California Water Boards

Edmund G. Brown Jr.
Governor

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Secretary for Environmental Protection

State Water Resources Control Board

August 15, 2018

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

Via Drop Box

Subject: San Francisco Bay Regional Water Quality Control Board Response to Test Claim 17-TC-04

Dear Ms. Halsey:

The San Francisco Bay Regional Water Quality Control Board (San Francisco Bay Water Board) files this response to Test Claim 17-TC-04.

I certify and declare under penalty of perjury under the laws of the State of California that the attached is true.

Sincerely,

Tamarin Austin
Attorney IV

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INTRODUCTION

Test Claim 17-TC-04 arises from a single permit issued by the San Francisco Bay Water Board as Waste Discharge Requirements and Clean Water Act Water Quality Certification (Permit). The Permit authorized the U.S. Army Corps of Engineers (Corps) and Santa Clara Valley Water District (District) to construct the Upper Berryessa Creek Flood Control Project (Project). The Project involved excavating portions of a reach of Upper Berryessa Creek, filling sections with riprap and concrete. The Project resulted in a trapezoidal, rock-lined channel, a design that the Corps' own permitting section views with disapprobation and the San Francisco Bay Water Board discourages because it destroys and discourages beneficial uses of that waterway by wildlife and the public. The Permit also authorized ongoing operations and maintenance of the channel and, due to the impacts from construction and ongoing maintenance of the Project, required mitigation and monitoring for impacts. The District filed the Test Claim seeking reimbursement of costs for only the offsite mitigation requirements in Provision B.19 of the Permit.

Reimbursement is only available if the requirement constitutes a new program or higher level of service and only if either (1) the program carries 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. If the claimant requests the regulation; if costs are mandated by federal law; or if the claimant has authority to levy charges, fees or assessments to pay for permit implementation, the Commission may not grant reimbursement. The District fails to meet any of these tests.

In this case, the Corps and the District could not have constructed a flood control project in a water of the United States (like Upper Berryessa Creek) without a water quality certification issued pursuant to Section 401 of the Clean Water Act. The San Francisco Bay Water Board cannot issue water quality certification for a dredge and fill project unless the project complies with water quality standards which protect the beneficial uses designated for the impacted water body. Under federal and State laws, when a project has permanent impacts to aquatic resources in waters of the United States, the project proponent must first avoid or minimize these impacts, and only then will an authorizing agency consider whether additional "compensatory" mitigation is necessary to address any impacts that remain after avoidance and minimization. Ensuring there is "no net loss" to aquatic resources is a requirement of both federal and State laws. In this case, the water quality standards requiring compensatory mitigation are the San Francisco Bay Water Quality Control Plan's (Basin Plan's) Antidegradation Policy, Basin Plan Prohibitions, Dredge and Fill and Wetland Protection Policies, No Net Loss Policy, and the United States Environmental Protection Agency (U.S. EPA) guidelines on dredge and fill procedures. The type of mitigation required in the Permit mirrored similar requirements in other permits issued by the San Francisco Bay Water Board to the District and the District has recently complied with

the contested provision by proposing as mitigation a capital improvement project that has been in its queue of projects since at least 2014.

The District may not seek reimbursement because it chose to seek the Permit and has the ability to comply with the mitigation requirements through means other than raising taxes.[1] Mitigation is required by federal law, which applies to all project proponents - both public and private - and is a requirement attached to every dredge and fill project with permanent impacts authorized by the San Francisco Bay Water Board. Dredge and fill projects for flood control purposes (and the associated mitigation requirements) are not peculiarly governmental, nor is it a new program or higher level of service. Federal laws and regulations requiring mitigation date back to the 1970s and the Board has issued numerous prior permits to the District requiring mitigation similar to that required in the contested Permit. For each of these reasons, the Commission should decline the District's request for subvention.

The following Statutory Background provides the legal backdrop for the authorities requiring mitigation in the Permit for the Project. Each of the authorities discussed in the Statutory Background section provide context for the following sections which will describe the Factual Background of the Project and permitting process and Argument describing why the District is ineligible for subvention.

I. STATUTORY BACKGROUND

A. Clean Water Act Sections 401 and 404

In 1972, Congress enacted the Federal Water Pollution Control Act, commonly known as the Clean Water Act.[2] The goal of the Clean Water Act is "to restore and maintain the chemical,

[1] There are a number of claimed costs that do not meet the requirement that costs be "reasonably necessary activities required to comply with the mandate." (Cal. Code Regs., tit. 2, § 1183.7.) For example, the District identifies communications with Staff concerning the Almaden Lake project as a cost associated with compliance. (Test Claim, at pp. 15-16.) Their own documents, however, demonstrate that the Almaden Lake project has been in their queue since 2014. (Bates TC-000001, NOP, State Clearinghouse No. 2014042041 and TC-000488-TC-000493 [District website noting the start date as FY 2014].) It is unclear how communications to plan and implement the Project are "reasonably necessary activities required to comply with the mandate," when the District began planning and developing the Project prior to the San Francisco Bay Water Board's adoption of the Permit. This is but one example of the types of questions concerning costs that are not briefed here and should be resolved at the Parameters and Guidelines (P&G) stage. (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 San Francisco Bay Water Board respectfully requests an opportunity to do so.

[2] 33 U.S.C. § 1251 *et seq.*

physical, and biological integrity of the Nation's waters."[3] The Clean Water Act generally prohibits discharges into waters "except in compliance with one of several statutory exceptions."[4]

Clean Water Act Section 404 establishes a permitting program, managed by the Corps, to regulate dredge and fill projects for the purpose of ensuring that associated discharges do not impair the chemical, physical, and biological integrity of waters of the United States.[5] The Corps has discretion over whether to issue a permit, but may not approve dredge and fill projects unless the applicant provides the Corps with a water quality certification, as required by Clean Water Act section 401.[6]

The two key provisions of Section 401 are section (a)(1), which requires an applicant for a Section 404 permit to obtain a water quality certification, and section (d), which dictates what the issuing entity must include in the water quality certification:

> (a)(1) Any applicant for a Federal license or permit to conduct any activity ... which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate...that any such discharge will comply with the applicable provisions of sections 301 [effluent limitations], 302 [water quality related effluent limitations], 303 [water quality standards and implementation plans], 306 [national standards of performance] and 307 [toxic and pretreatment effluent standards] of this title. No license or permit shall be granted until the certification required by this section has been obtained or has been waived... No license or permit shall be granted if certification has been denied by the State....
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> (d) Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this title, standard of performance under section 306 of this title, or prohibition, effluent standard, or pretreatment standard under section 307 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall

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[3] 33 U.S.C. § 1251, subd. (a); see *Arkansas v. Oklahoma* (1992) 503 U.S. 91, 101, (*Arkansas*). "Waters of the United States" definitively includes waterways, tidal waters, tributaries up to the high tide line, and wetlands adjacent to such waters. (40 C.F.R. § 230.3, subd. (o); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001) 531 U.S. 159, 167; *Rapanos v. United States* (2006) 547 U.S. 715, 779-780.)

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

[5] 33 U.S.C. § 1344 and 40 C.F.R. 230.1 ("Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact....").

[6] 33 U.S.C. § 1341.

become a condition on any Federal license or permit subject to the provisions of this section.

The United States Supreme Court has validated the propriety of water quality certifications required by Clean Water Act Section 401:

> [T]he requirement for a state certification applies ... to all federal licenses and permits for activities which may result in a discharge into the Nation's navigable waters. [A] permit must be obtained from the Army Corps of Engineers for the discharge of dredged or fill material....[7]

The San Francisco Bay Water Board is the responsible agency who provides water quality certifications for dredge and fill projects in the San Francisco Bay region.[8] The State Board has determined that discharges "produced by dredging or filling operations" involving "the discharge of earth, rock, or similar solid materials" are properly regulated by water quality certifications and WDRs.[9] The State Board reasoned that such regulation is necessary because:

> Discharges of fill can directly or indirectly destabilize the channel or bed of a receiving water by changing geomorphic parameters, including hydrologic characteristics, sediment characteristics, or stream grade. Such destabilization diminishes the ability of the water body to support designated beneficial uses.[10]

As the United States Environmental Protection Agency (U.S. EPA) explains in the "Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool For States and Tribes," (EPA Handbook), the Corps does not process a permit for its own dredge and fill activities (like the Project at issue here) pursuant to Clean Water Act section 404 but, like any other dredge and fill permittee, will still apply for Section 401 water quality certification.[11] This practice is codified in the Code of Federal Regulations.[12]

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[7] *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (1994) 511 U.S. 700, 722–723 (*Jefferson County*).

[8] 40 C.F.R. § 131.4 (States may issue certifications pursuant to the requirements of Clean Water Act Section 401). Bates 015237.002-015237.005, Basin Plan Chapter 1, sections 1.3-1.4; and Bates 015237.163-015237.165, Basin Plan section 4.23.

[9] Bates 14416.001-014416.022, State Board Order 2004-0004 (*Statewide General WDRs for Dredge and Fill Activities in Waters of the State*), p. 2.

[10] *Id.* at pp. 3-4. See also Bates TC-000033.055-001 - TC-000033.055-003, State Board Order 2003-0017-DWQ (*Statewide General WDRs for Dredged or Fill Discharges that Have Received State Water Quality Certification*) (affirming regulation of discharges of pollutants from dredge and fill activities to avoid impacts to beneficial uses).

[11] Bates 015269, EPA Handbook, at p. 4.

[12] 40 C.F.R. § 336, subd. (a)(1) ("Although the Corps does not process and issue permits for its own activities, the Corps authorizes its own discharges of dredged or fill material by applying all applicable substantive legal requirements, including public notice, opportunity for public hearing, and application of the section 404(b)(1) guidelines...The CWA requires the Corps to seek state water quality certification for discharges of dredged or fill material into waters of the U.S").)

Conditions included in water quality certifications often include compensatory mitigation.[13] "Mitigation requirements are often included in certification conditions to set the location, type, and extent of mitigation already required for a §404 dredge and fill permit or other permits."[14] The requirement to provide compensatory mitigation for impacts caused by dredge and fill activities are rooted in numerous federal authorities, beginning with water quality standards.

B. Water Quality Standards

As described in the citation to Section 401, above, the water quality certification must ensure the discharge does not violate water quality standards. According to U.S. EPA, "water quality standards are often the starting point for determining an appropriate response to a §401 request"[15] and the water quality standards and implementation regulations and guidelines are "the most important tools for the implementation of §401."[16] The Clean Water Act requires states to develop water quality standards which "establish the desired condition of a waterway."[17] U.S. EPA must review and approve (or disapprove) State-adopted water quality standards.[18] A water quality standard has four components: (1) the designated beneficial uses of the water body;[19] (2) the water quality criteria sufficient to protect those uses; [20] (3) an antidegradation provision; and (4) general policies to address implementation issues.[21]

Pursuant to section 303 of the Clean Water Act, the San Francisco Bay Water Board adopted, and U.S. EPA approved, a water quality control plan (the Basin Plan) which established water

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[13] Bates 015288, EPA Handbook, at p. 23 (citing *Jefferson County*, *supra*, 511 U.S. at p. 712).

[14] Bates 015289, EPA Handbook, at p. 24 (noting that "Missouri developed mitigation guidelines which regulators have implemented through CWA 401 certifications to increase the mitigation obtained from Corps permits" and "Virginia has established a 'No Net Loss' of wetland acreage and function goal in statute and the state often relies on it when certifying wetlands projects to require avoidance, minimization, and – when necessary – mitigation measures") (citations omitted).

[15] Bates 015284, EPA Handbook, at p. 19.

[16] *Ibid.*

[17] *Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089, 1092, citing 33 U.S.C. § 1313(a) and *Arkansas, supra,* 503 U.S. at p. 101. See also 40 C.F.R. § 131.4 (States are responsible for establishing water quality standards).

[18] 40 C.F.R. § 131.5 (in reviewing water quality standards, U.S. EPA evaluates whether the state has adopted designated water uses, criteria that protect the designated water uses, and whether the state has adopted an antidegradation policy).

[19] Examples of designated beneficial uses include warm freshwater habitat (WARM), wildlife habitat (WILD) and non-contact water recreation (REC-2). (See generally Bates 015237.009-015237.015, Basin Plan Chapter 2.1.)

[20] Examples of water quality criteria (called objectives in California) include numerical objectives, such as an objective for pH that establishes a numerical range. (See generally Bates 015237.075-015237.099, Basin Plan Chapter 3 and specifically section 3.3.9 (pH) (Bates 015237.079).) Water quality objectives may also be narrative, such as a statement that a discharge may not cause toxic substances in lethal concentrations. (See generally Bates 015237.075-015237.099, Basin Plan Chapter 3 and specifically section 3.3.18 (toxicity) (Bates 015237.081).)

[21] *Communities for a Better Environment*, *supra*, 109 Cal.App.4th at p. 1092, citing 33 U.S.C. § 1313(c)(2)(A) and 40 C.F.R. § 131.3(i). See also Bates TC-000444 - TC-00046, U.S. EPA, Standards for Water Body Health.

quality standards applicable to waters in the San Francisco Bay region.[22] Chapter 4 of the Basin Plan contains the implementation plans required by Clean Water Act section 303 and includes the Antidegradation Policy; Basin Plan Prohibitions; Water Board Policies on Dredge and Fill and Wetland Protection; No Net Loss Policy; and incorporates the U.S. EPA's guidelines on dredge and fill procedures.[23] All of these Board policies and programs are part and parcel of the federally-approved water quality standards.

1. Antidegradation

Federal law requires that, as part of establishing water quality standards, the states shall develop and adopt antidegradation policies that maintain and protect existing uses of the water body.[24] The Code of Federal Regulations requires that State antidegradation policies "shall, at a minimum, be consistent with the following: (1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected."[25]

In *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology,* the Supreme Court reflected that water quality standards in all 50 States contained antidegradation provisions when Congress adopted the Clean Water Act in 1972.[26] These provisions were required by federal law and, "in 1987, Congress explicitly recognized the existence of an 'antidegradation policy established under [Section 303].'"[27] U.S. EPA's regulations require States to adopt antidegradation policies and state that "no activity is allowable ... which could partially or completely eliminate any existing use."[28]

Where, as here, the federal antidegradation policy is applicable, the State Water Resources Control Board (State Board) has interpreted State Board Resolution 68-16, the operative antidegradation policy in California, to incorporate the federal antidegradation policy.[29] Resolution 68-16 provides, consistent with federal regulations, that "existing high quality will be maintained" and will not unreasonably affect present and anticipated beneficial use of such water.[30] In practice, the San Francisco Bay Water Board considers whether the impacts of each

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[22] 33 U.S.C. § 1313, subd. (c)(2)(A) and Bates 015237.003-015237.005, Basin Plan at Chapter 1, sections 1.3-1.4. See also Wat. Code § 13240 (requiring regional water boards to adopt basin plans).

[23] Bates 015237.100- 015237.194, Basin Plan, chapter 4.

[24] 40 C.F.R. § 131.12 (Establishment of Water Quality Standards; Antidegradation policy and implementation methods).

[25] *Ibid.*

[26] *Jefferson County, supra,*511 U.S. at pp. 718–719.

[27] *Ibid.* (citing 33 U.S.C. § 1313(d)(4)(B)).

[28] *Ibid.* (citing EPA, Questions and Answers on Antidegradation 3 (Aug. 1985)). See also 40 C.F.R. § 131.12 (Antidegradation policy and implementation methods).

[29] Bates TC-000033.026, *In the Matter of the Petition of Rimmon C. Fay* (Order No. WQ 86-17) at p. 18.

[30] Bates 015237.168, State Board Resolution 68-16, Statement of Policy With Respect to Maintaining High Quality of Waters in California. (See Basin Plan, section 4.25.2.1.)

proposed project will cause degradation.[31] U.S. EPA's National Guidance on Water Quality Standards for Wetlands notes that antidegradation policies are a "powerful tool for the protection of wetlands" and "EPA expects States to fully apply their antidegradation policies and implementation method to wetlands by the end of FY 1993."[32]

2. Basin Plan Prohibitions

The San Francisco Bay Water Board's Basin Plan designates beneficial uses, establishes water quality objectives, and contains implementation programs and policies, including prohibitions, to achieve those objectives for all waters addressed through the plan. Basin Plan Prohibitions are approved by U.S. EPA.[33] Sediment is regulated by Chapter 4 (Implementation), Table 4-1, Basin Plan Discharge Prohibition 9, which states "It shall be prohibited to discharge ... [s]ilt, sand, clay, or other earthen materials from any activity in quantities sufficient to cause deleterious bottom deposits, turbidity or discoloration in surface waters or to unreasonably affect or threaten to affect beneficial uses."[34] The intent of prohibiting such discharges "is to prevent damage to the aquatic biota by bottom deposits which can smother non-motile life forms, destroy spawning areas, and, if putrescible, can locally deplete dissolved oxygen and cause odors."[35] The prohibition refers to the policy on dredging,[36] which follows.

3. Water Quality Standards for Dredge and Fill and Wetland Protection and Management.

The Code of Federal Regulations required adoption of Water Quality Control Plans and specified that they must include dredge and fill control measures.[37] Chapter 4.20 of the Basin Plan is entitled Dredging and Disposal of Dredged Sediment, and describes potential impacts from discharges associated with dredging. Table 4-12 of the Basin Plan, referenced therein, describes the potential impacts to beneficial uses from bottom disturbance, suspended solids loading, dissolved oxygen reduction, mobilization of toxicants adsorbed to sediments, and release of biostimulatory substances.[38] When placement of fill will adversely impact the existing and potential beneficial uses, compensatory mitigation is required pursuant to Chapter 4.23 of the Basin Plan, Wetland Protection, which establishes the guidance the San Francisco Bay Water

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[31] Bates TC-000507-TC-000512, Fernandez Decl., at pp. 1 and 2.

