the urban runoff requirements of the PCBs TMDL. Permittees shall reduce PCBs loads by a specified amount during the term of the Permit, thereby making substantial progress toward achieving the urban runoff PCBs wasteload allocation in the Basin Plan. The allocation, on an aggregate and regionwide basis, is 2 kg/yr (1.6 kg/yr allocated to Permittees) to be achieved by March 2030. This wasteload allocation represents a load reduction from all urban runoff sources to the Bay of approximately 18 kg/yr (14.4 kg/yr from Permittees) compared to loads estimated using data collected in 2003.[80]
>
> Permittees shall prepare a PCBs control measures implementation plan and corresponding reasonable assurance analysis that demonstrates quantitatively that the plan will result in PCBs load reductions sufficient to attain the PCBs TMDL wasteload allocations by 2030. The plan must:
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> (i) Identify all technically and economically feasible PCBs control measures to be Implemented (including green infrastructure projects).[81]

Claimant acknowledges that the 2009 MRP required "Permittees to implement Green Infrastructure projects to comply with mercury and PCB load reduction requirements[82]." In the next breath, Claimant claims that the "green infrastructure requirements are new; the term was not used even once in the MRP1."[83] Claimant omits any discussion of the prior permit's requirements for low impact development, which is part of green infrastructure, as identified in the green infrastructure definition they cite.[84] The requirements for green infrastructure Planning were included at the permittees' request as a means of meeting the load reductions required by the TMDLs.[85] As described further in the table below, green infrastructure and low impact development provisions are common in federally-issued stormwater permits, and EPA "is a strong proponent for green infrastructure (GI) plans in MS4 permits."[86] The permit fact sheet

79 Item 467, MRP 2.0,Provision C.11.c.ii, Bates No. 83667.

80 Id., Provision C.12, Bates No. 83671-83680.

81 Id., Provision C.12.d, Bates No. 83677.

82 Test Claim, p. 5.15.

83 Ibid.

84 Decl. Of Thomas Ruark at 6.1.4, citing Order No. R2-2015-0049 (Item 467, Bates No. 83601).

85 See Item 378, Bates No. 37460-37462; 380, Bates No. 37497; Item 382, pp.37519-37520; Item 383, 37529-37530; Item 384, Bates No. 37534; Item 386, 37543-37545; Item 387, Bates No. 37546-37549; Item 388, Bates No. 37553-37544; and Item 390, Bates No. 37558.

86 Item 729, U.S. EPA Letter to SF Water Board, Bates No. 110608.

was modified to accept EPA's recommendation that the permit include EPA's menu of potential components of green infrastructure plans.[87]

2. The Regional Water Board Had No True Choice in Implementing the TMDL Requirements.

The Regional Water Board has little discretion in complying with title 40 of the Code of Federal Regulations, part 122.44(d)(1)(vii)(B), which governs implementation of TMDLs through permitting requirements. That section specifically directs the Board to include effluent limits which are consistent with the assumptions of any applicable wasteload allocations (WLAs). The Board had no "true choice" but to include the TMDL-related provisions in MRP 2.0 that will result in attainment of the WLA within the timeframe established in the TMDL (in the case of both the PCBs and Mercury TMDLs, 20 years.[88] The results of the pilot testing during the 2009 permit term demonstrate the lack of "true choice" for the Regional Water Board in imposing permit terms compliant with the TMDL. The Regional Water Board's Watershed Division Chief, Keith Lichten, described the PCBs TMDL load reduction requirements at the MRP 2.0 adoption hearing. He explained that the PCBs provisions were designed to achieve the stringent wasteload allocations set in the TMDL:

> The PCBs TMDL estimates that PCBs load from urban stormwater runoff is 20 kilograms per year, it assigns stormwater a waste load allocation of two kilograms per year, thus requiring a reduction of 18 kilograms per year after 20 years, and about 14 kilograms of that is assigned to the Permittees.
>
> MRP II would require a reduction of half a kilogram per year of PCBs by midway through the second year of the permit, and that would increase to three kilograms per year by the end of the permit term. That's about one-fifth of the PCBs TMDLs 14 kilograms per year load reduction requirements for the MRP Permittees, and it would be achieved half-way through that 20-year TMDL schedule[89]."
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> ***
>
> We need the Permittees to make substantial progress in load reductions consistent with the TMDL during this permit term. As a result, MRP II requires the load reductions and reporting on where, what and when actions will be taken to achieve them[90]."

The Implementation Plans of both the Mercury and PCBs TMDLs provide for adaptive implementation of the load allocations for municipal stormwater. "Adaptive implementation

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87 Id., at p. 3. See also Item 460, Response to Comments, Response to Comments on C.3, Bates No. 82543 (adding U.S. EPA's Attachment A into the C.3 Fact Sheet as guidance [see Bates No. 83758-83759.)

88 See *Department of Finance,* supra, 1 Cal.5th at p. 765

89 Item 469, Nov. 18 Transcript, at Bates No. 84022.

90 *Id*. at Bates No. 84027

simultaneously makes progress toward achieving water quality standards through implementing actions while relying on monitoring and experimentation to reduce uncertainty and refine future implementation actions."[91] The Implementation Plans anticipated that the first permit (in 2009) would require only pilot testing of mercury and PCBs controls, but that results of this testing would determine the requirements of the second permit (the provisions challenged here).

> The second five-year term permit requirements will be based on the knowledge gained during the first permit term and will call for strategic implementation of the BMPs and control measures identified as effective and that will not cause significant adverse environmental impacts based on the pilot studies conducted during the first permit term. The second term permit will also require development of a plan to fully implement control measures that will result in attainment of allocations, including an analysis of costs, efficiency of control measures and an identification of any significant environmental impacts[92].

Indeed, the provisions of MRP 2.0 reflect lessons learned during pilot testing: e.g., requiring PCBs reductions by "addressing building materials during demolition, from green infrastructure, particularly in older industrial areas, from referral of PCBs-contaminated sites for cleanup, from addressing PCBs in storm drain infrastructure, and street sweeping and other enhanced maintenance measures in contaminated areas[93]." U.S. EPA supported and recommended the retention of "the Water Board's approach to allow for flexibility in determining the various control measures to achieve PCBs milestones" in the final permit.[94] U.S. EPA also supported the accounting framework "based on permittees' success with several PCBs pilot projects during the current permit term, and likelihood of continued permittee efforts," and "endorse[d] the Water Board's evolving 'program' to minimize PCBs from entering urban runoff via age-specific building materials and concrete sealants."[95]

Accordingly, the Regional Water Board's discretion is curtailed by both the information on effectiveness submitted by permittees, which showed that green infrastructure would be effective and feasible for controlling PCBs and mercury discharges in stormwater when deployed on a large scale throughout the region, and the looming obligation to comply with aggressive load reductions to achieve water quality standards. Thus, the Regional Water Board had no "true choice" in imposing the challenged green infrastructure provisions of the new permit.

B. Clean Water Act Prohibitions

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[91] Item 685, PCBs Staff Report, Bates No. 106607.

[92] Item 685, PCBs Staff Report, Bates No. 106611.

[93] Item 469, Nov. 18 Transcript, Bates No. 84024.

[94] Item 729, U.S. EPA Letter to SF Water Board, Bates No. 110609.

[95] *Ibid.*

As discussed above in the introductory remarks, the Clean Water Act requires that MS4 permittees effectively prohibit non-stormwater discharges to their MS4s.[96] Clean Water Act section 301 prohibits the discharge of any pollutant by any person without a permit. The Act "prohibits the discharge of any pollutant except in compliance with one of several statutory exceptions."[97] The first principle of the statute is that "it is unlawful to pollute at all. The Clean Water Act does not permit pollution whenever that activity might be deemed reasonable or necessary; rather, the statute provides that pollution is permitted only when discharged under the conditions or limitations of a [federal discharge] permit.[98]

Pursuant to Clean Water Act section 402, subdivision (p)(3)(B)(ii), permitting agencies "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers." U.S. EPA has defined "storm water" to mean "stormwater runoff, snow melt runoff and surface runoff and drainage."[99] In general, the requirement to "effectively prohibit" non-stormwater discharges requires either prohibiting the flows to or from the MS4's system or ensuring that operators of such non-stormwater systems obtain permits for those discharges.[100] MS4 operators meet this requirement by implementing "a program, including a schedule, to detect and remove … illicit discharges and improper disposal into the storm sewer."[101] Although U.S. EPA has exempted specified categories of non-stormwater discharges from this prohibition, the same regulation provides that the exemption no longer applies to a category that a municipality has identified as a pollutant source.[102]

Federal MS4 permit application requirements specify that an applicant must demonstrate adequate legal authority to "[p]rohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer;" and "[c]ontrol through ordinance, order or similar means the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water."[103] The regulations define the term "illicit discharges" as "any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to an NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer)…."[104] In other words, since illicit discharges are not authorized by the Clean Water Act, they must be prohibited.