[32] Bates TC-000447 - TC-000486, U.S. EPA, National Guidance Water Quality Standards for Wetlands (1994), https://www.epa.gov/cwa-404/national-guidance-water-quality-standards-wetlands.

[33] 40 C.F.R. § 131.5.

[34] Bates 015254-015256, Basin Plan, Table 4-1.

[35] *Ibid.*

[36] *Ibid.*

[37] 40 C.F.R. § 130.6, subd. (c)(7) ("Dredge or fill program. Identification and development of programs for the control of dredge or fill material in accordance with section 208(b)(4)(B) of the Act").

[38] Bates TC-000487, Basin Plan, Table 4-12.

Board must use when permitting wetland disturbance.[39] The Wetland Protection Chapter (4.23) incorporates the No Net Loss Policy, discussed in the next section.[40]

The Basin Plan Chapter 4.23.4, Wetlands Fill, describes the San Francisco Bay Water Board's authority to condition activities that impact wetlands.[41] This chapter notes the Board's policy to "avoid wetland disturbance. When this is not possible, disturbance should be minimized. Mitigation for lost wetland acreage and functions through restoration or creation should only be considered after disturbance has been minimized."[42] The Chapter goes on to require the following for projects requiring mitigation:

> For proposed fill activities deemed to require mitigation, the Water Board will require the applicant to locate the mitigation project within the same section of the Region, wherever feasible. The Water Board will evaluate both the project and the proposed mitigation together to ensure that there will be no net loss of wetland acreage and no net loss of wetland functions.[43]

Finally, Chapter 4.23.4 incorporates the U.S. EPA's guidelines regulating dredge and fill activities.[44] These guidelines are discussed in more detail below.

4. No Net Loss Policy

Beginning with President Carter in 1977, numerous Presidents have signed Executive Orders for the protection of wetlands.[45] In 1989, President George H.W. Bush established a national policy of "no net loss of wetlands."[46] Federal compensatory mitigation policy dictates that the amount of mitigation required must be "roughly proportional with the permitted impacts, so that it is

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[39] Bates 015237.165, Basin Plan, Ch. 4.23, p. 4-66 ("For proposed fill activities deemed to require mitigation, the Water Board will require the applicant to locate the mitigation project within the same section of the Region, wherever feasible. The Water Board will evaluate both the project and the proposed mitigation together to ensure that there will be no net loss of wetland acreage and no net loss of wetland functions").

[40] Bates 015237.163-015237.165, Basin Plan, Ch. 4.23.

[41] Bates 015237.164- 015237.165, Basin Plan, Ch. 4.23.4 Wetland Fill.

[42] *Ibid.*

[43] *Ibid.*

[44] *Ibid.*

[45] Bates TC-000033.008-001 - TC-000033.008-002, Executive Order 11990 (May 24, 1977) ("Each agency shall provide leadership and shall take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency's responsibilities....").

[46] Bates TC-000033.053 - TC-000033.054, National Research Council, *Compensating for Wetland Losses Under the Clean Water Act* (National Academy Press, 2001), at p. 12 ("In recognition of these functions and their significance to the CWA, the goal of no net loss of wetland area and function was introduced at a national wetland policy forum by the Conservation Foundation in 1988, endorsed by the federal administration in 1990, and supported since. The no-net-loss goal lies behind the federal agencies' efforts to develop Section 404 guidelines that will secure compensation for permitted wetland impacts").

sufficient to offset those lost aquatic resource functions."[47] The Corps and U.S. EPA jointly issued regulations governing compensatory mitigation required to address impacts associated with Section 404 dredge and fill activities, and noted the obligation to comply with the No Net Loss Policy: "compensatory mitigation is a critical tool in helping the federal government to meet the longstanding national goal of 'no net loss' of wetland acreage and function."[48]

Executive Order W-59-93, is the California Wetlands Conservation Policy, more commonly known as the State "No Net Loss" Policy. Consistent with the Presidential Executive Orders and Corps' and U.S. EPA's and Corps' regulations, the first objective of the Policy is "[t]o ensure no overall net loss and long-term gain in the quantity, quality, and permanence of wetlands acreage and values in California...."[49] The Policy requires all agencies of the State to conduct their activities in accordance with the following objective:

> To ensure that no overall net loss and long-term net gain in the quantity, quality, and permanence of wetlands acreage and values in California in a manner that fosters creativity, stewardship and respect for private property.[50]

The No Net Loss Policy has been incorporated into Basin Plan chapter 5, Plans and Policies and also appears in Chapter 4, Implementation Plans (section 4.23), which states: "The Water Board will refer to [the Policy] for guidance when permitting or otherwise acting on wetland issues." The Basin Plan states that the "Water Board will evaluate both the project and the proposed mitigation together to ensure that there will be no net loss of wetland acreage and no net loss of wetland functions."[51]

When placement of fill will adversely impact existing and potential beneficial uses, compensatory mitigation is required pursuant to the No Net Loss Policy.[52]

5. Dredge and Fill Guidelines (404(b)(1) Guidelines)

The Basin Plan's Wetland Fill Chapter incorporates by reference the U.S. EPA's guidelines governing dredge and fill activities, commonly called "404(b)(1) Guidelines."[53] The 404(b)(1) Guidelines are codified in the Code of Federal Regulations, and regulations governing mitigation

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[47] 73 Fed. Reg. 19594, 19633 (April 10, 2008), Compensatory Mitigation for Losses of Aquatic Resources.

[48] *Id.* at p. 19594.

[49] Bates 015259-015261, California Wetland Conservation Policy, Executive Order 59-93 (Aug. 23, 1993) (No Net Loss Policy), at p. 1.

[50] *Ibid.*

[51] Bates 015249-015253, Basin Plan, § 4.23.4.

[52] Bates 015259-015261, No Net Loss Policy.

[53] Bates 015237.164- 015237.165, Basin Plan, Ch. 4.23.4 Wetland Fill, at p. 4-68 ("The Water Board uses the U.S. EPA's Section 404(b)(1), "Guidelines for Specification of Disposal Sites for Dredge or Fill Material," dated December 24, 1980, which is incorporated by reference into this plan, in determining the circumstances under which wetlands filling may be permitted").

appear (virtually verbatim) in both in the Corps' regulations and again in U.S. EPA's regulations.[54] The 404(b)(1) Guidelines recognize the importance of protecting wetlands:

> From a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.[55]

In furtherance of this "guiding principle," both agencies collaborated and adopted identical guidelines[56] requiring mitigation for impacts:

> The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by [Section 404] permits.[57]

The 404(b)(1) Guidelines illustrate steps which must be taken to ensure compliance with Section 404 of the Clean Water Act, and specify in great detail the means of mitigating for lost wetland acreage, function and value.[58] The Corps and EPA guidelines discuss types, amounts, locations, and programs for compensatory mitigation; require that permit applicants prepare and submit mitigation plans; and require monitoring of the completed project to ensure its success.[59]

> [T]he district engineer will issue an individual section 404 permit only upon a determination that the proposed discharge complies with applicable provisions of 40 CFR part 230, including those which require the permit applicant to take all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the U.S. Practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. *Compensatory mitigation*

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[54] 40 C.F.R. Part 230, Subpart J and 33 C.F.R. Part 332.

[55] 40 C.F.R. § 230.1. See also 33 C.F.R. § 320.4, subd. (b)(1) ("Most wetlands constitute a productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged as contrary to the public resource. For projects to be undertaken or partially or entirely funded by a federal, state, or local agency, additional requirements on wetland considerations are stated in Executive Order 11990, dated 24 May 1977") and Bates TC-000033.008-001 – TC-000033.008-002, Executive Order 11990 (May 24, 1977) ("Each agency shall provide leadership and shall take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency's responsibilities....").

[56] 73 Fed. Reg. 19594-01 (April 10, 2008) (US EPA and Corps jointly "are issuing regulations governing compensatory mitigation for loss of aquatic resources associated with activities authorized by permits issued by the Department of the Army, which includes Section 404 dredge and fill permits).

[57] 40 C.F.R. § 230.93, subd. (a) and 33 C.F.R. § 332.3, subd. (a).

[58] 40 C.F.R. Part 230.

[59] See 33 C.F.R. Part 332 and 40 C.F.R. Part 230, Subpart J (Compensatory Mitigation for Losses of Aquatic Resources).

for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines.[60]

> The district engineer *must* determine the compensatory mitigation to be required in a DA permit, based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity. When evaluating compensatory mitigation options, the district engineer *will consider* what would be environmentally preferable. In making this determination, the district engineer *must assess* the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project... Compensatory mitigation requirements *must be* commensurate with the amount and type of impact that is associated with a particular DA permit. Permit applicants are responsible for proposing an appropriate compensatory mitigation option to offset unavoidable impacts.[61]

Specifically, the Basin Plan framework for mitigation is based on an evaluation of the following factors, which are identified in the 404(b)(1) Guidelines:

1. Proximity of mitigation relative to the impacted area: mitigation site is onsite or offsite, and for offsite mitigation, distance from impacted area
2. Mitigation is in-kind or out-of-kind
3. Type of mitigation: enhancement, restoration, creation, or preservation
4. Certainty in success of the mitigation project
5. Temporal lag for onsite construction impacts to recover
6. Establishment period between occurrence of impacts and establishment of mitigation
7. Case-specific factors such as whether mitigation adheres to an adopted watershed plan or other regional stewardship plan
8. Size of impacted area and size of mitigation area[62]

The 404(b)(1) Guidelines require compensation ratios greater than one-to-one to account for temporal losses of aquatic resource functions during the interval between the disturbance or

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[60] 40 C.F.R. § 230.91 and 33 C.F.R. § 332.1, subd. (c)(2) (emphasis added).

[61] 40 C.F.R. § 230.93, subd. (a) and 33 C.F.R. § 332.3, subd. (a) (emphases added).

[62] Bates 015237.163-015237.165, Basin Plan Chapter 4.23.4 (incorporating by reference to 404(b)(1) Guidelines). See also 40 C.F.R. § 230.93 subd. (a) (General considerations); subd. (b) (Type and location of compensatory mitigation); subd. (c) (Watershed approach to compensatory mitigation); subd. (d) (Site selection); subd. (e) (Mitigation type); (f) (Amount of compensatory mitigation); 230.94 (Planning and documentation); 230.95 (Ecological performance standards); 230.96 (Monitoring); 230.97 (Management) and corresponding Corps' regulations: 33 C.F.R. §§ 332.3, subd. (a)-(f); 332.4, 332.5, 332.6 and 332.7.

destruction of a wetland and the functioning of the mitigation wetland at a level sufficient to replace the impacted aquatic resource functions.[63] To the extent a project proponent seeks to implement a project with greater impacts to beneficial uses, more mitigation is necessary to counter those impacts.

The Corps developed an Updated Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program, which provides a summary of policies and procedures to be used in implementing the Corps' program, and highlights compensatory mitigation.[64] The memo emphasizes that the Corps must incorporate all conditions of the water quality certification into the Section 404 dredge and fill permit.[65] The Corps further notes the mandatory nature of compensatory mitigation:

> Compensatory mitigation *must be* directly related to the impacts of the authorized activity, appropriate to the degree and scope of those impacts, and reasonably enforceable. The amount of mitigation required *must be commensurate* with the authorized impacts of the project. The goal of compensatory mitigation is to replace aquatic resource functions lost as a result of the permitted activity.[66]

Under all of the above water quality standards, as documented in the Basin Plan, compensatory mitigation is required for impacts to aquatic resources.

C. Other Appropriate Requirement of State Law

Section 401 of the Clean Water Act requires that a water quality certification include "any other appropriate requirement of State law," which "shall become a condition on any Federal license or permit subject to the provisions of this section."[67] The Porter-Cologne Water Quality Act (Porter-Cologne) and California Environmental Quality Act (CEQA) both contain "appropriate requirements of State law" protecting aquatic resources and which "shall become a condition" on water quality certifications.

The San Francisco Bay Water Board has statutory authority under Porter-Cologne to adopt WDRs requiring mitigation, independent of Clean Water Act section 401. In cases where a discharger proposes a discharge that will impact waters of the State, Water Code section 13263 requires that the regional water board "shall prescribe requirements as to the nature" of the proposed discharge.[68] Similar to Clean Water Act Section 401, Water Code section 13263(a) requires that regional water boards "implement any relevant water quality control plans that have

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[63] 40 C.F.R. § 230.93, subd. (f)(2) and 33 C.F.R. § 332.3, subd. (f)(2) General compensatory mitigation requirements.

[64] Bates TC-000033.056 - TC-000033.100, Memorandum for Commanders, Major Subordinate Commands and District Commands (July 1, 2009).

[65] *Id.* at p. 24.

[66] *Id.* at p. 33 (emphases added).

[67] 33 U.S.C. § 1341, subd. (d).

[68] Wat. Code § 13263 (emphasis added).

been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241."

The San Francisco Bay Water Board, as a responsible agency under CEQA, must independently consider the EIR prepared by the lead agency (in this case the District), and "reach its own conclusions on whether and how to approve the project involved."[69] The CEQA Guidelines explicitly contemplate that a responsible agency may require additional mitigation and, in fact, imposes a duty to do so upon the responsible agency where it is possible to lessen or avoid significant effects on the environment:

> • "When considering alternatives and mitigation measures, a responsible agency has responsibility for mitigating or avoiding the direct or indirect environmental effects of those parts of the project which it decides to approve."[70]
>
> • "When an EIR has been prepared for a project, the Responsible Agency shall not approve the project as proposed if the agency finds any feasible alternative or feasible mitigation measures within its powers that would substantially lessen or avoid any significant effect the project would have on the environment."[71]

Both of these State laws are appropriately attached as conditions to the Permit at issue here, and require mitigation for impacts to beneficial uses including aquatic resources. All of the mitigation required in the Permit could have been required relying solely on the water quality standards, which must be protected pursuant to Clean Water Act Section 401, subdivision (a), but these are additional, independent authorities requiring compensatory mitigation pursuant to Clean Water Act Section 401, subdivision (d).

II. FACTUAL BACKGROUND

A. The Project and Its Impacts.

The Project purpose is to increase flood protection in the area surrounding Upper Berryessa Creek, including the Milpitas Bay Area Rapid Transit (BART) station. The Project was scheduled for completion in December 2017, 99 percent complete in January 2018, and the final

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[69] Cal. Code Regs., tit. 14, § 15096, subd. (a).

[70] Cal. Code Regs., tit. 14, § 15096, subd. (g) (1).

[71] *Id.* at § 15096, subd. (g)(2).

1 percent completed in March 2018.[72] The District and the Corps were partners in the Project, sharing 50-50 in the capital construction costs, responsibility for construction oversight, and the District will undertake operations and maintenance (O&M) after construction.[73]

The Project involved dredge and fill activities in approximately 2.2 miles of Upper Berryessa Creek. Project elements include: (1) widening and deepening Upper Berryessa Creek; (2) armoring nearly 9,500 linear feet of the channel bed and banks with rock riprap (boulders of 9 to 24 inches average diameter, and 15 to 24 inches deep) and covering the riprap with 4 inches of soil; (3) installing 1,573 feet of concrete floodwalls; (4) constructing and redeveloping maintenance roads along almost 11,000 linear feet of channel; (5) removing sediment from concrete-lined section of the channel; (6) replacing and realigning utilities; and (7) installing three new concrete culverts, two concrete access ramps, and concrete and grouted rock transition structures.[74]

The Project impacted both waters of the State and United States.[75] Specifically, the completed Project includes 9.81 acres and 10,450 linear feet of temporary and permanent impacts. The temporary and permanent impacts occurred at the same location with the temporary impacts being caused by excavation and the permanent impacts being caused by armoring the creek bed and banks with riprap, installing floodwalls, and installing additional new concrete infrastructure in the creek.[76]

The District states that "the EIS concluded that impacts to water quality, biological resources, and other issues would be mitigated to less-than-significant levels" and the "EIR found that environmental impacts to biological resources, hydrology, and water quality, among other issues, would be either less-than significant or would be mitigated to a level of less-than-significant."[77] The District omits any discussion of the several *significant* impacts to the following resources,

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[72] Bates 010360, SCVWD Agenda (April 11, 2017) at Item 2.10; 010362, 0103657, SCVWD Presentation (April 11, 2017), at pp. 2, and 7); 000552-000553, R.T. (Jan. 11, 2017) at pp. 252-253; TC-000381 - TC-000382, Email, S. Glendening and B. Smith, construction contractor; and TC-000383, Construction General Permit Notice of Termination.

[73] Bates 010329-010357, Partnership Agreement and 008195, EIR, p. 3-2.

[74] Bates 008847-008859, EIR, at pp. 2-19 - 2-31; 003566-003636, Conformed Design Plans (100%); 005125-005255, Design Documentation Report (100%); and 001177-001179, Permit at Finding 7.

[75] Bates 001179, Permit at Table 1 (p. 5); 001184, Permit at Finding 20 (p. 10); and 003566-003636, Conformed Design Plans (100%).

[76] Bates 001179, Permit at Table 1 (p. 5); and 001184, Permit at Finding 20 (p. 10); 003566-003636, Conformed Design Plans (100%). The State Board General WDRs for Dredge and Fill in Waters of the State note that permanent impacts occur when "discharged material will be in place indefinitely and/or by its nature precludes a reasonable assurance that beneficial uses will be fully reestablished. Examples include filling of wetlands or other waters, streambank hardening, channelization, construction of bridge piers and abutments, and ongoing vegetation removal and channel maintenance." By contrast, temporary impacts include "temporary fills, excavation for temporary access roads, and onetime vegetation removal or excavation of sediment." (State Board Order 2004-0004, p. 7, n. 6.) (Bates 014416.001-014416.022).

[77] Test Claim at p. 3.

which are within the San Francisco Bay Water Board's jurisdiction and identified in the EIR: WAQ-1, WAQ-6, BIO-2, BIO-4 and BIO-5.