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[96] See State Water Board Order No. 2015-0175 (2012 LA MS4 Permit), pp. 62-63 (confirming that non-stormwater discharges to the MS4s under the Clean Water Act are not subject to the MEP standard applicable to stormwater discharges).

[97] See *WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1452.

[98] *Natural Resources Defense Council, Inc. v. U.S. E.P.A*. (D.C. Cir. 1987) 822 F.2d 104, 123; see 33 U.S.C. § 1311, subd. (a).

[99] 40 C.F.R. § 122.26.

[100] 55 Fed. Reg. 47990 at 47995.

[101] 40 C.F.R. § 122.26, subd. (d)(2)(iv)(B).

[102] *Ibid.*

[103] 40 C.F.R. § 122.26, subd. (d)(2)(i)(B) and (C).

[104] *Id.* at § 122.26, subd. (b)(2).

While "non-storm water" is not defined in the CWA or federal regulations, the federal regulations define "illicit discharge" as "any discharge to a municipal separate storm sewer that is not composed entirely of storm water and that is not covered by an NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer and discharges resulting from fire fighting activities)."[105] This definition is the most closely applicable definition of "non-storm water" contained in federal law. As stated in the Phase I Final Rule, U.S. EPA added the illicit discharge program requirement to begin implementation of the 'effective prohibition' requirement to detect and control certain non-storm water discharges to their municipal system. U.S. EPA stated: "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 (other than the permit for the discharge from the [MS4])."[106] Thus, federal law mandates that permits issued to MS4s must require management practices that will result in reducing storm water pollutants to the maximum extent practicable (MEP) yet at the same time requires that non-storm water discharges be effectively prohibited from entering the MS4. The argument that non-storm water discharges, prohibited from entry into the MS4 in the first instance, should be held to comply with only the less stringent MEP standard developed for storm water discharges is contrary to and potentially renders the "effectively prohibit" requirement in section 402(p)(3)(B)(ii) meaningless.

C. Basin Plan Prohibitions

The water quality control plan applicable in the San Francisco Bay region is the “San Francisco Bay Basin Water Quality Control Plan (Basin Plan).[107] The beneficial uses, water quality objectives, and antidegradation policy constitute water quality standards for purposes of compliance with the Clean Water Act.[108] Pursuant to Clean Water Act section 303(c), the U.S. EPA must review and approve all water quality standards. Since 1975, the Basin Plan has prohibited the discharge of rubbish and litter, and toxic and deleterious substances.[109]

> It shall be prohibited to discharge:
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> All conservative toxic and deleterious substances, above those levels which can be achieved by a program acceptable to the Regional Board, to waters of the Basin.
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[105] 40 CFR § 122.26(b)(2).

[106] 55 Fed. Reg, 47990, 47995 (Nov. 16, 1990).

[107] The complete, current Basin Plan may be accessed at https://www.waterboards.ca.gov/sanfranciscobay/basin_planning.html#basinplan.

[108] Wat. Code, §§ 13142, 13240, 13241, 13242; 33 U.S.C § 1313(c); 40 C.F.R. § 131.3(i); 40 C.F.R. § 131.6 (2010).

[109] Item 684, Bates No. 106525 et seq.

> Rubbish, refuse, bark, sawdust, or other solid wastes into surface waters or at any place where they would contact or where they would be eventually transported to surface waters, including flood plain areas.[110]

Provisions C.10 (trash), C.11 and C.12 (mercury and PCBs) are designed to protect U.S. EPA's approved water quality standards established in the Basin Plan.

The Fact Sheet indicates that the Regional Water Board adopted the Prohibition in 1975.[111] Government Code section 17551, subdivision (c), requires Claimant to file test claims within 12 months of the effective date of a statute or executive order. The time for challenge to these prohibitions passed more than thirty years ago.

D. Federal Requirements for Monitoring

Claimant has incorporated the prior briefing concerning monitoring provisions in C.8, conceding that the contested provisions were already required by the 2009 MRP.[112] The contested monitoring provisions in C.8 constitute data and reports on permit implementation that provide the required information concerning the status of implementation controls.

The inclusion of monitoring requirements in the 2009 MRP is consistent with comments on a draft version of the permit, in which U.S. EPA staff noted that they supported the inclusion of detailed requirements in the permit.[113] U.S. EPA had complained prior to issuance of the 2009 MRP that "[o]ur municipal audits of recent years have identified lack of detailed requirements as a frequent shortcoming in previously issued-permits in our Region."[114] And Mr. Bromley's comments are consistent with the finding in *San Francisco Baykeeper v. Regional Water Quality Control Board, San Francisco Bay Region* (2003).[115] Although not precedential, this case ordered the Regional Water Board to include type, interval and frequency sufficient to yield data representative of the monitored activity, citing the Code of Federal Regulations.[116] For the Regional Water Board to decline to do so would have risked being in contempt of court.

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[110] Item 688, Basin Plan, Table 4-1, Prohibitions 6 and 7, Bates No. 106969-106970.

[111] Item 467, MRP 2.0, Fact Sheet, p. A-87, Bates No. 83797 See also Item 684, 1975 Basin Plan, Bates No. 106530, Prohibitions 2 and 3, which are identical to the current prohibitions, with the exception that "floatable" appears before the word rubbish.

[112] Test Claim, p. 5.10.

[113] Item 729, U.S. EPA Letter to Regional Board, Bates No. 110608. The trash monitoring provisions of C.10 were made more specific in response to EPA comments on the draft Permit. See Item 460, Response to Comments, Section C.10, Appendix C, Bates No. 82693.

[114] Item 689, Email from Eugene Bromley, EPA, "Comments on December 27 Draft MRP", Bates No. 106973.

[115] Item 690, *San Francisco Baykeeper v. Regional Water Quality Control Board, San Francisco Bay Region* (2003) San Francisco Superior Court No. 500527, Order Granting Petition for Writ of Mandate and Statement of Decision, Bates No. 106974-106979.

[116] *Id*. at Bates No. 106977 (citing 40 C.F.R. § 122.48, subd. (b)).

Subsequent permits therefore included these required elements, including Provision C.8 in MRP 2.0.

Claimant acknowledges that any claim concerning C.8 should have been raised and resolved with respect to the 2009 permit and not here.[117] Should the Commission re-evaluate those claims here, the Regional Water Board incorporates prior briefing on Provision C.8 as submitted in the May 17, 2011 submission[118] and augmented in the December 20, 2016 submission concerning the impact of the Supreme Court's decision in *Department of Finance*. The 2011 Response briefs the numerous federal requirements that validate the 2009 MRP's monitoring provisions.[119] The supplemental briefing describes how the Supreme Court's decision in *Department of Finance* did not impact any federal authorities requiring monitoring.

It bears noting that San Francisco Baykeeper has petitioned the State Water Board, claiming that the monitoring required by Provisions C.8 is not stringent enough to comply with the Clean Water Act.[120] While the Regional Water Board disagrees that the monitoring provisions are inadequate, Baykeeper's argument supports the conclusion that the provisions are no more stringent than what federal law requires.

E. U.S. EPA Has Required Similar Provisions In Permits It Has Issued.

In concluding that the trash receptacle requirement in the LA MS4 Permit was not a federal mandate, the Supreme Court found that "the fact the EPA itself had issued permits in other cities, but did not include the trash receptacle condition, undermines the argument that the requirement was federally mandated."[121] In contrast to the LA MS4 permit, U.S. EPA has issued permits requiring substantially similar provisions to the contested provisions of MRP 2.0. The following table lists provisions in permits the U.S. EPA has issued that are analogous to the challenged provisions in MRP 2.0, demonstrating that these provisions are federally mandated and that the Regional Water Board effectively administered federal requirements concerning permit requirements for monitoring, green infrastructure, and trash.

To the extent the provisions are more detailed or provide more specificity than past iterations of MRP 2.0, that is consistent with U.S. EPA's guidance that successive permits for the same MS4 must become more refined and detailed:

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[117] Cal. Code Regs.,tit. 2, § 1183.1, subd. (c).

[118] Due to similar claims, this brief covers many of the same issues as the May 17, 2011 Response to Test Claims 10-TC-01, 10-TC-02, 10-TC-03 and 10-TC-05. To avoid undue length, this brief will refer as appropriate to that brief (2011 Response).

[119] 2011 Response, pp. 27-29 (MS4 permits must require monitoring conditions), 42-43 (monitoring provisions required by Clean Water Act and implementing regulations); 43-44 (collaborative and watershed monitoring required by federal law); 44-45 (characterization of MS4 discharges required by federal law); 46 (citizen monitoring required by federal law); 47 (electronic reporting required by federal law).

[120] Item 666, Baykeeper Petition, Bates No. 104302.

[121] *Department of Finance v. Comm'n on State Mandates, supra*, 1 Cal.5th at p. 772.