The EIR indicated that there are potential impacts to waters based on criteria WAQ-1 "Violate any water quality standard or waste-discharge requirement," and WAQ-6 "Otherwise substantially degrade water quality."[78] The EIR identifies further potential impacts under criteria WAQ-1 and WAQ-6: "Significant water quality impacts from spills of hazardous materials, contaminated groundwater, and creek dewatering," and the impacts are partially due to "[w]idening of channel bed and top of banks via excavation and grading of earthen material," and "[e]xcavation of channel bed and side slopes for placement of rock revetment"[79]

The EIR also identifies significant adverse impacts to riparian habitat, healthy trees/shrubs or other sensitive natural community (significance criterion BIO-2),[80] impacts to a native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors (BIO-4),[81] and impacts to biological resources that are protected under local policy or ordinance (BIO-5).[82] Specifically, in Reaches 1-3, the EIR identified permanent impacts to 5 acres of annual grassland habitat, trees and shrubs at the top of bank, and a 0.28 acre increase in hardscape within waters of the U.S.[83] In addition, the entire 3.06 acres of Waters of the U.S./State within Reaches 1-3, including nearly 0.5 acres of fringing wetland vegetation, would be temporarily impacted by the Project during construction.[84] In Reach 4, the EIR identified permanent impacts to 0.58 acre of waters of the State from increased hardscape, potential impacts to 0.18 acre of riparian from ground excavation in the root zone, and impacts from removal of mature trees, thereby not complying with the City of Milpitas Tree Protection Ordinance and requiring the replacement of removed native trees and shrubs (Mitigation Measure Bio-B), and requiring a buffer around riparian trees (Mitigation Measure Bio-D).[85] The EIR also identified impacts to a native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors (BIO-4).[86] Specifically, the California Roach and Monarch butterfly would potentially be impacted, and migratory birds would be

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[78] Bates 009064-009066, EIR, pp. 3-198 - 3-200; and 009071, EIR, Table 3.44, p. 3-205.

[79] Bates 009064, p. 3-198.

[80] Bates 008937, EIR, Table 3.16, "Statement of Impacts, Biological Resources"; and 008930-008932, EIR, p. 3-64 - 3-66.

[81] Bates 008937, EIR, Table 3.16; and 008932-008933, EIR p. 3-66 – 3-67, BIO-4 Impacts.

[82] Bates 009097-009103, EIR, Table 5-5, pp. 5-9 to 5-15; 008937, EIR, Table 3.16; and 008934-008935, EIR p. 3-67 – 3-68, BIO-5 Impacts.

[83] Bates 008931, EIR, p. 3-65.

[84] Bates 008930, EIR, p. 3-64.

[85] Bates 008936, EIR, p. 3-70.

[86] Bates 008933, EIR, p. 3-67; and 00893, EIR, Table 3-16, p. 3-71.

impacted by destruction of nests thereby requiring pre-construction nesting bird surveys and establishment of appropriate buffers (Mitigation Measure Bio-A).[87]

In addition to the impacts identified in the EIR, the San Francisco Bay Water Board evaluates impacts in the context of the beneficial uses of the impacted waters. The beneficial uses of Berryessa Creek and its tributaries within the Project site (Piedmont Creek and Los Coches Creek) are established in the Basin Plan, as described in the Statutory Background. The beneficial uses of Berryessa Creek are Warm Freshwater Habitat (WARM), Wildlife Habitat (WILD), Water Contact Recreation (REC-1), and Non-contact Water Recreation (REC-2), and Los Coches Creek also has the Preservation of Rare and Endangered Species (RARE) beneficial use.[88] The United States Fish and Wildlife Service (USFWS) Coordination Act Report (CAR) documents that the creek's habitat supports California roach, mosquito fish, great egret, and black-crowned night heron (among other aquatic and wildlife species).[89] Both the Corps' EIS and District's EIR identified a variety of biota at the Project site.[90] During a field inspection at the peak of a severe drought, egrets and ducks were observed in the creek at multiple locations.[91] Documented observations were consistent with a typical creek ecosystem, capable of supporting wildlife like California roach, egret, and ducks, and exhibiting a variety of biota including algae, benthic macro-invertebrates, zooplankton, insects and fish larvae - all important components of functional creek ecosystems and food webs, from primary producers (e.g. bacteria and algae) to predators like egrets and herons.[92]

The Project altered the creek's hydrology, adversely affecting the WARM, WILD, and REC2 beneficial uses. This is because the channel cross-section proposed in the Project's design will increase from between 5 and 12 feet to 20 to 40 feet wide (varying by creek reach),[93] causing the existing dry season flow (estimated at less than 1 cubic foot per second)[94] to spread out and become so shallow that it ultimately infiltrates the substrate, leaving no flow to support the observed ecosystem.[95] The diminished dry season flow will alter the creek's existing food web,

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[87] Bates 008935-008936, EIR, pp. 3-69–3-70; and 008937, EIR, Table 3.16, p. 3-71.

[88] Bates 015248, Basin Plan, Tbl 2.1 (excerpt).

[89] Bates 007233- 007251, CAR.

[90] Bates 006444-006452, EIS at pp. 4-39 - 4-47; and 008907- 008928, EIR at pp. 3-40 - 3-62 (addressed the impacts on biota in detail).

[91] Bates 005444-005665, Inspection (Sept. 3, 2015); 014066-014067, Summary (Sept. 3, 2017); and 002159, Email, AC-SG.

[92] Bates 012911, 012916, 012917, Kalff (2002), pp. 101, 364 (Figure 22-9), 426; Moyle (2002), p. 142; 012817, 012826-012829, 012838-012839, 012867-012868, Fischenich (2001), pp. 3, 12-15, 24-25, and 53-54; 013989, Cornell_Egret, p. 2; 013993, Cornell_Mallard, p. 2; 012647- 012648, Baylands Ecosystems (2000), pp. 260-261; 011866-011874, Federal Interagency Stream Working Group (FISRWG 1998), pp. 2.59 – 2.67.

[93] Bates 003566- 003636, 100% conformed plans.

[94] Bates 006433, EIS, p. 4-28.

[95] Bates 011291, Fetter, 1995 (Discharge (Q) as cubic feet per second (cfs), is inversely proportional to area; as area increases, Q will decrease).

including the potential for local extirpation of California roach and mosquito fish.[96] The post-project diminished flow will also reduce diversity and abundance in species at lower trophic levels, including benthic invertebrate, micro- and macro crustaceans, diatoms, phytoplankton, and filamentous algae.[97] The Project's impacts on the primary producers will likely diminish the food sources for fish larvae, fish, and birds significantly.[98] Thus, both the WARM and WILD beneficial uses will be adversely affected by the Project.[99] As a result of the adverse impacts on the WARM and WILD beneficial uses, the existing and potential REC-2 beneficial use will also be degraded due to a reduction in species diversity and complexity.[100]

A study of bioengineering techniques for stabilizing banks in urban creeks found that increases in biomass and the number of species, including biota that break down and recycle dead organic material, correlate directly with the quantity of root and wood habitat created on channel banks.[101] Thus, the Project's design – a hydroseeded 4-inch layer of soil over rock riprap – will restrict native plant growth in the creek's channel bed and banks because the *minimum* root depth for five of the six species to be hydroseeded ranges from 5 to 20 inches.[102] Further, the rock will displace the existing sediment/soil and will be underlain with a polymer fiber cloth, which will restrict the ability of the roots to penetrate to the substrate. In addition, the Corps' stated intention to develop an Operation and Maintenance Plan that will prohibit development of significant woody riparian vegetation along the Project's length will maintain the ecosystem in a degraded condition over the long-term.[103]

The Project's rock riprap, which will result in reduced root structure complexity, will also affect the potential for nutrient cycling, such as nitrogen sequestration, denitrification, and phosphorus cycling in the creek habitat.[104] With lower potential for nutrient cycling, water quality in the Project site will be degraded.[105] The planned restrictions on woody riparian vegetation or even larger herbaceous vegetation, which could provide shade, refuge from predators, and nesting sites, are likely to result in warmer water temperatures, limit habitat, and reduce the Project's potential to serve as a corridor between the higher-quality reaches of Berryessa Creek upstream

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[96] Bates 011291, Fetter p. 67; 008933, EIR, p. 3-67; and 000212, R2C Table, p. 11 (comment C-13-a).

[97] Bates 011904, 011906, FISRWG (1998), pp. 3-8 and 3-10; and 012848, Corps-Fischenich (2001), p. 34.

[98] Bates 012842, Fischenich (2001), p. 28; and EIR, p. 3-67.

[99] Bates 008933, EIR, p. 3-67; 011904, FISRWG (1998), p. 3-8; and 009682-009774, EIR Comment Letter (Nov. 12, 2015) at pp. 2-7.

[100] Bates 012867- 012868, Fischenich (2001), pp. 53-54; and 009682-009774, EIR Comment Letter (Nov. 12, 2015), at pp. 2-7.

[101] Bates 013231-013239, Sudduth and Meyer (2006), pp. 218–226.

[102] Bates 014090, IPC database summary; and 012838- 012839, Fischenich (2001), pp. 24-25.

[103] Bates 007658, EIS, App. B.III-3.1.5.2; and 008857, EIR, p. 2-29, at 2.5.5.

[104] Bates 012817, 012829, 012881, Fischenich (2001), pp. 3, 15, 67.

[105] Bates 012938-012977, Mayar (2005).

and downstream of the Project.[106] The Project, thus, is expected to directly impact existing and potential WARM beneficial uses permanently and indirectly impact related existing and potential beneficial uses in the higher-quality creek reaches upstream and downstream of the Project reach.[107]

As discussed in the Statutory Background, federal law requires mitigation for all of these impacts.

B. History of the Permitting Process.

The District dedicates several pages of the Test Claim to an inaccurate description of the permitting process, starting with an accusation that the Permit was unilaterally imposed and the District never asked for the Permit and objected to the issuance of the Permit and its "disruptive timing."[108] Omitted from this history is any discussion of the federal requirement for a permit to conduct the work undertaken by the Corps and the District and the Corps' request for water quality certification. Nor is there any description of the Corps' and District's relative responsibilities and their own objections which made it necessary for the San Francisco Bay Water Board to issue a Permit to both entities.

1. Relationship Between the District and Corps

The Corps and the District are equal partners in the Project because, as authorized by Congress, the Project could not occur without the participation of either co-sponsor.[109] The District and Corps' Project Partnership Agreement (Agreement) stipulates division of costs and responsibilities to construct the Project: the Corps is responsible for the construction contractor, while the District is responsible for the lands, easements, rights-of-way, relocations, and any improvements required on lands, easements, and rights-of-way to enable the disposal of dredged or excavated material.[110]

The District, working with the Corps, had numerous responsibilities for overseeing actions related to water quality: "require the construction contractor" to implement "measures for protecting water quality;" implement a rain action plan to "prevent adverse effects of water flows at construction areas;" prepare and implement a spill prevention and response plan; and ensure

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[106] Bates 012858- 012859, Fischenich (2001), pp. 44-45; and 013276, 013321, 13337, U.S. EPA (2008), pp. 7, 52, 68.

[107] Bates 013317, 013333-013334, U.S. EPA (2008), pp. 48, 63, 64.

[108] Test Claim, at pp. 4-6.

[109] Bates 010330, Project Partnership Agreement (May 17, 2016), at p. 2. Section 221 of the Flood Control Act of 1970, Public Law 91-611, as amended (42 U.S.C. § 1962d-5b), and Section 103(j) of the Water Resources Development Act of 1986, Public Law 99-662, as amended (33 U.S.C. §2213(j)), provides that "the Secretary of the Army shall not commence construction of any water resources project, or separable element thereof, until each non-Federal interest has entered into a written agreement to furnish its required cooperation for the project or separable element."

[110] Bates 010330-010331, Project Partnership Agreement (May 27, 2016), pp. 2-3. See also 002249, WQC Application, p. 6.

tree protection of riparian trees.[111] The Permit references that the District would be responsible for providing mitigation for the project on behalf of both the Corps and District as the two co-sponsors, a matter which the District does not contest here, before the State Board or in litigation.[112]

In addition to these water quality-specific responsibilities, the District also had responsibility for other construction-related measures, including supervision of the construction contractor[113] and responsibility for the project design.[114] The District's active role in the Project includes making required rights-of-way available to the Corps, taking responsibility for operation and maintenance of the completed Project,[115] and providing, through its Clean, Safe Creeks plan, "$38 million to design and construct" the Project, more than half of the total reported Project cost of $75 million.[116]

The Corps and District are also inextricably involved in post-construction activities. The Agreement stipulates that the non-federal sponsor must follow the O&M manual that the Corps will prepare, and the Corps will conduct inspections and, if necessary, other O&M and replacement of the project.[117] According to Corps staff Craig Conner, "The Corps' flood risk management projects are authorized in perpetuity by Congress until they are de-authorized. It is a partnership between the Corps and the local Non-Federal Sponsor, but it remains a Federal project throughout its life. If the local Non-Federal Sponsor does not fulfill their O&M obligations, the Corps has as one of its options to take over the O&M, and possibly try to recoup costs from the local Non-Federal Sponsor."[118]

The Permit recognizes that the Corps and District have an agreement concerning who is responsible for the various portions of the Project, and adoption of the Permit recognized that agreement.[119] In short, both the Corps and District are responsible for key components of the project.

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[111] Bates 002256- 002262, 401 Application, p. 13 of 19 (mitigation measures WAQ-A, WAQ-C, HWM-B and BIO-D).

[112] Bates 001176-001177, Permit at Finding 3.b.

[113] Bates 002256- 002262, 401 Application, pp. 13-19 of PDF (mitigation measures NOI-A, NOI-B, NOI-C, HWM-B, CUL-A, CUL-B, BIO-A, VIO-C, AIR-A).

[114] *Id.* at Bates 002260, p. 17 of 19 (mitigation measure GEO-A).

[115] Bates 010348, Project Partnership Agreement, Article VII.A, p. 20.

[116] See Bates 014149.02, Clean, Safe, Creeks-Upper Berryessa Creek Protection Project, "By the Numbers" at p. 2 of 2.

[117] Bates 010332-010334, Agreement, Articles II.A and VII.B, pp. 4-6.

[118] Bates 010085-010088, Email from C. Conner to S. Glendening and T. Kendall (May 19, 2016).

[119] See, e.g., Bates 001175-001176, 001179, 001186, Permit, Findings 2, 5 and 12.

2. Staff Engaged Early In the Design and Environmental Review Processes and Consistently Identified the Need for Mitigation for Significant Effects.

In 2004 through 2006, the San Francisco Bay Water Board staff (Staff) consulted with the District on a flood control project concept for Upper Berryessa Creek.[120] At that time, Staff recommended to the District that the project include a natural bottom channel and other multi-benefit elements such as a vegetated floodplain and depressed maintenance road.[121] At that point, the proposed project was a 4-mile stretch with an associated "greenbelt".[122] From 2006 to 2013, the Corps conducted analyses pointing to a higher cost-benefit ratio by removing the "greenbelt" portion of the project, and reducing the impacted area to the present design of 2 miles. The GRR-EIS report states that the Corps unveiled draft GRR/EIS for public comment in 2013.[123] However, neither the Corps nor District engaged directly with the Regional Water Board during that time.[124]

Staff again consulted with the District during the design phase in April 2015 and identified changes in the Project's design that could avoid and minimize expected impacts to beneficial uses.[125] Proposed alternatives included development of a low-flow channel that could more efficiently transport sediment; planting of woody vegetation to increase shade, thereby reducing temperatures and the need to remove vegetation such as cattails that can trap sediment; and changes to the channel cross-section by removing unnecessary Project elements, such as

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[120] Bates 001869-001895, 001896-001902, 001909-001914, 001915-001960, 001981-001982, 001989-001990, 001990-001991, meeting notes dated 4/5/2004; 9/14/2004; 4/13/2005; 8/16/2005; 7/18/2006; 8/15/2006(1) and 8/15/2006(2); 001981-001982, Interagency Site Inspection, (July 18, 2016); 001903-001904, Email from Valiela (U.S. EPA) to Amato (Water Board) (Sept. 20, 2004); and 001905-001908, Letter from Water Board to SCVWD (Oct. 14, 2004).

[121] *Ibid.* See, in particular, Bates 001907, Water Board letter to District (Oct. 14, 2004).

[122] Bates 014066-014067, A. Riley, Site Inspection Summary (Sept. 3, 2015).

[123] Bates 006659, EIS, at section 8.1.1.

[124] The Project General Reauthorization Report (GRR)/Environmental Impact Statement (EIS) prepared by the Corps incorrectly states there was no activity on the project or public engagement at all between 2006 and before the release of the Draft GRR-EIS Report for Public and HQUSACE Circulation in March-April 2013. (Bates 006289, EIS, at p. PAC-17 (item # PAC-18).) As noted in the Response to Comment document:

> Regarding the EIS, our records indicate a draft EIS was never received by the Water Board, which explains why Board staff did not submit comments on the draft EIS. In addition, after discovering the "Final EIS" dated December 2013, was revised in March 2014 ("Revised Final EIS"), it took 5 months of requests by Board staff to receive a hard copy of the Revised Final EIS, and we initially only received Volume 1 of three volumes. We ultimately received the complete electronic files in May 2015, although the Final Revised EIS is still not fully available on the Corps' website, despite several inquiries to post it online for public access (http://www.spk.Corps.army.mil/Portals/12/documents/Corps_project_public_notices/Berryessa_Creek_FinalGRR-EIS_Dec2013.pdf. Accessed October 3, 2016. (We note that only Volume 1 is posted.)

(Bates 000208, RTC, response to C-08, p. 7.)