> The EPA also expects stormwater permits to follow an iterative process whereby each successive permit becomes more refined, detailed, and expanded as needed, based on experience under the previous permit. See, 55 Fed. Reg. 47990, 48052 ("EPA anticipates that storm water management programs will evolve and mature over time."); 64 Fed. Reg. 67722, 68754 (Dec. 8, 1999) ("EPA envisions application of the MEP standard as an iterative process.") Interim Permitting Approach for Water Quality-Based Effluent Limitations in Stormwater Permits (Sept. 1, 1996) ("The interim permitting approach uses BMPs in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards.")[122]

(Emphasis in original.) The need for, e.g., "expanded or better-tailored BMPs" is illustrated in the specificity of U.S. EPA's own permit provisions, as shown here:

MRP 2.0	U.S. EPA-Issued Permits
Provision C.3.j (Permittees shall complete and implement a Green Infrastructure Plan to include low impact development drainage design into storm drain infrastructure on public and private lands)	Item 654, Consent Decree, Bates No. 103435. The consent decree for the Boston Water and Sewer Commission (BWSC) requires submission of BMP proposal to EPA that "include[s] and emphasize[s] the use of all appropriate currently available Green-Infrastructure ("GI") and Low-Impact Development ("LID") techniques." Upon approval of this proposal by EPA, the Commission must submit a "Phase I BMP Implementation Plan that contains recommendations and schedules for the implementation of specific GI/LID BMPs [in specified areas around Boston]." Item 655, 2016 Annual Report, Bates No. 103537. BWSC 2016 Annual Report indicates that, in compliance with the Consent Decree, they have submitted a watershed-scale stormwater management plan that evaluates systematic implementation of BMPs, including structural BMPs/GI in Boston aimed at reducing pollutant loadings in stormwater discharges sufficient to meet applicable total maximum daily loads. One component of the BMP plan is to collaborate with the Boston Transportation Department to expand Boston's Complete Streets Initiative, which requires green infrastructure in street design, and to further define green design guidelines and emphasize implementation of priority BMPs with high pollutant removal efficiency. Another is to identify large

[122] Item 695, Letter from Alexis Strauss to Tam Doduc and Dorothy Rice, April 10, 2008, Bates No. 107261-107262 concerning Los Angeles County Co-permittees Test Claim Nos. 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21. See also Item 729, U.S. EPA Letter to SF Regional Board, Bates No. 110608.

	impervious areas for retrofit such as parking lots with areas greater than 10,000 square feet that present BMP opportunities. *Id.* at Bates No. 103538-103539. BWSC's 2016 Annual Report shows that the City is implementing multiple green infrastructure projects around Boston, including projects at five public schools, a city-owned playing field, and near three tributaries to the Charles River. "The knowledge and experience gained pursuant to these projects will help guide Commission as it develops more detailed designs and schedules for installation of BMPs/GI citywide." Item 693, 2011 Washington, DC Permit, Bates No. 107100-107102. Requires Permittee to create green landscaping incentive program, develop performance standards for retrofits, inventory retrofit opportunities on federal land, and achieve targets for stormwater treatment, retention, tree planting, and green roofs. Item 671, MA MS4 General Permit. Requires report assessing zoning and design criteria and regulations affecting impervious cover in streets and parking lots (Bates No. 105739), including requirement to implement recommended changes to minimize impervious cover (Bates No. 105774); requires implementation of recommended, feasible changes to regulations to allow various green infrastructure techniques (Bates No. 105774-105775); requires inventory and identification of public properties to be retrofitted with stormwater controls (Bates No. 105775); requires development of new and redevelopment program, including LID planning and design, and stormwater controls in accordance with specified BMPs that specified amounts of certain pollutants (Bates No. 105772, 105773). Item. 670, Worcester, Draft 2008 EPA Permit, Bates No. 105700. EPA's draft permit for Worcester, Massachusetts, requires mapping of priority public and private facilities discharging pollutants throughout the MS4 (Bates No. 105703); coordination among public agencies for permitting of new development, and a program for construction and post-construction stormwater controls, including low-impact development technicques, (Bates No. 105703-105704) identification of regulatory barriers to implementing low-impact development and revisions to overcome them (Bates No. 105704); mapping of impervious area (Bates No. 105705) Requires infiltration or injection of storm water from new development or redevelopment sites, where feasible and appropriate, to approximate the annual recharge of

	groundwater occurring during pre-development conditions consistent with specified standards. (Bates No. 105700) Item 672, General Small MS4 for MA, NH, and tribal lands in CT. The permit requires permittees with stressed groundwater basins to "minimize the loss of annual recharge to ground water from new and redevelopment, including but not limited to drainage improvements done in conjunction with road improvements, street drain improvement projects and flood mitigation projects, Item 672, Bates No. 105800 Item 669, Draft NH Small MS4,Bates No. 105652. It also would require implementation of programs leading to disconnection of directly connected impervious area on municipal and/or private property, including green roofs, residential rain garden programs, removal of unnecessary impervious area, and downspout disconnection. *Id.*, Bates No. 105673. The Draft NH Small MS4 Permit requires site plan review for opportunities to use low impact design and green infrastructure. When the opportunity exists, the permittee shall encourage project proponents to incorporate these practices into the site design. The permittee shall track the number of site reviews, inspections, and enforcement actions. *Id.* Bates No. 105674. It would also require permittee to assess whether street design and parking lot guidelines can be modified to support low impact design options, coordinate with local planning and transportation boards, and recommend schedules for incorporating changes into relevant documents and procedures to minimize impervious cover in parking areas and street designs. *Id.* Bates No. 105674-105675. Permittee would assess the feasibility of making, at a minimum, specified green infrastructure practices allowable: green roofs, infiltration practices such as rain gardens, planter gardens, porous and pervious pavements, and other landscaping/soil based stormwater management techniques, water harvesting devices such as rain barrels and cisterns, and the use of stormwater for non-potable uses. Assessment would also identify any impediments to such practices, and include progress in annual reports. Requirement for an "inventory and priority ranking of permittee-owned property and existing infrastructure that could be retrofitted with BMPs designed to reduce the frequency, volume and pollutant loads of stormwater discharges to its MS4 through the mitigation of impervious area.

	Item 697, Albuquerque MS4 Watershed permit, Bates No. 107421-107426. Permittees required to implement a program that, inter alia: Describes master planning and project planning procedures to control the discharge of pollutants to and from the MS4. Minimizes the amount of impervious surfaces within each watershed, by controlling the unnecessary creation, extension and widening of impervious parking lots, roads and associated development. The permittee may evaluate the need to add impervious surface on a case-by-case basis and seek to identify alternatives that will meet the need without creating the impervious surface. Implements stormwater management practices that minimize water quality impacts to streams, including disconnecting direct discharges to surface waters from impervious surfaces such as parking lots. Implements stormwater management practices that protect and enhance groundwater recharge as allowed under the applicable water rights laws. Item 701, Boise/Garden City MS4 Permit, Bates No. 107753-107555. Requires Green Infrastructure/LID incentive strategy and pilot projects, development of one "green" outfall disconnection, and incorporation runoff reduction into street repairs.
Provision C.8.a (Permittees shall participate in monitoring program) **Provision C.8.b** (Permittees' monitoring data must meet minimum data quality requirements) **Provision C.8.c** (Permittees shall contribute to regional monitoring program) **Provision C.8.d** (Permittees shall monitor creeks for impacts of	Item 696, Washington, D.C. (2011) (Permit No. DC0000221), Revised Monitoring Program for D.C.'s NPDES Permit, Bates No. 107274: monitoring program "builds on" monitoring activities in prior permits. Item 693, Washington, DC NPDES Permit, Bates No. 107122-107127 Requires wet weather discharge monitoring; storm event data; sample type, collection, and analysis; dry weather monitoring; area and/or source identification program; flow measurements; minimum monitoring and analysis procedures. Item 700, Joint Base Lewis-McChord (2013) (Permit No. WAS-026638), Section IV.A.9, Bates No. 107705: Provides for participation in Puget Sound Regional Monitoring Program in lieu of certain monitoring requirements. Item 696, D.C. Revised Monitoring Program, Bates No. 107294-107296. Requires wet monitoring in three creeks and