[125] Bates 002012-002017, 002018-002022, Email dialogue following site inspection of April 15, 2015; 002080.01-002080.03, Water Board Comment Letter on 60% Design (June 5, 2015); 005756, Agenda (July 16, 2015); 005776-005781, Meeting notes-Lichten (Aug. 4, 2015); 005782-005791, Meeting notes-Glendening (Aug. 4, 2015); 005798, Agenda (Aug. 11, 2015); and 005794-005796, Meeting Handout_LEDPA Opportunities (Aug. 11, 2015).

including only one maintenance road for those reaches where maintenance roads have been placed on each side of the channel.[126] This last option would have allowed significantly greater flexibility in channel design and post-project vegetation, by allowing design elements like floodplain benches within the Project's existing planned right-of-way.[127]

The Corps and District continued full throttle, disregarding Staff's input. At one point in the process, the Corps considered self-certifying the Project pursuant to Clean Water Act section 404(r), in order to keep the Project on schedule.[128] Corps, District, and San Francisco Bay Water Board management subsequently met on December 14, 2015, to develop a strategy (including a mitigation plan) for the Board to certify the Project.[129] Recognizing the Project's important public safety goals, Staff worked with Corps and the District to identify a path forward that would allow issuance of the water quality certification while ensuring the Project, as authorized by both the water quality certification and the waste discharge requirements (WDRs), would comply with State water quality standards.[130]

Under the law, NEPA and CEQA are intended to be pre-decisional processes that encourage public participation and resource agency input in designing a project that evaluates and avoids significant effects on the environment.[131] The opposite was true here. The CEQA document was prepared after the Corps had nearly completed its project design[132] and both Corps and District staff estimated it would take at least three years to change the design to a project with fewer impacts.[133] In order to align the

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[126] Bates 005794-005796, Meeting Handout_LEDPA Opportunities (Aug 11, 2015).

[127] Bates 005827-005828, Action Items from August 11, 2015 meeting.

[128] 80 Fed. Reg. 61187 (Oct. 9, 2015) ("the Corps may invoke 404(r) exemption in lieu of obtaining a 401 Certification from the RWQCB"). See also Bates 009828-009831, email thread between B. Wolfe and J. Morrow (Corps) (Oct. 13, 2015). The Corps notified San Francisco Bay Water Board management in early December 2015 that it would not invoke the section 404(r) waiver, however. (Bates 009873.)

[129] Bates 009882-009883, Email thread from B. Wolfe thread to Governor Brown (via W. Crowfoot); 009884-009885, B. Wolfe summary; 009874, Email thread, B. Wolfe; and 005847-005848, Meeting recap (Dec. 14, 2015).

[130] Bates 005756, Agenda (July 16, 2015); 005757-005759, Meeting notes, Lichten (July 16, 2015); 005760-005762, Meeting notes, Glendening (July 16, 2015); 005862-005869, Meeting agenda and handouts (Jan. 4, 2016); 005870, Meeting notes, Lichten (Jan. 4, 2016); 005871-005876, Meeting notes, Glendening (Jan. 4, 2016); 005877-005880, Meeting Notes (Jan. 4, 2016); and 005883-005886, Corps staff's comments on meeting notes (Jan. 4, 2016).

[131] See, e.g., Cal. Code Regs., tit. 14, § 15004 (an EIR "should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design"); Pub. Res. Code § 21002.1, subd. (a) (purpose of an EIR is to "identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided") and subd. (b) ("Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so").

[132] Bates 010322- 010323, Record of Decision for Authorized Project (May 29, 2014) (based on alternative identified in the NEPA document); 002244-002262, 401 application (Sept. 25, 2015) (based on the 60-percent design plans) (see application, pg. 4, Box 7) (see 002555 for cover page of 60 percent design plans dated May 8, 2015); 003307, 90% Design Plans (Jan. 14, 2016); 008126, Draft EIR cover page (Sept. 25, 2015); 008792, EIR Notice of Determination (Feb. 16, 2016) (final EIR certified).

[133] Bates 005871-005876, SG meeting notes (Jan. 4, 2016) (See p. 1 ["We are stuck; no changes are possible," and the schedule is driven by the BART expansion project (A. Rakstins, Corps management)] and p. 6 [schedule for offsite mitigation project would take an additional three years (A. Cruz, Corps staff; Bates 005876)].) See also Bates 005883-005886, meeting notes (Jan. 4, 2016) (comments by A. Cruz, at p. 2, item 4 on top of page).

planned BART station construction and opening with the Project, ultimately, the circulated NEPA and CEQA draft documents only considered alternatives that ignored Staff suggestions to provide more natural flood protection design to allow vegetated floodplains.[134] Staff was extremely vocal in identifying the shortcomings of the EIR as it pertained to biological and hydrological impacts and mitigation. A 93-page comment letter identified deficiencies with the District's Draft EIR, provided comments on the alternatives and recommended additional alternatives consistent with Staff's suggestions from the early and mid-2000s.[135] With respect to mitigation, that letter:

- Noted inconsistencies related to sediment and vegetation maintenance activities and mitigations.[136]

- Stated that mitigation for impacts on waters of the U.S. and waters of the State did not comply with the State and Regional Water Board policies.[137]

- Observed that the DEIR did not adequately describe the potential post-project impacts or mitigations necessary to address impacts for sediment removal maintenance activities.[138]

- Requested revisions to the DEIR to include appropriate mitigation to compensate for both temporal and spatial losses in functions and values of the open water/aquatic vegetation and transitional vegetation, and pointed out that the types, numbers, densities, and locations of vegetation plantings, and success criteria would need to be developed in a mitigation and monitoring plan.[139]

- Requested revisions of the DEIR to recognize the project reach's designated beneficial uses and a plan to appropriately mitigate any unavoidable impacts on the creek habitat, especially the REC-2 and WILD beneficial uses.[140]

- Stated that the DEIR did not adequately describe the proposed project's environmental impacts and associated mitigations.[141]

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[134] Bates 005757- 005759, Lichten Meeting Notes (July 16, 2015); 002080.01- 002080.03, Water Board Comment Letter on 60% Design (June 5, 2015); 005776- 005781, Meeting notes-Lichten (Aug. 4, 2015); 005782-005791, Meeting notes-Glendening (Aug. 4, 2015); 005798, Agenda (Aug. 11, 2015), 005794-005796, Meeting Handout_LEDPA Opportunities (Aug. 11, 2015).

[135] Bates 009682-009774, EIR Comment Letter from W. Hurley to the District (Nov. 12, 2015).

[136] *Id.* at 009683, document p. 2.

[137] *Ibid.*

[138] *Ibid.*

[139] *Id.* at Bates 009686, document p. 5.

[140] *Ibid.*

[141] *Id.* at Bates 009688, document p. 8.

The Corps and District adopted the EIR without making recommended changes.[142] The resultant Project presented to the San Francisco Bay Water Board is a trapezoidal rock-riprapped channel, a design which the permitting arm of the Corps views with disapprobation.[143] The Project's unnaturally wide, flat, trapezoidal channel with hardened bed and banks from the rock riprap resulted in a homogenous system, that cannot transport sediment the way the previously-existing channel could or support the type of ecosystem the pre-Project channel had.[144]

At that point in the process, the San Francisco Bay Water Board could have filed suit pursuant to CEQA, as suggested by the District in its petition for writ of mandate currently pending in Superior Court.[145] Success in a CEQA lawsuit could have resulted in a court invalidating the EIR certification or enjoining the Project, potentially leaving the Corps and District unable to begin construction on what all parties agree is an important flood control project.[146] Another alternative was to wait on issuing the water quality certification until a defined mitigation plan was in place, a path that would have similarly delayed construction. Instead, Staff opted to work collaboratively with the District and Corps to authorize a project that would address the need for improved flood control and also address the significant impacts within the San Francisco Bay Water Board's jurisdiction through a placeholder for mitigation in the initial water quality certification and provisions of the subsequent Permit that required compensatory mitigation.[147]

3. The Two-Phase Permitting Process Was an Accommodation to the District and Corps and Contingent Upon Satisfactory Mitigation Requirements.

a. Accommodation to the District and Corps.

In ordinary circumstances, the San Francisco Bay Water Board typically issues joint WDRs/water quality certification permits where, like this Project, there is an initial project with impacts to waters of the State and/or United States and ongoing maintenance over a period of time.[148] In this case, due to Congressionally-authorized funding that was only available for a

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[142] Bates 008792, Notice of Determination (Feb. 16, 2016).

[143] Bates 014022-014023, Final 2015 Regional Compensatory Mitigation and Monitoring Guidelines (Design Pitfalls).

[144] *Ibid.* See also Bates 014066-014067, A. Riley field notes (Sept. 3, 2015).

[145] Bates 015497- 015498, Second Amended Petition for Writ of Mandate at pp. 7-8. See also Cal. Code Regs., tit. 14, §15096, subd. (e).

[146] Pub. Res. Code, § 21168.9 (A court may suspend any or all project activities pending a determination that there is CEQA compliance); *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1112 (set aside certification of EIR because it failed to explained why reduced flow in the creeks would not be environmentally significant); *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 143, (EIR vacated due to inadequate discussion of water issues); *LandValue 77, LLC v. Board of Trustees of California State University* (2011) 193 Cal.App.4th 675, 682–83 (directing superior court to set aside project approval); *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1221 (holding that "project approvals and associated land use entitlements also must be voided"); *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 672 (same approach).

[147] Bates 001175-001212, R2-2017-0014, Findings 20 and 21 (pp. 10-14), and Provision 19 (p. 25).

[148] See, e.g., Bates 015114, R2-2003-0115-Upper Guadalupe Flood Control Project (Provision 12).

limited time, the Executive Officer issued an initial water quality certification for the Project in March 2016 so that the Corps could begin Project construction as soon as possible.[149] A water quality certification can be issued relatively quickly through administrative procedures.[150] Issuing WDRs/water quality certification would have required a Board action and an additional two months to agendize the item and conduct the required public notification procedures for Board actions.[151] The additional two months needed for the Board to adopt a permit would have caused a delay in the Project. The only other time in recent history when the San Francisco Bay Water Board adopted separate water quality certification and WDRs for the same project was for the construction of the new eastern span of the San Francisco-Oakland Bay Bridge.[152] For that project, the California Transportation Authority (CalTrans) was the permittee for both the initial water quality certification, and the WDRs/water quality certification permit, and Caltrans followed through with mitigating for the Bay Bridge project's impacts.[153]

Like the Bay Bridge, this two-phase permitting approach was intended to allow accelerated contracting and construction of an important public safety project. The permitting approach for the Project was developed in collaboration with top management of the District and Corps prior to issuance of the water quality certification.[154]

There is no question that the Corps and the District sought water quality certification, as reflected in numerous meetings and discussions between Staff and the District.[155] Because of the Project's time-sensitive nature, the District and Corps pressed the San Francisco Bay Water Board to issue the water quality certification for the Project before the Project's mitigation measures were fully designed, evaluated by Staff, or vetted with the public.[156] Executive Officer Bruce Wolfe

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[149] Bates 009830, Email thread between J. Morrow and B. Wolfe (Oct. 10, 2015) ("I know this process is not preferred by the Water Board but the construction timeline simply cannot shift to the right anymore. The BART extension is too critical and is driving this Flood Risk Management project - I cannot allow any more delays on the project"); 009866- 009867, Letter from Senator Feinstein to Governor Brown (Dec. 2, 2015); 009882-009883, Email between B. Wolfe and W. Crowfoot; 009884-009885 (B. Wolfe summary attachment); 005883-005886, Interagency Meeting (Jan. 4, 2016); and 001849, March 14, 2016 WQC, p. 2.

[150] Cal. Code Regs., tit. 23, 3859 (Executive Officer may issue certification).

[151] Water Code § 13263 (requiring Board hearing for adoption of WDRs).

[152] See Bates 000213-000214, Response to Comments (RTC) pp. 12-13; 014349-014356, Order No. 2001-10 (CalTrans Bay Bridge water quality certification); and 014381-014416, Order No. 2002-01 (CalTrans Bay Bridge Permit).

[153] Bates TC-000507-TC-000512, Fernandez Decl., at pp. 3-4

[154] Bates 009886-009888, Email thread between B. Wolfe and W. Crowfoot; 009884-009885, B. Wolfe, Summary of project strategy (Dec. 15, 2015) ("District CEO Beau Goldie has continued to indicate to me that the District will address our concerns and is agreeable to our use of waste discharge requirements to see that these concerns are addressed moving forward."); Email from B. Wolfe, meeting coordination (Dec. 14, 2015), 005847-005848, Interagency Meeting, 12/14/2015-Meeting Recap.

[155] Bates 009917, Email M. Richardson to S. Glendening and reply (Jan. 7, 2016); 009918, Email M. Richardson (second request to confirm expeditious permitting); 009923, Email K. Lichten and M. Richardson (Jan. 12, 2016); and 009927, Email from K. Lichten to M. Richardson (Jan. 21, 2016).

[156] Bates 009917, Email S. Glendening to M. Richardson (Jan. 7, 2016); 009923, Email K. Lichten and M. Richardson (Jan. 12, 2016); 009927, Email, K. Lichten to M. Richardson (Jan. 21, 2016); 009928, Email from A. Cruz (Feb. 25, 2016) (requesting

received a letter and telephone calls from Senator Feinstein's and Congressman Honda's offices, all emphasizing the importance of the Project and requesting that the Board expedite the certification.[157] Bruce Wolfe discussed the permitting issues with District Chief Executive Officer, Beau Goldie, as explained in an email from Mr. Wolfe to Staff [158]:

> Feinstein and Honda have written to the Governor and Assistant Sec of the Army calling on us to permit the project expeditiously. Thus, we will need to certify the project, but we will still see how close we can steer it to addressing our issues. I discussed with Beau Goldie last night how we do that - he's fully aware of our issues with the project and wants to see how the District can address those. We've tentatively agreed that a certification with open-ended conditions to the Corps and WDRs with more specific conditions to the District is a good way to go. He recognizes that the District must certify CEQA before we can issue certification. [159]

That urgency was the reason Staff agreed to the two-phase permitting approach developed collaboratively among Corps and District staff and formally detailed in a meeting on January 4, 2016.[160]

The District urged Staff to memorialize one of the agreements made during the January 4, 2016 meeting that certification would be expedited as soon as the District completed its CEQA process:[161]

> I am writing to request that you send a letter or email to USACE and the SCVWD stating that the RWQCB will be issuing the 401 WQ certification for the Upper Berryessa Creek project (list project limits) as soon as the SCVWD certifies the EIR currently scheduled for Feb. 9, 2016.[162]

Ms. Richardson followed that email with a second one the next day on January 8, 2016: "When can we expect to receive a statement regarding intent to permit Upper Berryessa?"[163]

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update); 009929, Email, K. Lichten to T. Kendall (Feb. 25, 2016); and 009936, Email between B. Wolfe and J. Morrow (Mar. 10, 2016) (see p. 1 of 2: "...we are down to the 11th Hour and need a feasible permit very, very quickly").

[157] Bates 009832, Request from K. Rooney (Feinstein) to talk (Oct. 19, 2017); 009864-009865, Email thread between B. Wolfe and K. Rooney (Feinstein) (Dec. 2, 2015); 009866- 009867, Letter from Feinstein and Honda to Governor (Dec. 2, 2015) (Letter att. to email from K. Rooney); and 009879, Email, F. Marcus (request for status update on behalf of Governor Brown). See also Bates 009928, Email from A. Cruz (Feb. 25, 2016) (one of numerous occasions when Corps staff pressed for updates on progress to complete the certification expeditiously); and 009935, Email from A. Cruz.

[158] Bates 009875, Email from B. Wolfe to Staff (p. 2 of 3, top of the page).

[159] *Ibid.*

[160] Bates 005862, Agenda (Jan. 4, 2016); 005877 – 005880, Meeting recap for Jan. 4, 2016 meeting; and 005847- 005848, meeting recap of Dec. 14, 2015 meeting.

[161] Bates 009917 and 009918, Emails from M. Richardson to K. Lichten (Jan. 7 and 8, 2016).

[162] Bates 009918, Email from M. Richardson to K. Lichten and S. Glendening (Jan. 7, 2016).

[163] *Ibid.*

Water Board Division Chief Keith Lichten affirmed the Staff's intent to prepare the water quality certification as soon as the District completed its CEQA process.[164] Mr. Lichten separately followed up with District Deputy Operating Officer Melanie Richardson to affirm the need for mitigation:

> Subsequent to that and likely later this spring, we expect to bring Waste Discharge Requirements for the project before our Board for its consideration. Similar to our approach on past projects, such as the Bay Bridge, where we issued a fairly quick cert to facilitate contracting and then issued a separate WDR, the WDRs are likely to address aspects of the project in greater detail, including post-construction monitoring, alternate mitigation to address the project design issues, and potentially operation and maintenance, to the extent O&M isn't covered under the District's Stream Maintenance Program WDRs. At this point, our intention is to name both the District and the Corp.[165]

Staff worked expeditiously to develop the water quality certification to facilitate the Corps' and the District's contracting timeframe. Through meetings on February 29 and March 8, 2016, and numerous email and telephone calls between January 4 and March 14, 2016 (issuance date of the initial water quality certification), Staff significantly tailored the water quality certification[166], a process entailing two complete administrative drafts distributed to both the Corps and the District.[167]

These intense negotiations were intended to meet the Corps' needs and convey the understanding that WDRs would be necessary to complete the two-phase permitting approach discussed in January and reflected in the initial water quality certification signed on March 14, 2016.[168] The District's claims that the Board "changed course" or any claim of "surprising proposals"[169] is simply unsupported by the record.[170] The initial tentative order for WDRs named both the Corps and the District collectively as the Discharger, but that version was limited to WDRs for the

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[164] Bates 009923, Letter from K. Lichten to M. Richardson (Jan. 12, 2016).

[165] Bates 009927, Email from K. Lichten to M. Richardson (Jan. 21, 2016).

[166] Bates 002441.001-002441.003, 002456- 002457, 002487-002488, 002460-002461, 002510-002512, and 009932, which are examples of the numerous text changes and word-smithing in the working draft certification to avoid a delay in project construction.

[167] Bates 005298- 005324, administrative draft WQC (Feb. 11, 2016); and 005329 - 005347, March 2, 2016 administrative draft WQC.

[168] Bates 001849-001868, March 14, 2016 WQC; and 005877-005880, follow-up from the January 4, 2016, meeting.

[169] Bates 015316-015348, Petition to the State Water Board at p. 8; and Test Claim, at p. 5.

[170] Bates, 009875, Email from B. Wolfe to Staff (see p. 2 of 3, top of page) (discussion of two-phased permitting approach with Chief Operating Officer Beau Goldie); and 005847-005848, Meeting recap for Jan. 4, 2016, interagency meeting.

Project and would not have revised the initial water quality certification.[171] The Corps and the District both commented that the issuance of WDRs could potentially result in duplicative and/or inconsistent regulation of the Project, when viewed against the requirements of the initial water quality certification.[172] In response to those comments, Staff recommended consolidating the water quality certification with the WDRs, clarified which tasks in the water quality certification were complete, and replaced references to mitigation in the water quality certification with specific mitigation tasks.[173]

b. Contingent on Satisfactory Mitigation

The initial water quality certification noted that mitigation was necessary but details regarding the required mitigation plan would be deferred until the proposed adoption of WDRs at a later date.[174] As described in the initial water quality certification, the requirement for compensatory mitigation was necessary to ensure the Project complied with State water quality standards and thus Clean Water Act Section 401.[175] The Test Claim omits any discussion of the original water quality certification's documented need for compensatory mitigation. These references, in italics below, include:

- This Certification is being issued to facilitate the Applicant's contracting and construction schedule for the Project, which is intended to result in the completion of Project construction prior to the planned opening of the Milpitas Bay Area Rapid Transit (BART) station in late 2017. Subsequent to issuance of this Certification, the Water Board will consider adoption of Waste Discharge Requirements (WDRs). The following is a partial list of items the WDR will address: ... *A plan to compensate for the capital project's impacts*...[176]
- As noted elsewhere herein, the Water Board will also consider WDRs to address other needs for the Project, including *the need to compensate for temporal and permanent losses of functions and values by the Project design and future O&M activities* and to monitor vegetation establishment and success.[177]

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[171] Bates 001275- 001309, Draft WDRs (Aug. 19, 2016).

[172] Bates 001536-001576 and 001634-001644, District comments on public draft WDRs (Sept. 19 and Dec. 5, 2016); 01527-001534, and 001632-001633, Corps comments on public draft WDRs (Sept. 19 and Dec. 2, 2016). See also Bates 010248, 010249, 010256-010259, District letters to Regional Water Board (March 30, April 28, and May 16, 2016); and 010250-010255 and 001738-001743, Corps Letter, May 13, 2016 (erroneously dated March 13 and later resubmitted with date correction).

[173] Bates 001777, Email, K. Lichten to Dischargers (Oct. 28, 2016) (Revised TO Discussion); and 001175- 001176, and 001186-001188, Permit at Findings 3 and 21.

[174] Bates 001848-001868, March 14, 2016 WQC, at p. 2 and 10.

[175] *Id.* at Bates p. 001857; March 14, 2016 WQC at p. 10.

[176] Bates 001849, March 14, 2016 WQC, p. 2.

[177] Bates 001856-001857, March 14, 2016 WQC, p. 10, Finding I.K.

- *Mitigation necessary for future O&M activities is intended to be considered as a part of the WDRs for the Project to be brought before the Water Board later this year.*[178]
- *The need for compensation of impacts from the Project design and future O&M will be addressed as a part of the WDRs for the Project to be brought before the Water Board later this year.*[179]
- The project's EIR states that sediment removal maintenance activities have been pre-mitigated under the District's existing Stream Maintenance Program. *However, capital projects such as the project are not covered by the Stream Maintenance Program.*[180]
- "The EIR does not include necessary detail for long-term impacts and mitigation and impacts from O&M activities (see Finding I.E). *The need for compensation of impacts from the Project design and future O&M will be addressed as a part of the WDRs for the Project to be brought before the Water Board later this year.*"[181]

Consistent with the federal mandates described above, Staff appropriately identified the need for compensatory mitigation to address the Project's remaining impacts.[182]

As described in detail in the Factual Background, the Project's impacts include degradation of existing and potential beneficial uses of waters of the State and U.S. through the placement of fill into almost 10 acres of State waters.[183] Rather than "bring the environment to its original state," as the Corps stated,[184] the Project will permanently place rock riprap in a reshaped trapezoidal channel, and that design will reduce and limit existing and potential beneficial uses at the site and areas adjacent to it.[185] To minimize impacts from the Project, the District and Corps will seed the creek channel bed and banks with native plant species.[186] These vegetation efforts will not adequately compensate for the remaining impacts to creek functions and values, requiring an additional mitigation and monitoring plan to restore creek habitat.[187]

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[178] Bates 001853, March 14, 2016 WQC, p. 6, Finding I.H.

[179] Bates 001856-001857, March 14, 2016 WQC, p. 10, Finding I.K.

[180] Bates 001853, March 14, 2016 WQC, p. 6, Finding H.

[181] Bates 001857, March 14, 2016 WQC, p. 10, Finding I.L.

[182] Bates 015249-015251, Basin Plan, at section 4.23 (including 015259-015261, California Wetland Conservation Policy; and 015257-015258, Antidegradation Policy).

[183] Factual Background, *supra,* Section II.A; Bates 009208-009331, Wetland delineation; 001175-001212, Basin Plan at section 4.23; and 001175-001212, Permit at Finding 20 (pp. 10-12).

[184] Bates 001527, Corps comment letter (B. Smalley) (Sept. 19, 2016) at p. 6.

[185] Bates 012808-012897, Fischenich (2001); 011282-011288, Williams (1989); and 001184-001186, Permit at Finding 20 (pp. 10-12).

[186] Bates 008797, EIR, p. ES-iii; and 001177, Permit, at Finding 7.c, p. 3.

[187] Bates 001175-001212, Permit, Findings 20 and 21, (pp. 10-14), and Provision 19 (p. 25).

On numerous occasions, Staff requested that the Corps and/or District propose a compensatory mitigation project to incorporate into the Permit, as required under the Code of Federal Regulations, but none was proposed[188] As a result, the Permit contains criteria or a framework for what would constitute acceptable mitigation, but no details or reference to an actual mitigation plan.[189] Those criteria are consistent with mitigation requirements for four previous projects sponsored by the District that have similar impacts for which both onsite and offsite compensatory mitigation was part of the respective mitigation plans. These four projects include analogous features to this Project and mitigation was necessary to address unavoidable impacts:

(1) *Lower Guadalupe River Flood Control Project (Order No. R2-2002-0089).* The project length is 6.5 miles.[190] Permanent impacts were from construction of rock riprap and gabion slope protection structures (i.e., bundles of boulders contained by wire to form terraces on slopes), concrete fill for outfall structures and an overflow weir, fill from an expanded levee footprint and construction of a depressed maintenance road in the project channel. Temporary impacts were from construction activities, and sediment and vegetation removal throughout the Project.[191] To compensate for the unavoidable permanent and temporary impacts, the District planted 6.51 acres of native riparian vegetation onsite, and restored 35.54 acres of intertidal wetland habitat offsite in the South Bay Salt Ponds complex.[192] The District successfully completed both onsite and offsite mitigation by December 2016.[193]

(2) *Guadalupe River Project and Guadalupe Creek Restoration Project (also known as the Downtown Guadalupe River Flood Control Project) (Order No. R2-01-036).* The project length is 2.6 miles.[194] Project impacts are from armoring portions of the channel with concrete and rock; removing riparian vegetation and shaded riverine aquatic cover vegetation; removing spawning gravel for salmonids; and creating conditions that would potentially cause migrating fish to be stranded in the low flow channel. Mitigation for the unavoidable impacts included planting native vegetation along 0.5 miles of the river onsite and offsite,

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[188] Bates 001989-00199, Meeting notes – P. Amato (Aug. 13, 2006) (Emphasize Self-Mitigation); 005791-005782, Meeting notes – S. Glendening (Aug. 4, 2015); 005799-005805, Meeting notes – K. Lichten (Aug. 11, 2015); 005806-005823, Meeting notes - S. Glendening (Aug. 11, 2015); 005827-005828, Meeting Action Items (Aug. 11, 2015); 002080.01-002080.03, K. Lichten, Water Board Comments on 60% Design (June 5, 2015); 009785- 009786, Email K. Lichten (July 21, 2015); and 005877-005880, Meeting Summary - S. Glendening (Jan. 4, 2016).

[189] Bates 001187-001188, Permit at pp. 13-14.

[190] Bates 015072-015076, Lower Guadalupe permit at Finding 7.

[191] Bates 015071-015090, Lower Guadalupe permit at Findings 13-20.

[192] *Ibid*, at Findings 17-20.

[193] Bates TC 000242.003-TC000242.004, Letter B. Wolfe to Titus (Feb. 21, 2018) (documenting successful completion of Lower Guadalupe mitigation requirements).

[194] Bates 015040-015056, Downtown Guadalupe permit at Finding 2.

eight miles downstream of the Project site; and restoring 1.6 miles of Guadalupe Creek located four miles upstream of the Downtown Project.[195] Construction and vegetation plantings were completed in the mid-2000's, but mitigation monitoring is in progress (though some of the measurable objectives have been completed).[196]

(3) *Matadero and Barron Creeks Bypass Project (Downstream of Interstate 101) – water quality certification issued in 2003.* This project constructed a high-flow bypass channel. Construction of the bypass channel resulted in unavoidable permanent impacts to 0.01 acres of seasonal wetland habitat and 0.66 acres of riparian habitat, and temporary impacts to 0.05 acres of seasonal wetland and 0.48 acres of riparian habitat.[197] To compensate for the unavoidable permanent and temporary impacts, the District successfully established 0.37 acre of tidal salt marsh habitat onsite, restored 1.82 acres of riparian habitat onsite, and established 0.64 acres of riparian habitat offsite; the monitoring requirements were completed in 2014.[198]

(4) *San Francisquito Creek Flood Reduction, Ecosystem Restoration, and Recreation Project* – water quality certification issued in April 2015. The project length is 1.5 miles.[199] Permanent impacts to 6.3 acres of jurisdictional wetlands and other waters are mainly from channel widening and realigning, placing rock riprap for bank slope protection, and reconfiguring the low flow channel.[200] The 3.75 acres of temporary impacts are from construction activities, realigning the creek channel, constructing high-tide refugia, degrading a Bay levee, and realigning the low flow channel.[201] Compensatory mitigation of the permanent and temporary impacts to the impacted wetlands and waters will require a minimum of a total of 13.93 acres of tidal salt marsh, 0.80 acres of diked marsh, and 1.62 acres of tidal channel be restored by the project.[202] In addition, planting of 267 native trees is required for mitigation of removing riparian habitat

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[195] *Ibid*, at Findings 2, 6, 7, 9, and 10.

[196] Bates TC-000443.023, 2017 Guadalupe River Mitigation and Monitoring Report (excerpt), at Table ES-1.

[197] Bates 015091-015097, Matadero/Barron Creeks downstream of 101) permit (water quality certification) at p. 3.

[198] Bates TC-000033.100-001-TC-000033.100-027, Matadero/Barron MMP Year 10 report (Dec. 24, 2014) at p. i.

[199] Bates 015188-015207, San Francisquito Creek permit (water quality certification (April 7, 2015) at Finding 2 (p. 3).

[200] *Ibid*; see Bates 015195, at Table 1 (p. 8).

[201] *Ibid.*

[202] Bates TC-000034.001-TC-000034.069, San Francisquito Creek Mitigation and Monitoring Plan (August 2016) at Table 3 (pp. 20-21).

established previously for a different project. Tree plantings will be offsite.[203] This project is currently under construction.

The San Francisco Bay Water Board initially considered the WDRs in January 2017, but postponed adoption of the WDRs. The Board Chair noted in her closing remarks from that hearing that "[M]itigation is appropriate…" but the "…exact language to describe that mitigation…." had not been finalized.[204] Staff attempted to engage the District further in response to the Chair's comments, but the District continued to refuse to engage in substantive discussions about mitigation, so Staff ultimately proposed the revised Permit adopted in April 2017, which provided a requirement to develop a mitigation plan and framework guiding the development of that plan.[205] This is the Permit the District contests.

The District alleges that the San Francisco Bay Water Board changed the size of the mitigation project twice.[206] Neither draft permit established an actual mitigation project, however, but rather a *framework* and *scenarios* of potentially acceptable mitigation proposals. Both versions of the Permit necessarily made assumptions because the District refused to submit a mitigation plan. In the January 2017 draft, Staff assumed that a mitigation project would need to be about twice the impacted area, which would result in the mitigation project being about 20,000 linear feet or 20 acres.[207] The San Francisco Bay Water Board has used ratios as a placeholder for other large flood control projects when a final mitigation plan was not available so that the project could sponsor would be able to proceed with their complex cost approvals and construction contracting plans.[208]

In the April 2017 draft, still in the absence of a requested mitigation plan, Staff provided a bulleted list of assumptions about the type of mitigation that the District would likely propose, based on past projects and plans for capital improvement projects, and clarified the amount of mitigation necessary based on those assumptions.[209] Staff removed the references to ratios and clarified the factors used to determine whether a mitigation project meets the No Net Loss Policy. The Permit notes that the amount of 15,000 linear feet or 15 acres would change,

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[203] *Ibid*, at p.4 (see last bullet point: "Plant riparian willows off-site along an upstream portion of San Francisquito Creek…").

[204] Bates 000608, R.T. (Jan. 11, 2017), p. 308.

[205] Bates 005976 and 005977, Emails (Feb. 23, 2017) (coordinating field visit and follow-up discussion of Admin. Draft); 005741-005755, Site inspection photographs (Feb. 24, 2017); 001437-001484, Admin Draft (Feb. 28, 2017); and 001175-001212, Permit. Originally scheduled for the March 8, 2017 Board meeting, the item was postponed to April 12, 2017, so that the District could focus on responding to emergency conditions due to heavy rainfall that had occurred in late February. See Bates 000610-000611, Agenda (March 8, 2017) and 000614, Staff Summary Report.

[206] Test Claim, at p. 5.

[207] Bates 000018-000021, January 2017 Tentative Order at Finding 21.

[208] Bates 015202- 015203, at Condition 23 ("Conditional Water Quality Certification for the "San Francisquito Creek Flood Reduction, Ecosystem Restoration, and Recreation Project, Santa Clara County"); and 151226, at Condition 15 ("Conditional Water Quality Certification for the Permanente Creek Flood Control Project, Santa Clara County"). See also Bates 000018-000021, January 2017 Tentative Order at Finding 21.

[209] Bates 000677- 000679, April 5, 2017, Tentative Order at Finding 20 and Bates 000679-000681, April 5, 2017, Tentative Order at Finding 21.

depending upon the type of project ultimately proposed, noting that the Basin Plan framework could account for a range of potential projects that could meet the No Net Loss Policy. The Permit notes that the amount of mitigation ultimately required would still depend upon the size and scope of the project the District ultimately proposed.[210]

Notably, both drafts specified types of projects that could compensate for the impacts that had no relation to the 15 or 20 acres given as examples in the two versions of the Permit:

> "Examples of potentially acceptable mitigation projects include dam removal, increasing salmonid habitat complexity in another creek, replacing a concrete channel with restored riverine wetland habitat, and preparing a watershed management plan and implementing specified projects sufficient to meet the Order's mitigation requirements."[211]

The project the District ultimately chose was a project along these lines.[212] The District utilized the framework in the Permit, but does not propose to provide either 20 or 15 acres of mitigation, the two example values given in the two versions of the Permit.[213]

C. The Almaden Lake Mitigation Project Has Been Approved.

The adopted Permit required the District to submit an acceptable mitigation and monitoring plan by October 2, 2017. The District submitted a concept plan for the Almaden Lake Improvement Project (Almaden Lake project) on August 28, 2017[214] and subsequently submitted supplemental information through a series of meetings, email dialogues, technical memoranda, and draft design plans.[215] The project has strong stakeholder support[216] and it will provide multiple benefits and improvements to functions and value with respect to water quality.[217] Based on the information submitted by the District, construction of the Almaden Lake project would result in

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[210] Bates 001186- 001188, Permit at Finding 21.

[211] Bates 000020, at Finding 21 in January 2017 Revised Tentative Order (pp. 13-14); and 000681 at Finding 21 (p. 14) in April 2017 Tentative Order (p. 14).

[212] Bates TC-000033.001-001 - TC-000033.001-016, Almaden Lake project staff memo.

[213] Bates 000018-000021, January 2017 Tentative Order at Finding 21; 000679-000681, April 5, 2017, Tentative Order at Finding 21; and Bates TC-000033.001-001 - TC-000033.001-016, Almaden Lake Project project staff memo.

[214] Bates TC-000003 - TC-000006, Emails. Hakes and K. Lichten (Aug. 17 through Aug. 28, 2017); and TC-000008 - TC-000009, Initial concept plan (attachment to August 28 email from C. Hakes).

[215] Bates TC-000010 - TC-000012, SCVWD technical memo (Sept. 28, 2017) ("Fisheries Benefits of Almaden Lake Project"); TC-000014 - TC-000015, status update of Almaden Lake project plans; TC-000019 - TC-000020, SCVWD technical memo (Oct. 2, 2017) ("Recreation Benefits of Almaden Lake"); TC-000021, Meeting agenda (Nov. 11, 2017); TC-000022 - TC-000024, Design plans, part 1 of 2; TC-000025 - TC-000026, Emails S. Glendening and R. Blank (Dec. 11, 2017, through Jan. 26, 2018); TC-000027 - TC-000028, Design plans, part 2 of 2; TC-000029 - TC-000030, Email S. Glendening and R. Blank (Jan. 31-Feb. 2, 2018); TC-000031, blue-green algae information; TC-000032, Email, R. Blank (April 11, 2018) (CEQA information); TC-000033, Email L. Porcella (May 2, 2018) (operations of Alamitos flashboards).