stormwater) **Provision C.8.f** (Permittees shall implement pollutant of concern load monitoring and long-term monitoring using protocols identified in the Code of Federal Regulations) **Provision C.8.g** (Permittees shall monitor for pesticides and toxicity)	multiple special study sites. *Id.*, Bates No. 107292. Requires monitoring for pollutants of concern identified in historical data. Item 693, D.C. NPDES Permit, Bates No. 107123. Listing locations of monitoring stations. See generally Item 701, Boise/Garden City Area MS4 Permit, Section IV , Bates No. 107777-107785 (Monitoring and Reporting Requirements). See generally Item 697, Albuquerque MS4 Watershed Permit, Part III, Bates No. 107448-107455 Monitoring, Assessment, and Reporting Requirement (similar provisions).
Provision C.8.e (When Status Monitoring results trigger a follow-up action, Permittees shall conduct a site-specific evaluation)	Item 696, Washington, D.C. Revised Monitoring Program (2016), Bates No. 107283-107284: Monitoring is adaptive – the monitoring program incorporates the flexibility to be modified if needed. For instance, it can be modified if monitoring results identify the need to incorporate a follow-on study or if additional parameters or sites need to be monitored to gather the information required to understand sources or stressors and their impacts. See also *id.* Bates No. 107323, Follow Up Site Visits and Investigation, which requires: "This element addresses Section 5.4 of the MS4 permit, which requires DOEE to '… identify, investigate, and address areas and/or sources within its jurisdiction that may be contributing excessive levels of pollutants to the MS4 and receiving waters…'"
Provision C.8.h (Report data and monitoring; report data electronically)	Item 693, Washington, D.C. (2011) (Permit No. DC0000221), Bates No. 107126 (electronic reporting of monitoring results); Item 696, Washington, D.C., Revised Monitoring Program (2016), Bates No. 107348: "DOEE's monitoring data (quantitative and qualitative) will be input into separate Microsoft Access databases for each component of the Revised Monitoring Program…." *Id*. at Bates No. 107328: "Data are initially recorded on paper data sheets and then transferred into an electronic database." Item 697, Albuquerque MS4 Permit, Bates No. 107455:

	requiring electronic submission of discharge monitoring reports, annual reports, and all other reports required under the permit.
Provision C.10.a.i, ii, and iii (Permittees shall implement trash load reduction control actions to meet the goal of 100 % or no adverse impact to receiving waters from trash by July 1, 2022; Permittees shall demonstrate attainment; mandatory minimum trash capture) **Provision C.10.b** (Permittees shall demonstrate trash reduction)	Item 693, Washington, D.C. (2011) (Permit No. DC0000221), Bates No. 107114: The permittee shall continue to ensure the implementation of a program to further reduce the discharge of floatables (e.g. litter and other human-generated solid refuse). The floatables program shall include source controls and, where necessary, structural controls. *Id.*, Bates No. 107117-107118: At the end of the first year the permittee must submit the trash reduction calculation methodology with Annual Report to EPA for review and approval. The methodology should accurately account for trash prevention/removal methods beyond those already established when the TMDL was approved, which may mean crediting a percentage of certain approaches. The calculation methodology must be consistent with assumptions for weights and other characteristics of trash, as described in the 2010 Anacostia River Watershed Trash TMDL. Annual reports must include the trash prevention/removal approaches utilized, as well as the overall total weight (in pounds) of trash captured for each type of approach. *Id.* at Section 4.4.1, Bates No. 107110: Inventory of Critical Sources and Source Controls: *Ibid.,* 4.4.1.1: The permittee shall continue to maintain a watershed-based inventory or database of all facilities within its jurisdiction that are critical sources of stormwater pollution. *Id.*, 4.4.1.3, Bates No. 107111: The permittee shall update its inventory of critical sources at least annually. *Ibid.* 4.4.2: Inspection of Critical Sources. The permittee shall continue to inspect all commercial facilities identified in Part 4.4.1. herein and any others found to be critical sources twice during the five-year term of the permit. A minimum interval of

	six months between the first and the second mandatory compliance inspection is required, unless a follow-up inspection to ensure compliance must occur sooner. *Id.*, Section 4.7.1, Bates No. 107113: The permittee shall continue to implement an ongoing program to detect illicit discharges, pursuant to the SWMP, and Part 4 of this permit, and to prevent improper disposal into the storm sewer system, pursuant to 40 C.F.R. § 122.26(d)(2)(iv)(B)(1). Such program shall include, at a minimum the following: … d. Visual inspections of targeted areas. *Id.*, Section 4.10.1, Bates No. 107117-107118, Anacostia River Watershed Trash TMDL Implementation: The permittee shall attain removal of 103,188 pounds of trash annually, as determined in the Anacostia River Watershed Trash TMDL, as a specific single-year measure by the fifth year of this permit term. *Id.*, Section 4.10.3, Bates No. 107118: Consolidated TMDL Implementation Plan requiring, where applicable, "numeric benchmarks [which] will specify annual pollutant load reductions and the extent of control actions to achieve these numeric benchmarks" and interim milestones. The plan must also demonstrate, using modeling, how goals will be attained and include a narrative explanation for the schedules and controls proposed. Item 696, Revised Monitoring Program, Bates No. 107279. Trash monitoring. Trash monitoring occurs at stormwater outfalls where trash traps have been installed during wet weather events. It will be implemented at three sites in the Anacostia Watershed, two in the Potomac Watershed, and one in the Rock Creek Watershed. A number of categories of trash are quantified and the total weight of trash from each site will be recorded. Sample collection and analysis, quality control, reporting and adaptive management are described. The information collected through trash monitoring will inform the MS4 Program

	about trends in trash accumulation and the success of trash control efforts. See also *id.*, Bates No. 107324-107328, Trash Monitoring: Reductions must be made through a combination of the following approaches: 1. Direct removal from waterbodies, e.g., **stream clean-ups,** skimmers 2. Direct removal from the MS4, e.g., catch basin clean-out, trash racks Item 670, Worcester Draft Permit, Bates No. 105700, requires the control the discharge of spills and prohibits the dumping or disposal of materials, including but not limited to industrial and commercial wastes, trash, used motor vehicle fluids, food preparation waste, leaf litter, grass clippings, and animal wastes into its MS4. *Id.,* Bates No. 105707. requires direct removal prior to entry to the MS4, e.g., street sweeping: The Permittee shall continue a street sweeping program that removes sand, sediment and debris and includes year-round (weekly or more often) main line and arterial sweeping, spring city-wide residential sweeping, fall city-wide street sweeping and leaf pick-up program. As a goal, the Permittee shall compress its spring residential sweeping schedule to maximize the quantity of material collected at the end of the winter season. The Permittee shall document results of its sweeping program including, at a minimum: curb miles swept, dates of cleaning, cubic yards of material collected, and method(s) of reuse or disposal. *Id.*, Bates No. 105701-2: Prevention through additional disposal alternatives, e.g., public trash/recycling collection *Id.* Bates No. 105709: The Permittee shall continue to inspect, maintain, and monitor the Vortechnics Model 16000 storm water treatment device installed as a demonstration project during the first permit term on the Belmont Street Drain. *Ibid.*: The Permittee shall continue to inspect, maintain, and monitor the resource restoration project at Salisbury Pond, which included the installation of hydrodynamic separators at two outfalls into the pond, to reduce nutrients and sediment from entering the pond. The project shall include public

	education elements and the tracking of pollutant removal effectiveness of the separators. The Permittee shall continue to inspect, maintain, and monitor the resource restoration project at Indian Lake, which included the installation of three hydrodynamic separators to remove sediment and nutrients from entering the Lake. The project shall also include public education elements and ongoing operation and maintenance of the separators. Item 669, NH Draft Small MS4 Permit, Bates No. 105676. Permittee required to establish procedures for management of trash containers at parks (scheduled cleanings; sufficient number), and for placing signage in areas concerning the proper disposal of pet wastes. *Id.*, Bates No. 105672Provisions for construction program to include: Requirements to control wastes, including but not limited to, discarded building materials, concrete truck wash out, chemicals, litter, and sanitary wastes. These wastes may not be discharged to the MS4. Item 701, Boise/Garden City Area MS4 Permit, Bates No. 107762: Throughout the Permit term, the Permittee must implement effective methods to reduce litter within their jurisdiction. The Permittee must work cooperatively with others, as appropriate, to control litter on a regular basis, and after major public events, in order to reduce the discharge of pollutants to receiving waters. Item 697, Albuquerque MS4 Watershed Permit, Bates No. 107438-107439 Permittee required to: "[D]evelop, update and implement a program to address and control floatables in discharges into the MS4… include[ing] source controls and, where necessary, structural controls." Develop a schedule for implementation of the program to control floatables in discharges into the MS4. Certain permittees required to "update the schedule according to the findings of [scientific studies]" Estimate the annual volume of floatables and trash removed from each control facility and characterize the floatable type. Permittee required to detail methods of compliance and "assess the overall success of the program, and document the

	program effectiveness in the annual report." *Id.,* at Bates No. 107451. Floatables material monitoring required.

F. The Supreme Court Held that the Regional Water Board's Findings Regarding Implementation of Federal Law Are Entitled to Deference.

An essential underpinning of *Department of Finance* is the Supreme Court's determination that the LA Permit had as its roots both federal and State law. The Los Angeles Water Board made no finding that the permit requirements were necessary or the only means of implementing the MEP standard.[123] Instead, the Los Angeles Water Board found only that the permit was consistent with or within the federal standard. In *Department of Finance*, the Supreme Court held that, "Had the Regional Board found when imposing the disputed permit conditions, that those conditions were the only means by which the maximum extent practicable standard could be implemented, deference to the board's expertise in reaching that finding would be appropriate."[124]

In contrast to the LA MS4 permit, when issuing MRP 2.0, the San Francisco Regional Water Board implemented *only federal law*: "The authority exercised under this Permit is not reserved state authority under the CWA's savings clause … but instead, is part of a federal mandate to develop pollutant reduction requirements for MS4. To this extent, it is entirely federal authority that forms the legal basis to establish the permit provisions."[125] Findings No. 9, 10 and 11 of the Permit and Fact Sheet Section V.C set forth the Board's regulatory basis for issuing the permit. Collectively, these findings make it clear that the Board intended to and did rely solely on federal law in issuing the Permit.[126]

The Regional Water Board understands the Supreme Court to mean that, to be entitled to deference, regional water boards must make an express finding that the particular set of permit conditions finally embodied in a given permit is required to meet that federal standard, and must support that finding with evidence. Unlike the LA MS4 permit, MRP 2.0 made specific findings demonstrating that the permit provisions were necessary to implement the maximum extent practical standard:

> The requirements of the Permit are necessary to reduce the discharge of pollutants to the MEP. The Water Board finds that the requirements of the Permit are practicable, do not exceed federal law, and thus do not constitute an unfunded mandate. These findings are the expert conclusions of the principal state agency charged with implementing the NPDES program in California (CWC sections 13001, 13370). The provisions in this to effectively prohibit non-

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123 *Dept. of Finance v. Comm'n on State Mandates, supra,* 1 Cal.5th at p. 768.

124 *Ibid.*

125 See Item 467, MRP 2.0 Fact Sheet, Bates No. 83728 (["[T]his Permit implements federally-mandated requirements under CWA section402, subdivision (p)(3)(B)") and Bates No. 83724 ("The Basin Plan's comprehensive program requirements are designed to be consistent with federal regulations (40 CFR Parts 122-124) and are implemented through issuance of NPDES permits to owners and operators of MS4s").

126 *Id.* at Bates No. 83560-83561.

> stormwater discharges are also mandated by the CWA (33 USC section 1342(p)(3)(B)(ii)).[127]
>
> [Th]e Water Board finds that the requirements in this Order are reasonably necessary to protect beneficial uses identified in the Basin Plan.[128]

As the Supreme Court held, "deference to the board's expertise in reaching that finding would be appropriate."[129]

G. The Supreme Court and Recent San Diego Mandates Decisions Have No Impact on This Permit.

Last month, the California Court of Appeal, Third Appellate District, issued its opinion in *Department of Finance v. Commission on State Mandates*, Case No. C070357 (filed December 19, 2017, 3rd Dist. Ct. App.) (2017 WL 6461994) (the "San Diego Opinion"). The San Diego Opinion conflicts with key provisions set forth in the Supreme Court's decision in *Department of Finance*. These provisions include the Court's recognition that deference is due to the Water Boards' factual findings that Permit provisions are necessary (i.e., the "only way") to meet the MEP standard, and the Court's reliance on evidence other than "federal law, regulation, or administrative case authority" to determine whether the permit provisions at issue were federal mandates.

Notably, neither the San Diego Mandates Decision nor the Supreme Court addressed critical questions here, including but not limited to (a) whether the requirement has general applicability; (b) whether the permit programs at issue are new; (c) whether the permit programs represent a higher level of service than required in previous permits; (d) whether TMDL-based provisions required by section 303(d) of the Clean Water Act are federally mandated; (e) whether requirements implementing the Clean Water Act's effective prohibition of non-stormwater discharges into the MS4 are federally mandated; and (f) whether permittees have the ability to impose fees or charges to fund the programs at issue. The Water Boards believe the San Diego Opinion was wrongly decided and are considering all options for seeking review.

IV. <u>There is No Unfunded Mandate Where the Requirement Has General Applicability.</u>

Claimant contends that the Permit requirements are unique to public entities because they arise from the operation of an MS4, which involves activities different from private non-governmental dischargers. These include "the development and amendment of government planning documents, the inspection of property, the development and construction of public work projects and other purely government functions."[130] In fact, many entities in the San Francisco Bay Region are on the Bay margin, involving potential stormwater discharges to San Francisco Bay; NPDES permits regulate those facilities.

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[127] Item 467, MRP 2.0, Bates No. 83730.

[128] *Id.*, Bates No. 83722.

[129] *Department of Finance v. Comm'n on State Mandates, supra,* 1 Cal.5th at p. 768.

[130] Test Claim p. 5.10.

In order to obtain reimbursement, the Claimants must demonstrate either that (1) the program must carry out a governmental function of providing services to the public, or (2) the requirements, to implement a state policy, implement unique requirements on local governments and do not apply generally to all residents.[131] "[T]he intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities."[132]

Reimbursement to local agencies is required only for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general applicability are not entitled to subvention because they do not "force" programs on localities.[133] The fact that a requirement may single out local governments is not dispositive; where local agencies are required to perform the same functions as private industry, no subvention is required.[134]

EPA requires both municipal and non-municipal stormwater discharges to be controlled.[135] Moreover, numerous provision of the Permit are "laws of general applicability" and therefore fail to constitute an unfunded state mandate.[136] Compliance with NPDES regulations, and specifically with stormwater permits, is required of private industry as well as state and federal government agencies. Local government is not subject to "unique" requirements. Thus, while the MRP 2.0 provisions applied only to the municipalities and counties enrolled in the permit, the substantive actions required by the Permit's provisions were by no means unique to this class of permittee.

A. Provision C.8 (Monitoring)

With respect to the monitoring requirements in Provision C.8, federal law requires *all* NPDES permits to include monitoring "sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring."[137] In keeping with this requirement, the monitoring obligations in Provision C.8 are common to non-municipal NPDES permittees in the Bay Area. For instance, Provision C.8.b, which provides for contribution to the Regional

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[131] Cal. Const. Art. XIIIB, § 6, subd. a; see also *City of Richmond v. Comm'n on State Mandates* (1998) 64 Cal.App.4th 1190, 1199.

[132] *San Diego Unified School Dist.* v. *Comm'n on State Mandates*, *supra*, 33 Cal.App.4th at p. 874.

[133] *Id.* at p. 875; *County of Los Angeles v. State of California, supra,* 43 Cal.3d at pp. 56-57.

[134] *Ibid.; City of Richmond v. Comm'n on State Mandates, supra,* 64 Cal.App.4th at p. 1197 ("[a]lthough a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable mandate"); *County of Los Angeles v. State of California, supra*, 43 Cal.3d at pp. 50-51 ("the drafters and the electorate had in mind subvention for the expense or increased cost of programs administered locally and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities").

[135] 40 C.F.R. § 122.26, subd. (a)(vi)(6).

[136] See *City of Richmond v. Comm'n on State Mandates, supra,* 64 Cal.App.4th at pp. 1197-1198.

[137] 40 C.F.R. § 122.48, subd. (b).

Monitoring Program or equivalent regional monitoring networks, is not limited to municipal dischargers.[138] The current San Francisco Bay Mercury Watershed Permit allows industrial and municipal wastewater dischargers to participate in the Regional Monitoring Program.[139] Pollutants of concern identification and monitoring akin to Provision C.8.e is not unique to municipalities but also required in individual NPDES permits.[140] Similarly, both general and individual NPDES permits also require electronic reporting, as required in Provision C.8.h.[141]

B. Provision C.10 (Trash)

The prohibition against discharging any solid waste and floating materials, including trash, is applied to many types of non-municipal NPDES permittees, as a refinement of the general prohibition on non-stormwater discharges.[142] In most circumstances outside of the municipal stormwater context, strict compliance is required, and dischargers are not permitted to achieve zero discharge over time. The Permit is thus generally applicable, but *less* stringent than individual permits.

C. Provisions C.11.f and C.12.f (TMDL Implementation)

Provisions C.11.f and C.12.f, which require Permittees to conduct pilot feasibility studies to divert mercury and PCBs, respectively, to public treatment works, implement the mercury and PCBs TMDLs in the San Francisco Bay. In addition to being mandated by federal law, these two provisions are also generally applicable to entities aside from local agencies.[143] The Mercury TMDL has wasteload allocations for stormwater runoff, wastewater from refineries and other industrial dischargers, and publicly-owned treatment works, while the PCBs TMDL has

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[138] See Item 711, San Francisco Bay Regional Water Quality Control Board, Reso. No. 92-043 (*Implementation of the Regional Monitoring Program within the San Francisco Bay Region*) (resolving to suspend monitoring requirements for permitted dischargers that allocate resources to the RMP), Bates No. 108366-108368. See also Item 712, Bates No. 108369 et seq., Order No. R2-2006-0029 (*USS-POSCO*) (individual NPDES permit requiring steel processor to participate in RMP); Item 715, Bates No. 108796, Order No. R2-2007-0077 (Mercury Watershed Permit) (recommending participation in RMP); see also Item 687, Mercury TMDL Staff Report, Bates No. 106871 (describing RMP), 106878 (describing utility of RMP), 106879 (RMP data is important in determining whether TMDL load allocations will reduce mercury concentrations in fish tissue); 106900 (RMP data guides adaptive management and implementation of TMDL).