[216] Bates TC-000127, District's Annual Report for Capital Improvement Program, FY 2016-2017 (Year 4) ("The project has a high level of stakeholder engagement....").

[217] Bates TC-000033.001-001 - TC-000033.001-016, Almaden Lake Project project staff memo (Aug. 2018).

no net loss for both the Project and impacts of constructing the mitigation project.[218]

Planning and design of the Almaden Lake project is funded through a parcel tax that funds the District's *Safe, Clean Water and Natural Flood Protection Program.* The parcel tax was approved by the voters of Santa Clara County in 2012 through adoption of "Measure B" with 74% of the vote .[219] The District's own website states that the fish passage and habitat project at Lake Almaden "was voter approved as part of the Safe, Clean Water and Natural Flood Protection Program" and identifies funding for the project as the Safe, Clean Water Fund.[220] The same website identifies the schedule as starting in FY 2014 and finishing in FY 2019.[221]

The District's actions demonstrate their commitment to constructing the Almaden Lake project. For example, the District issued a notice of preparation (NOP) for a draft environmental impact report for the Almaden Lake project on April 4, 2014,[222] and conducted several stakeholder meetings to refine the project alternatives before and after the NOP was issued.[223] The draft EIR is expected to be released in late spring 2018.[224] In addition, the District's published timeline for the Almaden Lake project shows construction will begin in 2019 and be completed in 2022.[225] The Almaden Lake project has strong support by stakeholders,[226] and the District's submittals to the San Francisco Bay Water Board and their ongoing activities to bring the project to construction strongly point to completion of the Almaden Lake project within the next five years. Presumably the District will complete the Project in accordance with the information it has given its ratepayers.

At this point in time, the District has proposed a project which, once implemented, will comply with the off-site mitigation requirements of Provision B.19 contested in the Test Claim.

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[218] *Ibid.*

[219] Bates 014132- 014138, Measure B election returns, November 2012; and 014139-014149 (Item D4 at Bates 014147: "Construct one creek/lake separation project in partnership with local agencies.").

[220] Bates TC-000488 - TC-000493, District website, https://www.valleywater.org/project-updates/creek-river-projects/fish-habitat-passage-improvement.

[221] *Ibid.* See also Bates TC-000422- TC-000443, 2019–2023 Five-Year Capital Improvement Program, chapter 4, pg. IV-9.

[222] Bates TC-000001, NOP (State Clearinghouse No. 2014042041).

[223] Bates TC-000001- TC-000002.001, TC-000002.003 TC-000002.005, and TC-000002.008- TC-000002.013 (San Jose Mercury News articles from 2014 about the Almaden Lake project including public workshops conducted by the District); and TC-000033.001, Email R. Blank to S. Glendening (May 17, 2018) (District's public outreach was extensive).

[224] Bates TC-000032, Email R. Blank (April 11, 2018) (status of draft EIR).

[225] Bates TC-000431, 2019-20123 Five-Year Capital Improvement Program report, at chapter 4, pg. IV-10.

[226] Bates TC-000001 - TC-000002.001, TC-000002.003 TC-000002.005, and TC-000002.008- TC-000002.013 (San Jose Mercury News articles from 2014 about the Almaden Lake project including public workshops conducted by the District).

D. Challenges to The Permit Are Pending in More Than One Forum.

The District petitioned the Permit to the State Water Resources Control Board within 30 days of the Permit adoption.[227] That petition was dismissed by operation of law.[228] The District also filed suit in Superior Court, alleging violations of the California Environmental Quality Act, challenging the San Francisco Bay Water Board's authority to issue the Permit, accusing the San Francisco Bay Water Board of various due process violations, and raising other procedural issues.[229] The Second Amended Petition for Writ of Administrative Mandamus requests as relief that the court set aside the Permit.[230]

III. ARGUMENT

The Test Claim focuses on only a portion of a single Permit requirement – the off-site mitigation requirement of Provision B.19 – which requires submission of a Mitigation and Monitoring Plan "sufficient to ensure the mitigation of permanent and temporal losses in functions and values of waters of the State and to ensure the Project results in no net loss and a long-term net gain in wetland and waters area, function and value...."[231] The District asserts that the mitigation provision is subject to subvention because it is a State mandate, not required by federal law[232] and because it imposes new programs or higher levels of service.[233] The District also alleges that none of the exceptions in Government Code section 17556 apply.[234] Finally, the District states that it lacks authority to assess a fee to recover the costs of these mandated activities.[235]

Article XIII B, Section 6 of the California Constitution requires subvention of funds to reimburse local governments for State-mandated programs "[w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government." Government Code section 17556 provides several exceptions and limitations to the subvention requirements:

a) The local agency requested authorization to implement a given program.

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[227] Bates 015316-015348, Petition to the State Water Board.

[228] Bates 015446-015447, Dismissal letter.

[229] Bates 015489-015507, Second Amended Petition for Writ of Administrative Mandamus.

[230] *Ibid.*

[231] Bates 001199- 001200, Order No. R2-2017-0014, p. 25, Provision B.19.

[232] Test Claim, at pp. 9-12.

[233] *Id.* at pp. 12-13.

[234] *Id.* at pp. 7-8.

[235] *Id.* at pp. 13-14.

b) The Permit affirmed a mandate that has been declared existing law or regulation by action of the courts.
c) The Permit imposes a requirement mandated by federal law.
d) The local agency has the authority to levy charges, fees or assessments.[236]

In this case, the Commission should decline to require subvention for five independent reasons, any one of which defeats the District's Test Claim:

1. The District elected to seek the permit that forms the basis of the Test Claim. The San Francisco Bay Water Board did not unilaterally impose requirements on the District.
2. The District has already budgeted funds to pay for the requirements from parcel tax money funded by residents who voted for it.
3. The requirement to mitigate impacts from dredge and fill activities is not a new program or higher level of service. The requirement is not peculiarly governmental, nor is it unique to local entities. Every party – public or private – who chooses to seek a permit for dredge and fill activities with permanent impacts and the associated water quality certification will be subject to mitigation requirements. The requirement to mitigate dredge and fill impacts dates back to the 1970s and has been declared existing law by the United States Supreme Court. The District itself has been subject to a number of other similar dredge and fill permits where mitigation was required
4. The mitigation requirement is a federal mandate. The only "true choice" involved was the District's election to pursue a permit for dredging activities. Once it chose to pursue that permit, the Clean Water Act and associated federal regulations required mitigation for impacts.

A. The District Exercised a Choice in Seeking Water Quality Certification

Government Code 17556, subdivision (a) states that the Commission shall not find subvention by the State where the local agency requested the Permit. Here, not only did the District choose to pursue the permit, the District selected and proposed the mitigation plan that the San Francisco Bay Water Board ultimately approved – a plan that was already in the queue of projects the District intended to undertake.[237]

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[236] Gov. Code § 17556, subd. (a) – (d).

[237] Bates 014147, 2012 Measure B ballot information (discussing parcel tax to fund the funds the District's *Safe, Clean Water and Natural Flood Protection Program*) (see page 9 of 11, bottom of page); TC-000002.006, 2014 Notice of Preparation for environmental impact report; TC-000001- TC-000002.001, TC-000002.003 TC-000002.005, and TC-000002.008- TC-000002.013 (San Jose Mercury News articles from 2014 about the Almaden Lake project including public workshops conducted by the District); and TC-000123- TC-000127, Excerpt from Annual Report for Capital Improvement Program, FY 2016-2017 (Year 4) (addressing Almaden Lake project). See also Bates TC-000488-TC-000493, District website (capital improvement projects listed under Item D4, at TC-000490, KPI#1 (Key Performance Indicator #1) with project update for the creek-lake separation projects) (District URL: http://www.valleywater.org/project-updates/creek-river-projects/fish-habitat-passage-improvement. Accessed July 9, 2018).

The history of interactions described in detail in the Factual Background affirms that all parties believed that authorization from the San Francisco Bay Water Board was necessary to implement the project.[238] The request for regulation, however, was a discretionary act by the District. Discharging to waters of the State is not something the San Francisco Bay Water Board required of the District and unauthorized discharges are strictly forbidden by the Clean Water Act. The District's voluntary act to subject itself to the framework of authorities discussed in the Statutory Background, *supra*, defeats its unfunded mandates claim.

In *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, the California Supreme Court determined that two statutes requiring school site councils and advisory committees to provide notice of meetings and to post agendas for those meetings were not unfunded mandates:

> [T]he statutes require that districts adopt policies or plans for school site councils-but the statutes do not require that districts adopt councils themselves *unless the district first elects to participate in the underlying program.*[239]

City of Merced v. State of California (1984) 153 Cal.App.3d 777 similarly noted that subvention was unnecessary where the City of Merced contested a requirement to pay for goodwill in eminent domain proceedings:

> [W]hether a city or county decides to exercise eminent domain is, essentially, *an option of the city or county*, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost.[240]

Similarly, in this case, federal and State law require parties to apply for water quality certification when seeking a dredge and fill permit, but neither federal nor State law requires that parties discharge to waters of the United States. Accordingly, because the District's discretionary acts led to the issuance of the Permit challenged here, the contested provision is not an unfunded State mandate subject to reimbursement.[241]

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[238] See Factual Background, supra, Section II.B.

[239] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 745 (emphasis added) (*Department of Finance 2003).*

[240] *City of Merced, supra,* 153 Cal.App.3d at p. 777 (emphasis added).

[241] *Department of Finance 2003, supra,* 30 Cal.4th at p. 741 ("a reimbursable state mandate arises only if a local entity is 'required' or 'commanded'—that is, legally compelled—to participate in a program (or to provide a service) that, in turn, leads unavoidably to increasing the costs incurred by the entity") (citing *City of Merced, supra,* 153 Cal.App.3d at pp. 777, 783; *Long*

The District claims that it was not an "applicant" for the section 401 water quality certification, and claims the timing of the issuance of the Permit was "disruptive."[242] The evidence in the record belies this claim: the District and Corps jointly proposed the Project, both acknowledged the need for water quality certification, and the District's Project partner (the Corps) duly submitted an application for section 401 water quality certification to authorize the Project on September 25, 2015.[243] As to the timing of issuing the Permit, the Factual Background demonstrates that the District and the Corps pushed the San Francisco Bay Water Board to issue authorization for the Project.[244]

Furthermore, Section 401 must be construed in conjunction with both Clean Water Act section 301, prohibiting discharge without a permit, and Title 23 of the California Code of Regulations, section 3855, which requires that an "application for water quality certification shall be filed with the regional board executive officer in whose region a discharge may occur." Staff construed the Corps' application for certification[245] and the District's EIR[246] to be an application that covered both the District and the Corps.[247] The only alternative interpretation is that the

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Beach Unified Sch. Dist. v. State of California (1990) 225 Cal.App.3d 155, 174; and *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1284 (*County of Sonoma*)).

[242] Test Claim, at p. 4 ("The District never asked for this draft order and objected both to the Regional Board's authority to issue it and to its disruptive timing in doing so").

[243] Factual Background, *supra,* Section II.B.; Bates, 002246-002262, Corps application for water quality certification (Sept. 25, 2016); TC-000035.001, District's draft EIR (Sept. 25, 2016) (cover page with date stamp; for full draft EIR, see Bates 008126-008791; 008792, Notice of Determination (February 16, 2016)); 006015, Project Environmental Impact Statement, at Table V-"Funding History" (showing District's expenses from 1998 through 2012 totaling $3,304,117 for engineering and planning analyses and the Corps' contribution during the same period was $4,891,133); 009828-009831, Email B. Wolfe and LTC J. Morrow (Oct. 7-13, 2015) (404 (r) waiver for water quality certification); 002263-002264, 80 Fed. Reg. 61187 (Oct. 9, 2015) (Corps' intent for Clean Water Act, section 404(r) waiver); 009882, Email from B. Wolfe to T. Howard, F. Marcus, and W. Crowfoot ("In sum, based on yesterday's conference call between the Corps, the Santa Clara Valley Water District, and the Water Board, we have an agreed-upon path forward to get this project certified by February 2016 and meet the Corps' goal of putting the project out to bid by March 2016. That should allow the project to be completed by the end of 2017, the time the Milpitas BART station, which borders the project, is scheduled to open.") and 009884-009885, attachment to B. Wolfe email to T. Howard et al.; 009918, Email M. Richardson to K. Lichten and S. Glendening (Jan. 7, 2016) ("I am writing to request that you send a letter or email to USACE and the SCVWD stating that the RWQCB will be issuing the 401 WQ certification for the Upper Berryessa Creek project (list project limits) as soon as the SCVWD certifies the EIR currently scheduled for Feb. 9, 2016."); 009918, Email from M. Richardson to S. Glendening (Jan. 8, 2016) ("When can we expect to receive a statement regarding intent to permit Upper Berryessa? Thanks again for all of your help."); 001992-002011, Letter from District to *Park Row Neighbors on Berryessa Creek* (Sept. 7, 2006) (addressing the Corps-District partnership and stating that the District is working closely with regulatory agencies) (see p. 3 at Bates 001994); 008792, Notice of Determination pursuant to CEQA (Feb. 16, 2016); 010329-010357, Project Partnership Agreement (May 17, 2016) (see p. 29, signature of District Chief Executive Officer, Norma J. Camacho); 005847-005848, Meeting recap for Dec. 14, 2015 meeting and Meeting notes for Jan. 6, 2016 meeting; 61187-61188; and 005756-005930 (meetings from July 16, 2015 through March 10, 2016 in which the Corps and District participated).

[244] Bates 009918, Email M. Richardson to K. Lichten and S. Glendening (Jan. 7, 2016); 009917, Email S. Glendening to M. Richardson (conveying intent to expedite certification); and 009923-009924, Email M. Richardson (Jan. 8, 2016) followed by K. Lichten's response (Jan. 12, 2017) (Water Board's intent to expedite certification).

[245] Bates 002244- 002262, Application for Water Quality Certification.

[246] Bates 008792, Notice of Determination (Feb. 9, 2016); State Clearinghouse No. 2001104013.

[247] Bates 000276, Response to Comments, p. 5, response RTO-C-01 (which begins on p. 1, Bates 000272).

Corps and District failed to comply with requirements that parties apply for water quality certification for dredge and fill activities.

The District concedes that the only way that the San Francisco Bay Water Board could have avoided imposing conditions on the underlying dredge and fill permit would have been by denying certification, such that the District and the Corps could not have undertaken their project.[248] To suggest that the San Francisco Bay Water Board could have denied certification admits that the District sought the permit, a fact borne out by numerous emails and meeting notes in the record.[249]

Here, where the *District* made a choice to seek a dredge and fill permit and thus water quality certification, the San Francisco Bay Water Board did not require them to undertake dredging activities and thus the element of "legal compulsion" is absent. In the applicable caselaw above, where the test claimant chose to undertake certain actions, there was no requirement for reimbursement.[250]

B. The District Has the Authority to Levy Service Charges, Fees, or Assessments to Pay for the Program

The District claims it lacks fee authority, arguing that "any service charges, fees, or assessments the District could use to pay for the Mandate would require voter approval."[251] Not only does the District have fee authority, it has already exercised it, and the voters approved the special parcel tax the District has identified as the funding for the Almaden Lake Project.[252]

The Court in *County of Sonoma v. Commission on State Mandates* found "it is the expenditure of tax revenues of local governments that is the appropriate focus of section 6."[253] *County of Fresno v. State of California* concurred in limiting any analysis of state mandates to taxation:

> That fact is apparent from the language of the measure. It is confirmed by its history. In his analysis, the Legislative Analyst declared that Proposition 4 "would not restrict the growth in appropriations financed from other [i.e., nontax]

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[248] Test Claim, at p. 10 (State may grant or deny the certification).

[249] See Factual Background, *supra,* Section II.B.3.a.

[250] Gov. Code § 17556, subd. (a).

[251] Test Claim, at pp. 13-14.

[252] Bates 014132 and 014139 (Measure B ballot results (2012)).

[253] *County of Sonoma, supra,* 84 Cal.App.4th at p. 1283, as modified on denial of reh'g (Dec. 19, 2000).

sources of revenue, including federal funds, bond funds, traffic fines, user fees based on reasonable costs, and income from gifts."[254]

No subvention is required here, where the District "is not required to expend its proceeds of taxes."[255] As discussed in the Factual Background, the District's mitigation project will be funded through the "Measure B – Safe, Clean Water Program" parcel tax which was approved by 74 percent of the Santa Clara County voters in 2012.[256] 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.[257] Although labeled a "special parcel tax,"[258] Measure B is, in fact, a special assessment. The California Supreme Court distinguished special assessments from taxes, noting that where taxes are intended "for revenue purposes rather than in return for a specific benefit,"[259] special assessments are intended for specific projects and confer a benefit through improvements.[260] The District's own website describes the very specific nature of the use of Measure B funds, listing five priorities that will be funded from Measure B's proceeds.[261] Providing such a limited scope for the use of funds is akin to the Supreme Court's description of a special assessment, not a tax.

Even if the District had not already received voter approval to fund the Almaden Lake project, the District has the ability to increase sewer fees or charges without voter approval to cover increased costs of implementing the 2012 Permit. The Santa Clara Valley Water District Act confers fee authority on the District for purposes of fees and charges relating to flood control or

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[254] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 (citing Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), analysis by Legislative Analyst, p. 16.)

[255] *County of Sonoma, supra,* 84 Cal.App.4th at p. 1284, citing *Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 987 (Article XIII B intended to limit spending of the proceeds from taxes).

[256] See Factual Background, *supra*, Section II.C.; Bates 014132- 014138, Measure B election returns, November 2012; and 014139-014149 (see Item D4 at Bates 014147: "Construct one creek/lake separation project in partnership with local agencies.")

[257] 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").

[258] Bates TC-000502 – TC-000506, District website, https://www.valleywater.org/project-updates/safe-clean-water-and-natural-flood-protection-program.

[259] *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 874.