[139] Item 722, Order No. R2-2012-0096, Bates No. 109905.

[140] See, e.g., Item 712, Order No. R2-2006-0029 (*USS-POSCO*), Bates No. 108382-108383 (requiring steel processor to identify types of pollutants of concern, sources and methods of reduction, and effectiveness of such methods); see also Item 713, Order No. R2-2006-0035 (*Chevron*), Bates No. 108545, 108549 (describing requirement for Chevron to conduct ambient background monitoring and specifying representative location).

[141] See, e.g., Item 707, 2009 Construction General Permit (CGP), Bates No. 107908, 107916, 107831-107933, 107960, 107965, 107969; Item 718, Schnitzer Steel, Order No. R2-2016-0045, Bates No. 109126.

[142] See, e.g., Item, 707, 2009 CGP, Bates No. 107961 (prohibition on discharge of debris, defined as “litter, rubble, discarded refuse, and remains of destroyed inorganic anthropogenic waste”); Item 710, Bay Ship & Yacht, Order No. 2005-0039, Bates No. 108320 (prohibitions on discharge of “solid materials and solid wastes” and “floating oil or other floating material”); Item 718, Schnitzer Steel, Order No. R2-2016-0045, Bates No. 109087 (prohibition on discharge of “untreated stormwater… or waste materials” including “rubbish, refuse, or debris”); Bates No. 109094 (requiring Water Pollution Prevention Plan to identify the activities that generate refuse and debris, “locations where these materials may accumulate, source types and characteristics”); Bates No. 109096 (requiring all debris and waste to be cleaned up and disposed of properly).

[143] See generally Items 685 (PCBs TMDL Staff Report_ and 687 (Mercury TMDL Staff Report)..

wasteload allocations for industrial wastewater discharges, municipal discharges, stormwater, and the Central Valley watershed.[144]

> The stormwater runoff allocations implicitly include all current and future permitted discharges, not otherwise addressed by another allocation, and unpermitted discharges within the geographic boundaries of urban runoff management agencies including, but not limited to, *California Department of Transportation (Caltrans) roadway and non-roadway facilities and rights-of-way*, atmospheric deposition, public facilities, *properties proximate to stream banks, industrial facilities, and construction sites*."[145]

Under both TMDLs, municipalities managing stormwater have comparable obligations to those of Caltrans[146] or industrial facilities managing wastewater and/or stormwater to identify and reduce their discharges of mercury and PCBs.[147] Caltrans' responsibility for reducing stormwater discharges demonstrates that the TMDL requirements were not targeted at local municipalities alone. To the contrary, responsibility for TMDL compliance lies with all the entities discharging the relevant pollutant, whether the entities are public or private, state or local.[148] In the case of the PCBs and Mercury TMDLs, local, state, and private entities were all required to reduce their discharges of PCBs and mercury.[149] With respect to reducing mercury in stormwater specifically, shuttered mines, whether privately or publicly owned, share responsibility for implementing control actions with municipal agencies.[150] Similarly, Caltrans, industry, developers, and municipal stormwater agencies bear responsibility for reducing PCBs in stormwater.[151]

Industrial and municipal wastewater dischargers, including one federal facility, meanwhile, are subject to a mercury and PCBs watershed NPDES permit.[152] Under this permit, similar to

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[144] See Item 687, Mercury TMDL Staff Report, Bates No. 106882-106884; Item 685, PCBs TMDL Staff Report, Bates No. 106600-106601.

[145] See Item 685, PCBs TMDL Staff Report, Bates No. 106609 (emphases added).

[146] The Mercury TMDL contemplated that various provisions would be added to NPDES permits as a result of the TMDL, including investigations and reporting regarding mercury contamination; mercury source control program; monitoring; fate and transport studies; allocation-sharing with Caltrans; annual reporting; compliance with loadings via pollution prevention, source control, and treatment. (Item 687, Mercury TMDL staff report, Bates No. 106929.) Caltrans was subject to similar requirements as those imposed in MRP 2.0. (Item 708, Caltrans permit, Bates No. 108187.)

[147] See Item 687, Mercury TMDL Staff Report, Bates No. 106885-106886, 106890; Item 685, PCBs TMDL Staff Report, Bates No. 106608 (wasteload allocations for municipal and industrial dischargers would be implemented through BMPs); Bates No. 106610 (diversion of dry and/or wet weather flows to POTWs "should be investigated, pilot-tested, and implemented where feasible").

[148] Item 686, Basin Plan, Bates No. 106694 – 106703 (mercury sources); 106712 – 106716 (PCB sources); See also the Mercury and PCBs watershed permit, Item 722, Order No. R2-2012-0096, Bates No. 109834, which directs compliance for municipal and industrial wastewater facilities.

[149] Item 686, Basin Plan, Bates No. 106712 – 106713 (Sources of PCBs required to implement wasteload reductions); Bates No. 106694-106703 (listing sources of mercury and methylmercury).

[150] Item 686, Basin Plan, Bates No. 106702.

[151] *Id.* Bates No. 106713-106714; Item 722, Order No. R2-2012-0096, Bates No. 109835-109841 (listing permittees).

[152] Item 722, Order No. R2-2012-0096, Bates No. 109835-109841 (listing permittees).

(footnote continued on next page)

stormwater agencies, wastewater dischargers are required to achieve stringent load reductions. To achieve these, they must not only achieve effluent limitations, but must implement source control programs to reduce the amount of PCBs and mercury entering their treatment systems.[153] NPDES permits in the Bay Area impose requirements of feasibility studies akin to the requirements in C.11.f and C.12.f.[154]

V. The Permit Is Consistent With Federal Law; It Does Not Require a New Program or Higher Level of Service.

Section 6 of article XIII B of the California Constitution states, "[w]henever 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 program or increased level of service…." In this case, the contested provisions of the Permit are not new programs or higher levels of service, and in some cases were proposed by the permittees.[155]

A. MRP 2.0 Is a Continuation of the 2009 MRP, Not a New Program.

Claimant suggests that federal law did not compel the contested provisions, "because the State's NPDES program is undertaken on a voluntary basis" and "the State was not compelled to operate its own permitting system. . . Accordingly, the regional board's exercise of a 'true choice' constitutes a state mandate of costs associated with the contested permit provisions." [156] Contrary to Claimant's statements, federal law compels the adoption of MRP 2.0. "[T]he Clean Water Act requires an NPDES permit to be issued for *any* storm sewer discharge, whether there is any actual impairment in a particular region."[157]

The Clean Water Act requires municipalities to apply for an NPDES permit that must meet various federally mandated requirements. The state's "choice" to administer the program in lieu of the federal government does not alter the federal requirements on municipalities. If California had not decided to administer the NPDES program, Permittees would still receive a permit from U.S. EPA. As shown in the table above, a permit issued by U.S. EPA would contain the very

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(footnote continued from previous page)

[153] Item 722, Order No. R2-2012-0096, Bates No. 109849-109858 (effluent limitations and discharge specifications).

[154] See Item 714, Order No. R2-2007-0032 (*C&H Sugar*), Bates No. 108700-108701 ; Item 715, R2-2007-0077 (*Mercury Watershed Permit*), Bates No. 108823-108824 (requiring both industrial and municipal dischargers to provide description of source control projects, including estimates of avoided mercury loading achieved by recycling water).

[155] The Regional Water Board has previously briefed this matter with respect to the 2009 MS4 permit, which had similar requirements. See 2011 Response, pp. 25-27 (prior permits include management plans, monitoring programs and annual reports that demonstrate permittees had already implemented numerous provisions); pp. 30-42 (Provision C.8 does not require new programs or higher levels of service); 49-53 (Provision C.10 does not require new programs or higher level of service); 55-56 (Provisions C.11 and C.12 do not require new programs or higher level of service); 59-63 (Provision C.2 does not require new programs or higher levels of service). See also December 20, 2016 Brief at pp. 4-6.

[156] Test Claim, p. 5.9.

[157] *City of Rancho Cucamonga v. Regional Water Quality Control Bd. – Santa Ana Region* (2006) 135 Cal.App.4th 1377, 1386.

same substantive requirements as MRP 2.0. In its role in issuing NPDES permits to dischargers, the Regional Water Board must implement the regulatory requirements U.S. EPA has established for state permitting agencies.[158]

A program is defined as "a program which carries out the 'governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.'"[159] A program is "new" if the local government had not previously been required to institute it. (*Ibid*.) Here, even if each of the challenged provisions could be considered a "program," none meets this definition of "new." Permittees had been permitted under the NPDES program for more than two decades at the time the 2015 MRP was adopted.[160] Permittees' prior permits contained requirements for implementing mercury and PCBs TMDLs and implementing trash reduction activities which would result in a zero trash load by 2022.[161] EPA recognized and supported the evolution of permit terms based on permittees' successes in earlier permit terms and lessons learned by the agency.[162]

1. Provisions Implementing Mercury and PCBs TMDLs Predate MRP 2.0.

Description of phased implementation belies that this is a new program. The Mercury and PCBs TMDLs and their implementation plans were approved by EPA in 2008 and 2010, respectively, predating MRP 2.0 by a substantial amount of time. Both TMDLs envisaged that achievement of the required load reductions would take approximately 20 years, or four 5-year NPDES permit cycles. As one example, the PCBs TMDL anticipated that requirements would be refined and strengthened over two decades[163] as more information was gathered:

> These BMPs and control measures are expected to be implemented in phases as NPDES permits are issued and reissued. In the first five-year permit term, stormwater permittees will be required to implement control measures on a pilot scale to determine their effectiveness and technical feasibility…. The second five-year term permit requirements will be based on the knowledge gained during the first permit term and will call for strategic implementation of the BMPs and control measures identified as effective and that will not cause significant adverse environmental impacts based on the pilot studies conducted during the first permit term. The second term permit will also require development of a plan

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[158] 40 C.F.R. § 123.25.

[159] *County of Los Angeles v. Comm'n on State Mandates* (2003) 110 Cal. App.4th 1176, 1189 (citing *County of Los Angeles v. State of California* (1987) 43 Cal. 3d 46, 56).

[160] See Item 467, MRP 2.0, Bates No. 83559-83560; Item 721, 2009 MRP, Bates No. 109547-109548(listing prior permits for all municipalities) and Bates No. 109681-109684 (prior permits include management plans, monitoring programs and annual reports that demonstrate permittees had already implemented numerous provisions).

[161] See 2011 Response, pp. 30-42 (C.8); 49-53 (C.10); and 55-56 (C.11 and C.12).

[162] Item 729, U.S. EPA Letter to SF Water Board, Bates No. 110608.

[163] Item 686, Basin Plan, Bates No. 106717 (PCB stormwater allocations to be implemented by urban runoff management agencies and Caltrans over a 20-year implementation period).

> to fully implement control measures that will result in attainment of allocations, including an analysis of costs, efficiency of control measures and an identification of any significant environmental impacts. Subsequent permits will include requirements and a schedule to implement technically feasible, effective and cost efficient control measures to attain allocations. If as a consequence, allocations cannot be attained, the Water Board will take action to review and revise the allocations and these implementation requirements as part of adaptive implementation.[164]

The implementation program for stormwater entities anticipated that the second permit (the challenged MRP 2.0) would include broadly applicable requirements that reflected the results of pilot testing and any other new information gathered during the permit term[165]. Anticipated implementation actions to reduce mercury in stormwater included: source and treatment controls and management methods, while anticipated implementation actions for PCBs included: technologies to filter or treat stormwater, increased use of routine maintenance BMPs, industrial inspections to identify and direct removal PCBs-containing equipment, and a program to control demolition waste[166]. These expected categories of implementation actions mirror the terms of the current permit.

The program under which the green infrastructure and other TMDL requirements were included in the permit was not new in 2015. Permittees had been aware of the required load reductions since adoption of the TMDLs in 2008. They had had the opportunity to participate, and did participate, in TMDL development. The Santa Clara Valley Urban Runoff Prevention Program's input directly informed the cost analysis by the Regional Water Board for the Mercury TMDL.[167] Permittees were also aware that achievement of load allocations would be challenging,[168] and that permit terms would become more stringent as the twenty-year implementation deadline approached. Furthermore, they had participated actively in pilot green infrastructure projects and discussions about how to "scale up" over the course of the entire term of the 2009 permit.[169] If Permittees were concerned that the TMDLs imposed unfunded state mandates then they should have challenged them on such grounds. Because they did not do so, their collateral attack on the TMDL allocations by way of the MRP 2.0 provisions, is not timely.[170]

Accordingly, the Permit provisions cannot be viewed in isolation, but instead in the context of the TMDL adoption and implementation as a whole. Viewed in this way, the green infrastructure

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[164] Item 685, PCBs TMDL Staff Report, Bates No. 106610-106611.

[165] Item 686, Basin Plan, Bates No. 106703.

[166] Item 685, PCBs TMDL Staff Report, Bates No. 106609-106611.

[167] Item 687, Mercury TMDL Staff Report, Bates No. 106898.

[168] Item 686, Basin Plan, Bates No. 106717.

[169] See generally Steering Committee Minutes (Items 195-208), Green Infrastructure Workgroup Minutes (Items 378-385, starting at Bates No. 37460), POC Workgroup Minutes (Items 386-390, starting at Bates No. 37543). See also, footnote 71, *supra.*

[170] Cal. Code Regs., tit. 2, § 1183.1, subd. (c).

provisions are not a new program at all, but the continuation of a program that had been ongoing for the better part of a decade by the time the Board adopted MRP 2.0.

2. The MRP 2.0 Trash Provisions Are a Continuation of the Prior Permit.

Similarly, the schedule for trash reduction activities is not new. As discussed above, Clean Water Act and Basin Plan have prohibited the discharge of trash into receiving waters for decades. Both the 2009 MRP and MRP 2.0 required reduction of trash to zero load by the year 2022.

> The Permittees shall demonstrate compliance with Discharge Prohibition A.2 and trash-related Receiving Water Limitations through the timely implementation of control measures and other actions to reduce trash loads from municipal separate storm sewer systems (MS4s) by 40% by 2014, 70% by 2017, and 100% by 2022 as further specified below.[171]
>
> Permittees shall implement trash load reduction control actions in accordance with the following schedule and trash generation area management requirements, including mandatory minimum full trash capture systems, to meet the goal of 100 percent trash load reduction or no adverse impact to receiving waters from trash by July 1, 2022.[172]

Claimant concedes that the 2009 MRP "stated that Permittees must achieve phased annual reductions in trash loading culminating in 100 percent by 2022."[173] MRP 2.0 does not change that expectation.

Claimant also suggests that the 2009 MRP had goals whereas MRP 2.0 has enforceable deadlines, claiming that this distinction "constituted a new program."[174] In fact, this is a distinction without a difference. As a general practice, NPDES permits will not contain requirements that go beyond the five-year term of the permit. The indented language above belies any claim that Claimant

B. MRP 2.0 Does Not Mandate a Higher Level of Service.

The changes to the requirements of prior permits (e.g. increased detail or specificity) are also not a higher level of service, both because equivalent changes are applicable to non-municipal permittees, as discussed above, and because they are merely refinements of existing requirements.[175] A higher level of service is not simply any increase in costs. "If the Legislature had intended to continue to equate 'increased level of service' with 'additional costs,' then the

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[171] Item 721, 2009 MRP, Provision C.10, Bates No. 109635-109638.

[172] Item 467, MRP 2.0, Provision C.10.a, Bates No. 83655-83657.

[173] Test Claim, p. 5.12.

[174] *Ibid.*

[175] See *County. of Los Angeles v. Comm'n on State* Mandates (2003) 110 Cal.App.4th 1176, 1189-1190.

provision would be circular: 'costs mandated by the state' are defined as 'increased costs' due to an increased level of service, which, in turn would be defined as 'additional costs.'"[176] Additional costs do not equal "every increase in a locality's budget resulting from compliance with a new state directive."[177] Nor does every increase in specificity about where to direct costs amount to a higher level of service.[178]

Rather, the costs incurred must involve programs previously funded exclusively by the state.[179] The "state must be attempting to divest itself of its responsibility to provide fiscal support for a program, or forcing a new program on a locality for which it is ill equipped to allocate funding."[180]

In this case, any costs arising from the Permit's requirements do not result from a "new" program. Nor do they result from a "higher level of service," because the State has not shifted its own responsibilities to local agencies and the permittees are not "ill-equipped" to allocate funding to stormwater control. As described in the 2011 Response, the permittees' own documentation indicates that they have always been responsible for maintaining their trash collection services, storm drain system, etc.[181] Moreover, in rebutting the Regional Water Board's arguments that the challenged provisions impose a higher level of service, claimants do not contend that the state has shifted any costs to local government or that they have been saddled with entirely new obligations to control pollution in stormwater.[182] Without any burden shifting from the state to municipalities, mere direction from the Regional Water Board that the municipalities reallocate some of their resources in a particular way does not amount to a higher level of service.[183] "Loss of flexibility does not, in and of itself, require the [local agencies] to expend funds that previously had been expended by the State."[184]

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[176] See *County. of Los Angeles v. Comm'n on State* Mandates (2003) 110 Cal.App.4th 1176, 1191.

[177] *Id.* at p. 1194; accord *San Diego Unified School Dist. v. Comm'n on State Mandates* (2004) 94 Cal.4th 859, 876-877.

[178] See *Id.*, at p. 1194 (requiring that local law enforcement agencies devote some of their training budgets to domestic violence training was not higher level of service).