[260] *Id.* at pp. 874-75 (e.g. construction of streets). See also *California Assn. of Professional Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 944 ("special assessments are based on the value of benefits conferred on property").

[261] *Ibid.*

the storm drainage system.[262] The authority of a local agency to defray the cost of a program without raising taxes indicates that a program does not entail a cost subject to subvention.[263]

In asserting that Proposition 218 limits the District's fee authority, [264] the District ignores the Constitution's exception to the voter approval requirements of Proposition 218 "for fees or charges for sewer, water, and refuse collection services."[265] The Legislature has recently enacted two important pieces of legislation confirming that the District has fee authority without the need for voter approval, neither of which is addressed in the District's Test Claim.

First, through Assembly Bill 2043 (2014), effective January 1, 2015, the Legislature amended the definition of "water" for purposes of articles XIII C and XIII D to mean "water from any source."[266] In doing so, the Legislature stated that its act "is declaratory of existing law."[267]

Second, through Senate Bill 231 (2017), effective January 1, 2018, the Legislature "reaffirm[ed] and reiterate[d]" 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* 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*.[268]

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[262] Bates TC-000033.101 - TC-000033.127, Santa Clara Valley Water District Act § 5, District Powers, ¶ 9.

[263] *Connell v. Superior Court* (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").

[264] Test Claim, at p. 14 (Proposition 218 subjects any fee or charge to voter approval).

[265] Cal. Const. Article XIII D, section 6, subd. (c).

[266] Gov. Code, § 53750, subd. (n), amended by Assembly Bill 2043 (Stats. 2014, ch. 78, § 2).

[267] Stats. 2014, ch. 78, § 1(c).

[268] Gov. Code, § 53750, subd. (f), and § 53751, subd. (i), added by Senate Bill 231, Stats. 2017, ch. 536, § 2 (emphases 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).

In addition, Health and Safety Code section 5471, subdivision (a), gives the District fee authority for "services and facilities furnished…in connection with its water, sanitation, *storm drainage*, or sewerage system."[269]

Section 4 of the Santa Clara Valley Water District Act lists as a primary object and purpose "water management," and, in particular, describes numerous objectives related to stormwater management.[270] The District's website describes the Project as a "flood protection project," intended to control storm flows to "avoid utility and transportation shutdowns and prevent damages from a 100+ year storm event."[271] In addition, the Project EIR states that the Project will "enhance stormwater conveyance downstream"[272] and that it "is intended to facilitate flow of stormwater through the upper Berryessa Creek area."[273] Thus, the District's own enabling act and website materials concerning the Project demonstrate that it has fee authority and subvention is not required.

C. The Permit is Not a New Program or Higher Level of Service.

The District contends that the Permit imposes a new program or requirement to provide higher levels of service because, prior to the Permit, there was no requirement to carry out a large off-site mitigation project[274] and further contends that the Permit's requirements are "intended to provide an enhanced service to the public," to wit, the goal of ensuring a net gain in wetlands.[275]

Numerous cases establish the criteria for a new program and higher level of service. In this case, not only is the requirement to mitigate for impacts not a "program," it is certainly not a *new* program, nor a higher level of service. The requirement to provide compensatory mitigation for permanent impacts is not a government function; applies generally to the public and private sectors; has been applied to the District in other permits; and the federal requirements to mitigate for impacts date back to the 1970s.

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[269] Health & Saf. Code, § 5471, subd. (a) (emphasis added).

[270] Bates TC-000033.101 - TC-000033.127, Santa Clara Valley Water District Act, §§ 4(a) (comprehensive water management); 4(c)(1) (protect the County from stormwater); 4(c)(2) (protect public highways, life and property from stormwater); 4(c)(3) (provide for the management of stormwater); 4(c)(4) manage any of the waters; 4(c)(6) obtain, retain, protect and recycle stormwater).

[271] Bates TC-000496- TC-000501, District website, https://www.valleywater.org/project-updates/creek-river-projects/upper-berryessa-creek-flood-protection.

[272] Bates 008793-009674, EIR, pp. 3-183 - 3-184 (Bates 009049-009050).

[273] *Ibid*, EIR, p. 3-203 (Bates 009069).

[274] Test Claim, at p. 12.

[275] *Ibid.*

1. The Permit Is Not a Program

The District contends that the Permit imposes a new program or requirement to provide higher levels of service because, prior to the Permit, there was no requirement to carry out a large off-site mitigation project.[276] The District misconstrues the term "program."

In the same vein, in *County of Los Angeles v. State of California*, the California Supreme Court declined to order subvention for a local agency's costs incurred for worker's compensation benefits. The Court identified two definitions of "program" for the purposes of Article XIII, Section 6: (1) Programs that carry out the governmental function of providing services to the public; or (2) Laws which impose unique requirements on local governments and do not apply generally to all residents and entities in the state.[277] We address each of these definitions in turn.

a. The Permit is Not Peculiar to Government

Hayes v. Commission on State Mandates found that reimbursement is required when the State "freely chooses to impose on local agencies *any* peculiarly 'governmental' cost which they were not previously required to absorb."[278] The cost of water quality certification and attendant mitigation requirements are not a "peculiarly governmental cost."

The Commission decision regarding the *Los Angeles Test Claim*[279] evaluated *Carmel Valley Fire Protection District v. State of California (Carmel Valley)*[280] and *County of Los Angeles v. State of California (State of California)*,[281] two decisions which construe the term "program."[282] *Carmel Valley* considered whether a county qualified for subvention for the "program" costs of purchasing protective clothing and equipment for county fire fighters, as required by a then-new

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[276] Test Claim, at p. 12.

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

[278] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1578 (*Hayes*).

[279] *In re Test Claim on Los Angeles Regional Water Quality Control Board* (July 31, 2009) No. 03-TC-04, 03-TC-19, 03-TC-30, 03-TC-21, pp. 48-49. (*Los Angeles Test Claim*).

[280] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537 (*Carmel Valley*).

[281] *State of California, supra* 43 Cal.3d 46.

[282] In the *Los Angeles Test Claim*, the Commission also relied on *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898 (*County of Los Angeles*), which considers, in passing "whether a particular permit or an obligation thereunder imposed on local governments constitutes a state mandate." (*Id.* at 919.) However, *County of Los Angeles* did not address whether the permit applied even-handedly to public and private entities. In that case, the Court of Appeals held that the State Water Board was not exempt from Article XIII, Section 6 because it was a state agency. (*Ibid.*) Here, the San Francisco Bay Water Board is not arguing that it is exempt, but rather a fundamentally different question: whether water quality certifications apply universally. *County of Los Angeles* declined to address that question. (*Ibid.* ["Whether the permit in question issued by Regional Water Boards governs both public and private pollution discharges to the same extent presents factual issues not yet resolved"].) *County of Los Angeles* is therefore not useful in resolving this Test Claim.

California law.[283] In *Carmel Valley*, the Court of Appeals focused on aspects of fire protection as a peculiarly governmental function.[284] Firefighting is "overwhelmingly" engaged in by local agencies, and the state policy to provide updated equipment to all fire fighters was compulsory.[285] In contrast, *State of California*, the California Supreme Court declined to order subvention for a local agency's costs incurred for worker's compensation benefits. As discussed above, one of the definitions of "program," for the purposes of Article XIII, Section 6 focused on the governmental function of providing services to the public.[286] The Court found reimbursement was not necessary because workers' compensation is not a program administered by local agencies to provide service to the public.[287] Benefits to employees are indistinguishable from those provided by private employers.[288] For these reasons, "increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6."[289]

In the present case, issuance of mitigation requirements in a water quality certification is not a "program" as defined in either *Carmel Valley* or *State of California*. First, neither dredging and filling nor mitigation of the impacts of dredging and filling are peculiarly governmental functions, nor are they "overwhelmingly" engaged in by local entities in the same vein as firefighting, police protection or other local services provided to the public. In fact, as noted in the attached Declaration of Xavier Fernandez, roughly the same number of private entities as local agencies apply for water quality certifications. The more specific act of dredging and filling for flood control purposes is not peculiar to governmental entities either, but is undertaken by many private landowners adjacent to water bodies.[290] The mitigation requirements to counter the impacts of dredging and filling are a component of a permitting scheme for protection of water quality, but they do not constitute a local government function of providing services.

According to the reasoning in *Carmel Valley* and *State of California*, where the mandate is not "peculiar" to government function, there is no requirement for reimbursement.

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[283] *Carmel Valley, supra,* 190 Cal.App.3d at p. 530.

[284] *Id.* at p. 537.

[285] *Id.* at p. 538.

[286] *State of California, supra,* 43 Cal.3d at p. 56.

[287] *Id.* at p. 58.

[288] *Ibid.*

[289] *Ibid.*

[290] Bates TC-000507- TC-000512, Fernandez Decl., at p. 1 ("Flood control projects are not limited to public agencies; many private entities seek water quality certifications for flood control projects protecting private land. Though such projects on private lands are relatively small with fewer impacts, the Water Board nevertheless routinely requires compensatory mitigation for unavoidable impacts such as rock riprapping and channel widening.")

b. The Mitigation Requirement Is a Law of General Application

While the District includes an argument that it is a local agency,[291] it neglects to address the fundamental tenet of mandates law that the mandate must be imposed uniquely upon local agencies. In *State of California*, discussed above, the California Supreme Court has determined that expenses incurred from compliance with a law which is "applied generally" is not reimbursable.[292] When the law universally requires all parties – public or private – to incur expenses, that is not the "type of expense ... [that] the voters had in mind when they adopted section 6 of article XIII B."[293] 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 application are not entitled to subvention.[294] Where local agencies are required to perform the same functions as private industry, no subvention is required.[295]

In *City of Sacramento,* the Court held that a law extending mandatory unemployment insurance coverage to local governments did not constitute a new program or higher level of service.[296] The Court reasoned that the law "merely makes the local agencies indistinguishable ... from private employers."[297] It rejected the local government's argument that because the program was new to local governments (even though the program already applied to private industry), it triggered reimbursement under Article XIII B, Section 6.[298] Accepting that argument, the Court explained, would create an anomalous situation in which the State could avoid the reimbursement requirements if it imposed the same obligations on the public and private sectors at the same time, but if it "proceeded by stages, extending such obligations first to private entities, and only

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[291] Test Claim, at p. 13.

[292] *State of California, supra,* 43 Cal.3d at pp. 55–57 ("We also have observed that a reimbursable state mandate does not arise merely because a local entity finds itself bearing an "additional cost" imposed by state law").

[293] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 (*Lucia Mar*). See also *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 70 (*City of Sacramento*) ("extension of the subvention requirements to costs 'incidentally' imposed on local governments would require the Legislature to assess the fiscal effect on local agencies of each law of general application... We concluded that nothing in the language, history, or apparent purpose of article XIII B suggested such far-reaching limitations on legitimate state power).

[294] *Hayes, supra,* 11 Cal.App.4th at p. 1578.

[295] *State of California,* 43 Cal.3d at pp. 55–57.

[296] *City of Sacramento, supra,* 50 Cal.3d at p. 57.

[297] *Id.*, at p. 67.

[298] *Id.*, at p. 68 (explaining that the law "may have imposed a requirement 'new' to local agencies, but that requirement was not 'unique'").

later to local governments, it would have to pay. This was not the intent of our recent decision."[299]

Similarly, in *City of Richmond,* a state law exempted public safety employers from Labor Code provisions governing death benefits payable to a deceased employee's survivors.[300] After the State repealed the exemption, a city sought reimbursement for payment of death benefits.[301] The Court of Appeal recognized that just because a law "affects only local governments does not compel the conclusion that that [the law] imposes a unique requirement on local government."[302] The new law made "the workers' compensation death benefit requirements as applicable to local governments as they are to private employers," and therefore did not impose a new program or higher level of service.[303]

Private industry must comply with Clean Water Act section 404 and 401 requirements, including mitigation requirements. Those same requirements also apply to all governmental entities that undertake dredge and fill activities, including State, Tribal and federal facilities; local government is not singled out.[304] The cost of providing mitigation for impacts from these types of projects are not unique to local agencies. As described by Xavier Fernandez, a San Francisco Bay Water Board employee with an educational background and over 20 years' experience in wetlands and mitigation, every water quality certification involving a project with permanent impacts – public or private - requires mitigation:[305]

> [T]he San Francisco Bay Water Board has required compensatory mitigation for all projects with permanent impacts for over 20 years. In the more than 11 years working at the San Francisco Bay Water Board, I have written and reviewed over 300 water quality certifications. As a whole, the San Francisco Bay Water Board has issued around 800 water quality certifications over the past 5 years. Approximately half of the water quality certifications are issued to private entities and the other half to public agencies. Flood control projects are not limited to public agencies; many private entities seek water quality certifications for flood control projects protecting private land. Though such projects on private lands are relatively small with fewer impacts, the Water Board nevertheless

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[299] *Id.*, at p. 69.

[300] *City of Richmond v. Commission on Mandates* (1998) 64 Cal.App.4th 1190, 1193.

[301] *Ibid.*

[302] *Id.*, at p. 1197.

[303] *Id.*, at p. 1199.

[304] See Bates 015262- 015311, "Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes."

[305] Bates TC-000507 - TC-000512, Fernandez Declaration, p. 1.

> routinely requires compensatory mitigation for unavoidable impacts such as rock riprapping and channel widening.
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> Approximately one-quarter (200 certifications) of the projects over the last five years involved permanent impacts. Every certification of a project with permanent impacts has been conditioned to require compensatory mitigation, regardless of whether the project is public or private. Further, prior to working for the San Francisco Bay Water Board, I understood, as a consultant, that mitigation for permanent impacts was always required by the San Francisco Bay Water Board.[306]

The above cases and Mr. Fernandez's Declaration illuminate the reasoning that should apply here. Both the California Supreme Court in *City of Sacramento* and the Court of Appeal in *City of Richmond* considered that the laws at issue put local government on an equal footing with private entities, rather than placing a burden exclusively on local government. Under *City of Richmond,* the Commission should recognize that because the Permit requirement for mitigation does not rest exclusively on the District, it cannot be a reimbursable mandate so long as the District is held to the same standard as private entities.[307] Under the Commission's prior reasoning, allowing a subvention of funds for water quality certification would be an impermissible "state subsidy of the public sector" to offset "expenses imposed *in common* on the private and public sectors by ... a general law."[308] Therefore, the mere fact that one particular water quality certification, out of hundreds of water quality certifications issued by the Water Boards, only names local governments is not the correct standard as to whether the Permit constitutes a "program" under Article XIII B, Section 6 of the California Constitution.

In two prior Commission decisions involving the *San Diego* and *Los Angeles Test Claims* concerning NPDES permits, the Commission interpreted the *order* as the mandate rather than the underlying statute (the Clean Water Act) which formed the basis for the orders' requirements.[309] Taken to its logical conclusion, this interpretation would result in the determination that *any* order issued to any local agency is inherently an unfunded mandate, ignoring the rationale developed by the California Supreme Court in *County of Los Angeles* and other similar caselaw. The Commission reasoned that the particular permits in question did not regulate private entities,

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[306] *Ibid.*

[307] See *City of Richmond, supra,* 64 Cal.App.4th at p. 1197.

[308] *City of Sacramento, supra,* 50 Cal.3d at p. 69, discussing *State of California, supra,* 43 Cal.3d at pp. 56-58.

[309] *In re Test Claim on Los Angeles Regional Water Quality Control Board* (July 31, 2009) No. 03-TC-04, 03-TC-19, 03-TC-30, 03-TC-21, pp. 48-49. (*Los Angeles Test Claim*); *In re Test Claim on San Diego Regional Water Quality Control Board* (Mar. 26, 2010) No. 07-TC-09, pp. 35-37. (*San Diego Test Claim*).

and therefore must not be laws or executive orders of general application.[310] This approach is contrary to the fundamental tenet of unfunded mandate law, however, that a program be unique to local agencies.

In the *San Diego Test Claim* decision, the Commission observed that the Code of Federal Regulations had different requirements for public versus private dischargers.[311] The Commission stated that, due to the differences in the regulations for public and private dischargers, the permitting for local agencies only applied to local agencies and, consequently, subvention for the local agencies was appropriate.[312] Setting aside Water Boards' objections to that analysis, no parallel distinction exists in the Clean Water Act between public and private entities; the water quality certification requirements apply to both equally.[313] Accordingly, it would be inappropriate to distinguish between private and public entities for the purposes of subvention.

Here, where the State regulates all parties in an evenhanded manner, local agencies are not entitled to reimbursement.[314] Whether the Clean Water Act water quality certifications generally constitute a "program" within the meaning of Article XIII, Section 6 is a threshold issue the Commission should resolve consistently with *County of Los Angeles*.

Consistent with this interpretation, on remand from the California Supreme Court, the Los Angeles County Superior Court recently agreed with the Water Boards that the receptacle and inspections requirements in the 2001 Los Angeles MS4 Permit are not state mandated program subject to subvention because the costs incurred by the local governments are "an incidental impact of laws [and policies] that apply generally to all state residents and entities" rather than the result of a state mandate shifting the costs of a state initiated program to the local governments.[315] Notably, the Court also found the following:

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[310] *San Diego Test Claim, supra,* at p. 36.

[311] *San Diego Test Claim, supra*, at pp. 35-37.

[312] *Ibid.*

[313] 33 U.S.C. § 1341.

[314] Test Claim, at p. 13.

[314] *State of California, supra,* 43 Cal.3d at pp. 55–57 ("We also have observed that a reimbursable state mandate does not arise merely because a local entity finds itself bearing an "additional cost" imposed by state law").

[314] *Lucia Mar, supra,* 44 Cal.3d at p. 835 and *City of Sacramento, supra,* 50 Cal.3d at p. 70.

[314] *Hayes, supra,* 11 Cal.App.4th at p. 1578.

[314] *State of California, supra,* 43 Cal.3d at pp. 55–57.

[314] See Bates 015262- 015311, EPA Handbook.