[179] See *City of San Jose v. State of California* (1996) 45 Cal. App.4th 1802, 1812 (citing *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836); see also *County of Sonoma v. Comm'n on State Mandates* (2000) 84 Cal. App.4th 1264, 1288 (state law requiring reallocation of school funds from one local government entity to another, where local government generally had always had a substantial role in funding schools, did not impose a higher level of service).

[180] See *County of Los Angeles v. Comm'n on State Mandates, supra,* 110 Cal.App.4th at p. 1194; accord *Dept. of Finance v. Comm'n on State Mandates, supra,* 1 Cal.5th at p. 771 (agreeing that state had shifted responsibility for some industrial inspections to local government agency).

[181] See 2011 Response, pp. 25-27 (general); 30-42 (C.8); 49-53 (C.10); 55-56 (C.11 and C.12). The 2011 Response describes, in detail, the provisions of the prior permits that are equivalent to Provisions C.8.b (pp. 30-31), C.8.c (pp. 31-33), C.8.d (pp. 33-35), C.8.e (pp. 35-38), C.8.f (pp. 38-39), C.8.g (pp. 39-40), C.8.h (pp. 40-42), C.10.a (pp. 49-51); C.10.b (pp. 51-52); C.10.c (p. 53); C.10.d (p. 53), C.11.f and C.12.f (pp. 55-56).

[182] See Written Rebuttal Comments to Response to Test Claims 10-TC-01 and 10-TC-02 (Sept. 16, 2011), at pp. 10-11.

[183] See *County of Los Angeles v. Comm'n on State Mandates, supra,* 110 Cal.App.4th at p. 1194.

[184] *Ibid.;* accord *Dept. of Finance v. Comm'n on State Mandates* (2003) 30 Cal.App.4th 727, 748 (requirement that school districts allocate some of their grant funds in a particular way did not transform those costs into a reimbursable state mandate).

As documented in the 2011 Response, many program components, and their associated costs, existed before the MRP 2.0 was issued and many of the Permit's terms were proposed by Permittees. In addition, reported program costs are not all attributable to compliance with the MRP 2.0. For example, the Alameda Stormwater Quality Management Plan (1996-2001 Plan) documents involvement in the regional monitoring program and numerous other monitoring efforts in place as of 1996/97.[185] The 2001-2008 Alameda Stormwater Management Plan reflects the "use of street sweeping to remove potential pollutants prior to their being flushed into local creeks and the bay. All of the municipalities report their street sweeping and storm drainage cleaning activities on a standardized monthly form."[186]

1. TMDL Compliance Requirements Do Not Impose a Higher Level of Service

The evolution of permit conditions to reflect better information and require more effective pollution control does not, *ipso facto*, mean that the new permit terms require a higher level of service. The level of service of the TMDL is the load allocation, which was set at the time of the adoption of the TMDLs in 2008 and 2010. The Mercury TMDL recognized that the 50% load reduction for municipal stormwater permittees from 160kg to 82 kg of mercury/year was not achievable immediately, particularly given scientific uncertainty about the best control methods.[187] Similarly, while identifying the types of actions municipal stormwater permittees would have to take to reduce PCB loadings, the staff report acknowledged that it would take time to evaluate and refine these mechanisms to determine which were successful.[188] The terms of successive permits are all designed to achieve the original load allocations – that is, the original level of service, not to achieve additional reductions beyond what the TMDL requires.[189]

2. Trash Provisions Do Not Require a Higher Level of Service.

Claimant protests the addition of an 80% milestone in the Trash Provision,[190] but that milestone does nothing to change the consistent schedule and expectation in both the 2009 MRP[191] and MRP 2.0[192] that Permittees reduce trash loading to zero or a no adverse impact by 2022. Achievement of this interim milestone is the type of specificity or additional detail –

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[185] Item 719, Alameda Stormwater Management Plan (1996-2001), Bates No. 109251-109256, 109298-109300.

[186] Item 720, Alameda Stormwater Management Plan (2001-2008), Bates No. 109449.

[187] Item 687, Mercury TMDL Staff Report, Bates No. 106880; Item 686, Basin Plan, Bates No. 106703-106704.

[188] Item 686, Basin Plan, Bates No. 106716-106717.

[189] E.g., Item 686, Basin Plan, Bates No. 106716-106717; see also Item 729, U.S. EPA Letter to SF Water Board, Bates No. 110608.

[190] Test Claim, p. 5.14

[191] Item 721, 2009 MRP, Bates No. 109635.

[192] Item 467, MRP 2.0, Bates No. 83655.

inconsequential in the scheme of the overall timetable – that courts have declined to find constitutes a higher level of service.[193]

Claimant further argues that because specific provisions were not in the prior permit, they are new or higher levels of service, even though Claimant had already undertaken those services – e.g. had a plan in place for trash.[194] But the fact that Claimant was *already performing* those services, in accordance with City plans or policies, means there is nothing *new*; there is no new cost to Claimant beyond what it had previously incurred for the same services.[195] Under these circumstances, there is no new program or higher level of service for which the State shifted responsibility.

Claimant argues that Provision C.10.b "specifies detailed full trash capture system installation and maintenance instructions, which are more prescriptive, burdensome and costly than MRP1 to fulfill."[196] Such a claim is disingenuous given Claimant's simultaneous acknowledgement that MRP1 "required Permittees to install and maintain full trash capture devices."[197] Similarly, Petitioners' claim that they are required to implement full-trash capture devices is misleading.More accurately, they have concluded it is the most cost-effective of multiple options: "compliance by means of Other Trash Management Actions (meaning non-full trash capture systems) has become so burdensome and costly that Union City has determined installation of full trash capture systems is the least costly compliance option."

Finally, Claimant makes various arguments concerning the need to purchase a vactor truck, which it concedes it already had.[198] Maintaining full trash capture devices was a requirement of the 2009 MRP, however, and is not a new requirement in MRP 2.0.[199] Specifying timeframes for cleaning the trash capture devices is another example of the type of specificity, additional inconsequential detail, that the *County of Los Angeles* case found was not a higher level of service.[200] A less frequent cleaning schedule would not meet the requirement, dating from the 2009 MRP, to maintain trash capture devices.[201]

Finally, Claimant provides a laundry list of activities it has undertaken to comply with the trash reduction requirements.[202] MRP 2.0 does not specify any of these actions.[203] These are

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[193] See *County. of Los Angeles v. Comm'n on State Mandates* (2003) 110 Cal.App.4th at p. 1194.

[194] Test Claim, pp. 5-7.

[195] *County of Los Angeles v. Comm'n on State Mandates, supra,* 110 Cal. App.4th at pp. 1189 (no new program) and 1193 (limited to programs previously funded exclusively by the state).

[196] Test Claim, p. 5.12.

[197] *Ibid.* See also Item 721, 2009 MRP, Provision C.10.a.iii, Bates No. 109636 (requiring full trash capture installation and maintenance).

[198] Test Claim, pp. 5.13-5.14.

[199] See Item 721, 2009 MRP, Provision C.10.a.iii, Bates No. 109635-109636.

[200] *County. of Los Angeles v. Comm'n on State* Mandates (2003) 110 Cal.App.4th at p. 1194.

[201] Item 721, 2009 MRP, Provision C.10.a.iii, Bates No. 109636.

[202] Test Claim, p. 5.14.

activities Claimant independently decided it would undertake to reduce trash loading; not requirements in the permit. Other options were available to Claimant, such as enforcing existing littering laws, to get to the next trash reduction goal. MRP 2.0 provided a flexible framework for Permittees to design their own programs to meet the trash reduction levels fundamentally required by the Clean Water Act.

VI. CONCLUSION

The evidence does not support any of the four factors that must *all* be proven for Claimant to prevail. Not only has the Legislature reaffirmed and reiterated that municipalities are able to raise fees for all costs associated with implementing the Permit, but the evidence is that Claimant and other Permittees have done just that. The NPDES permit program is an environmental protection program that applies to all dischargers – municipal and non-municipal alike – in the Bay Area. Non-municipal permittees throughout the Bay Area are subject to the same requirements as the contested provisions here. Finally, Claimant's own papers admit that numerous provisions were already required in past permits; the contested provisions are not a new program or higher level of service. Under these facts, the Commission should reject the Test Claim.

Respectfully submitted,

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(footnote continued from previous page)

[203] See Item 467, MRP 2.0, Provision C.10.

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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 February 9, 2018, I served the:

- **SFRWQCB Late Comments on the Test Claim filed February 1, 2018**
- **Administrative Record on Order No. R2-2015-0049, California Regional Water Quality Control Board, San Francisco Bay Region, (Volumes I-VIII) filed February 1, 2018**

  California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2015-0049, 16-TC-03
  City of Union City, Claimant

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 February 9, 2018 at Sacramento, California.

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Commission on State Mandates
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 12/21/17

Claim Number: 16-TC-03

Matter: California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2015-0049

Claimant: City of Union City

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