[315] *State of California Department of Finance v. Commission on State Mandates*, Los Angeles County Superior Court Case No. BS130730, Order Granting Petition for Writ of Mandate (Post-Remand) and Denying Cross-Petitions as Moot, Feb. 9, 2018, p. 14 (citing *State of California, supra,* 43 Cal.3d at p. 57.)

> Moreover, just because the requirements are "unique" to the local governments and cause them to incur costs does not mean the local entities are necessarily entitled to reimbursement from the state... Indeed, because the anti-pollution laws, the permit and the policies behind them implement a ban on unlawful discharges that applies to both public and private entities, the state must, as a practical matter, impose "unique" requirements on local governments to ensure that their required compliance is "indistinguishable ... from private employers."[316]

Thus, while the provisions in the Permit apply only to the District, the substantive actions required by the permit's provisions are by no means unique to the District.[317] That other water quality certifications impose similar requirements on non-local government agencies demonstrate that the provisions in the Permit are not unique to local government.[318] The San Francisco Bay Water Board urges the Commission to reconsider its prior approach in this respect and to view the Permit within the larger scheme of the Clean Water Act.

2. The Permit Is Not a *New* Program or Higher Level of Service.

a. No New Program

As the Supreme Court observed, federal law requiring water quality certification and mitigation has been the law for decades.[319] As such, Government Code section 17556, subdivision (b) prohibits subvention where a mandate has been declared existing law by action of the courts.[320] The mitigation requirements at issue in the Test Claim are very similar to those in the District's prior permits, as described at length in the Factual Background,[321] and, as such, do not constitute new programs.

A program is "new" if the local government had not previously been required to institute it.[322] Here, the District has been subject to mitigation requirements for impacts associated with a Section 404 dredge and fill permit and as required in prior water quality certifications. The

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[316] *Id.*, at p. 13 (citing *State of California, supra*, 43 Cal.3d at p. 56).

[317] Bates TC-000507-000512, Fernandez Decl., at p. 1.

[318] *Ibid.*

[319] *Jefferson County, supra,* 511 U.S. at pp. 722–723.

[320] See Gov. Code § 17556, subd. (b) ("The statute or executive order affirmed for the state a mandate that has been declared existing law or regulation by action of the courts. This subdivision applies regardless of whether the action of the courts occurred prior to or after the date on which the statute or executive order was enacted or issued").

[321] See Factual Background, *supra*, Section II.B.3 (describing four District projects with onsite and offsite mitigation measures). See also Bates 015040-015056, Downtown Guadalupe River/Guadalupe Creek Project, at pp. 3; 015098-015128, Upper Guadalupe River Project, at pp. 7-17; 015057-015070, Lower Silver Creek Project, at pp. 4-5.; and 015176-015187, Lower Berryessa Creek-Lower Calera Creek Project, at pp. 2-3, for flood control projects in which mitigation was feasible onsite.

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

Factual Background, identified four prior projects sponsored by the District, each of which had similar impacts and mitigation requirements to those the District contests here.[323] Each of the four projects were conditioned by water quality certifications and mitigation requirements included analogous features to those recommended for this Project to reduce impacts and mitigate unavoidable impacts. The District cites to *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 in claiming that the mitigation requirement was "new in comparison with the preexisting scheme," but the District's submission to this same requirement in at least these four examples demonstrates that the requirement is not new.

The highest court in the land has validated that Clean Water Act Section 401, requiring water quality certification, is an existing requirement:

> [T]he requirement for a state certification applies ... to all federal licenses and permits for activities which may result in a discharge into the Nation's navigable waters. [A] permit must be obtained from the Army Corps of Engineers for the discharge of dredged or fill material ... We assume that a § 401 certification would also be required for some licenses obtained pursuant to these statutes.[324]

Government Code 17556, subdivision (b) prohibits subvention in these circumstances where a court has affirmed a mandate is existing law.

None of the numerous authorities requiring water quality certification and mitigation cited above in the Statutory Background are new programs or higher levels of service. The Clean Water Act sections 401 and 404 were adopted in 1972.[325] The 404(b)(1) Guidelines, requiring mitigation, were adopted by the Corps as Interim final Guidelines in 1975,[326] adopted by U.S. EPA in 1980[327] and updated in 1986 to clarify that "permit conditions requiring mitigation must be added when necessary to ensure that a project complies with the [404(b)(1)] guidelines."[328] The Basin Plan

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[323] See Factual Background, supra, Section II.B.3.b.

[324] *Jefferson County, supra,* 511 U.S. at pp. 722–723.

[325] 33 U.S.C. §§ 1341 and 1344 (adopted October 1972).

[326] 45 Fed. Reg. 85336 (Dec. 24, 1980).

[327] Bates TC-000033.008-003 - TC-000033.008-039, Corps regulatory program workshop (February 2015), at p. 4. See also TC-000242-001 -TC-000242-008, "Memorandum: Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements," U.S. EPA (December 2017). Accessed online at https://www.epa.gov/cwa-404/memorandum-appropriate-level-analysis-required-evaluating-compliance-section-404b1, August 8, 2018).

[328] 33 C.F.R. § 230. See also 51 Fed. Reg. 41206-01 (Nov. 13, 1986) (Final Rule for Regulatory Programs of the Corps) ("The Corps has been requiring mitigation as permit conditions for many years based on our regulations and the 404(b)(1) guidelines").

incorporated the 404(b)(1) Guidelines in 1986.[329] The California Wetlands Policy was adopted in 1993.[330] The Basin Plan contained the requirement to implement the California Wetlands Policy as of 1994.[331] The Basin Plan contained the Dredge/Fill/Wetlands Protection sections as of 1975[332] and Prohibition 9 as of 1975[333].

Government Code section 17551(c) requires test claims be filed within 12 months of the effective date of a statute or executive order. The argument that mitigation for dredge and fill activities imposes a State mandate is not timely.

b. No Higher Level of Service

The District claims that requiring the District to comply with the No Net Loss Policy was a "shift in funding of an existing program from the state to the local entity."[334] The key cases evaluating whether a permit or order is a new program or higher level of service primarily involve circumstances in which a state-funded program is "shifted" to a local agency. For example, in *Lucia Mar v. Honig*, the State initially funded costs of educating severely disabled students and then shifted those costs to local government entities.[335] *County of San Diego v. State of California* involved similar circumstances, wherein the state provided MediCal coverage and then shifted that burden to the counties.[336] The California Supreme Court noted the key circumstance - not present in this case - requiring subvention:

> We do not hold that 'whenever there is a change in a state program that has the effect of increasing a county's financial burden ... there must be reimbursement by the state.' ... Rather, we hold that section 6 prohibits the state from shifting to counties the costs of state programs for which the state assumed *complete financial responsibility before adoption of section 6.*"[337]

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[329] Bates TC-000033.044 - TC-000033.045, 1986 Basin Plan (excerpts).

[330] Bates 015259-015261, No Net Loss Policy (adopted in 1993).

[331] Cal. Code Regs, tit. 23, § 3912 (revisions to the Basin Plan included the addition of the No Net Loss Policy).

[332] Bates TC-000033.003-TC-000033.005, 1975 Basin Plan, at p. 5-42 – 5-44 (Dredging and Disposal of Dredged Sediment).

[333] *Ibid.* TC-000033.008, at p. 5-47 (Discharge Prohibition 5).

[334] Test Claim, at p. 13 (citing *Lucia Mar, supra,* 44 Cal.3d at p. 835).

[335] *Lucia Mar, supra,* 44 Cal.3d at p. 836 ("The intent of the section [section 6 of the Constitution] would plainly be violated if the state could ... simply shift the cost of the programs to local government").

[336] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81 (the intent of Section 6 "is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are "ill equipped" to assume increased financial responsibilities").

[337] *Id.* at p. 99, fn. 20 (emphasis added).

In a similar holding, *County of Sonoma* found no higher level of service where a state law requiring reallocation of school funds from one local government entity to another because local government had always had a substantial role in funding schools.[338]

The unifying concept in these cases is the *transfer* of the costs of a program previously and entirely funded by the State at the time Article XIII, Section 6 went into effect.[339] 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."[340]

The District's circumstances are distinguishable. Applicants for 404 permits and 401 water quality certifications, whether public or private entities, have always been subject to the No Net Loss Policy and borne the costs of complying with mitigation requirements and other water quality certification conditions. The State has never borne the costs of completing permit applicants' mitigation requirements; this would be manifestly unfair, as it would shift the burden of rectifying harm from destruction of wetlands onto the taxpayers. Thus, unlike *Lucia Mar* or *County of San Diego,* the District does not have a "direct and ascertainable cost resulting from the State's action."[341]

D. The San Francisco Bay Water Board Had No Choice in Applying Federal Mandates to the District's Proposed Project.

The Test Claim asks the Commission to resolve whether: (1) the mitigation requirements in the Permit are federal mandates, and (2) in carrying out the federal mandate the State exercised discretion. The California Supreme Court cited *Hayes, City of Sacramento* and County of Los Angeles in "distill[ing] the following principle:"

If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.[342]
Here, the State has *no choice* in requiring mitigation where an applicant chooses to apply for water quality certification for a project with permanent impacts on aquatic resources. Unlike

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[338] *County of Sonoma, supra,* 84 Cal. App.4th at p. 1288.

[339] *County of Sonoma, supra,* 84 Cal.App.4th at pp. 1285–1287, and *City of San Jose v. State of California* (1996) 45 Cal. App.4th 1802, 1812.

[340] *County of Los Angeles v. Commission on State Mandates, supra,* 110 Cal.App.4th at p. 1194; *accord Department of Finance v. Commission on State* Mandates (2016) 1 Cal.5th 749, 771 (agreeing that state had shifted responsibility for some industrial inspections to local government agency) (*Department of Finance 2016*).

[341] *Id.* at p. 1283.

[342] *Department of Finance (2016), supra,* 1 Cal.5th at p. 765.

Department of Finance (2016), which evaluated permits requiring reduction of pollutants in municipal storm water to the "maximum extent practicable," here, the San Francisco Bay Water Board had to ensure that a specific set of requirements and policies established to meet federal requirements and incorporated into basin plans approved by US EPA were followed. The District concedes that there is no requirement for reimbursement when "the State lacks '*discretion* whether to impose a *particular* implementing requirement' of the federal law."[343]

As the California Supreme Court found in *City of Sacramento v. State of California*, "The test for determining whether there is a federal mandate is whether compliance with federal standards "is a matter of true choice," that is, whether participation in the federal program "is truly voluntary."[344] Here, as discussed in the Factual Background, the Project caused impacts to numerous beneficial uses.[345] As described in the Statutory Background, in order to obtain water quality certification, compensatory mitigation for those impacts was necessary to ensure compliance with water quality standards. The applicable water quality standards are recorded in the Basin Plan, which is approved by U.S. EPA, and includes antidegradation, Basin Plan prohibitions, the Dredge and Fill and Wetland Policies, the No Net Loss Policy, and the 404(b)(1) Guidelines. In addition to the mandatory language in Clean Water Act Sections 401 and 404, discussed above, the Clean Water Act requires that the San Francisco Bay Water Board add other "appropriate requirements of state law" as conditions to the permit. Water Code section 13263 and CEQA are "appropriate requirements of state law," and both require mitigation to address impacts to beneficial uses which are significant effects on the environment.

1. Federal Law Requires Section 401 Water Quality Certification for A Section 404 Dredge and Fill Project Permit.

The Test Claim suggests that the San Francisco Bay Water Board had discretion, a choice, in deciding whether to grant certification. This is inconsistent with the language of the Clean Water Act. As described in the Statutory Background, Section 404 of the Clean Water Act provides that the Corps *may* issue permits governing dredge and fill activities.[346] The associated federal regulations are clear that a party *must* apply for the permit, even if the Corps' granting of it is permissive.[347] Before the Corps will issue a dredge and fill permit, however, the permittee *must* apply for water quality certification pursuant to Clean Water Act Section 401[348] and the entity

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[343] Test Claim, at p. 10.

[344] *Hayes, supra,* 11 Cal. App.4th at p. 1581 (citing *City of Sacramento, supra,* 50 Cal. 3d at p. 76).

[345] See Factual Background, *supra*, Section II.A.

[346] 33 U.S.C. § 1344, subd. (g).

[347] *Id.* at subd. (a).

[348] 33 U.S.C. § 1341, subd. (a)(1) ("Any applicant for a Federal license or permit to conduct any activity … which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate… No license or permit shall be granted until the certification required by this section has been obtained or has been waived… No license or permit shall be granted if certification has been denied by the State….").

providing that certification (in this case the San Francisco Bay Water Board) *shall* impose conditions on the activity to ensure that it is protective of water quality standards.[349] Moreover, any compensatory mitigation requirements that attach to the Section 404 permit *must* be performed or the Corps should deny the Section 404 permit:

> For activities involving 404 discharges, a permit *will be denied* if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency's 404(b)(1) guidelines.[350]

> For Section 404 applications, mitigation *shall be required* to ensure that the project complies with the 404(b)(1) Guidelines.[351]

In this case, like any other party seeking to perform dredging activities, the Corps and District – partners in the proposed project – documented consistency with Section 404 and applied for water quality certification.[352]

In determining whether to issue the initial water quality certification, the San Francisco Bay Water Board evaluated whether the Project complied with Clean Water Act section 401, a statute which ensures protection of water quality.[353] Where a project does not comply, the certifying State agency *must* add conditions to ensure that the project will comply with the Clean Water Act *and* "any other appropriate requirement of state law set forth in such certification."[354]

> "*Conditions shall be added to any certification*, if necessary, to ensure that all activities will comply with applicable water quality standards and other appropriate requirements."[355]

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[349] *Id.* at subd. (d) (Any certification provided under this section *shall set forth any effluent limitations and other limitations, and monitoring requirements* necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this title, standard of performance under section 306 of this title, or prohibition, effluent standard, or pretreatment standard under section 307 of this title, and with any other appropriate requirement of State law set forth in such certification, and *shall become a condition* on any Federal license or permit subject to the provisions of this section) (emphases added).

[350] 33 C.F.R. § 320.4, subd. (a)(1) (emphasis added).

[351] 33 C.F.R § 320.4, subd. (r)(1)(ii) (emphasis added). See also 33 C.F.R. § 332.1 (all Department of the Army [including Section 404 dredge and fill] permits must comply with 404(b)(1) Guidelines).

[352] Bates 002244- 002262, Corps' application for CWA, section 401, water quality certification; and Bates 007252-007266, Section 404(b)(1) Evaluation for Upper Berryessa project, June 2012.

[353] 33 U.S.C. § 1341, subd. (a)(1).

[354] *Id.* at subd. (d); 40 C.F.R. §§ 121.2, subd. (a) (emphases added).

[355] 23 Cal. Code Regs., § 3859, subd. (a) (emphasis added).

The Permit, with its conditions, became a requirement of the federal Section 404 dredge and fill permit.[356] The District and Corps are bound by the conditions of the Permit: "The federal agency may not select among conditions when deciding which to include and which to reject."[357]

The Corps presumably found the mitigation requirements of the Permit satisfactory because it proceeded with the Project. "If the Federal agency 'cannot ensure compliance' with the state['s] water quality requirements, it 'shall not issue such license or permit.'"[358] If the Corps found the Permit requirements required the Corps to take an unacceptable action or one outside its statutory authority, the Corps had the option to consider the request for water quality certification as administratively denied.[359] The Corps exercised none of these options, therefore the mitigation requirements are still conditions of the Section 404 approval of the Project.

2. Water Quality Standards Require Mitigation

Where the Test Claim asserts that issuing a water quality certification containing "appropriate requirement of State law" is discretionary,[360] the United States Supreme Court views the matter differently, stating that "a project that does not comply with a designated use of the water does not comply with the applicable water quality standards."[361] The High Court further noted the rule that "pursuant to § 401(d), the State "shall set forth any ... limitations ... necessary to assure that [the applicant] will comply with any ... limitations under [§ 303] ... and with any other appropriate requirement of State law"[362] ultimately determining that "[a] certification requirement that an applicant operate the project consistently with state water quality standards—*i.e.,* consistently with the designated uses of the water body and the water quality criteria—is both a 'limitation" to assure "compl[iance] with ... limitations" imposed under § 303, and an 'appropriate' requirement of state law."[363] U.S. EPA concurs with the Supreme Court, noting that the federal permitting agency "*shall* condition such license or permit in such manner as may be necessary to ensure compliance with applicable water quality requirements."[364]

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[356] 33 U.S.C. § 1341, subd. (d) (the water quality certification "shall become a condition on any Federal license or permit").

[357] Bates 015275, EPA Handbook, p. 10 (citing *American Rivers v. Federal Energy Regulatory Commission* (2d Cir. 1997) 129 F.3d 99, 110-11).

[358] Bates 015273, EPA Handbook, at p. 8 (citing 33 U.S.C. 1341(a)(2)).

[359] Bates 015270, EPA Handbook, at p. 5, n. 23 (citing RGL 92-04, "Section 401 Water Quality Certification and Coastal Zone Management Act Conditions for Nationwide Permits").

[360] Test Claim, at pp. 10-11.

[361] *Jefferson County, supra,* 511 U.S. at pp. 714–715. See also p. 723 (the State may impose "requirements in a certification issued pursuant to § 401 of the Clean Water Act insofar as necessary to enforce a designated use contained in a State water quality standard).

[362] *Ibid.*

[363] *Jefferson County, supra,* 511 U.S. at pp. 714–715.

[364] Bates 015273, EPA Handbook at p. 8 (citing 33 U.S.C. § 1341).

As described in the Statutory Background, water quality standards required mitigation for impacts to wetlands pursuant to the Antidegradation Policy, Basin Plan Prohibitions, the Dredge and Fill and Wetland Protection Policies, the State and federal No Net Loss Policies and the 404(b)(1) Guidelines.[365] The language in the water quality standards is mandatory, not discretionary, leaving no true choice for the San Francisco Bay Water Board but to require mitigation.

a. Antidegradation

As discussed in the Statutory Background, federal and State antidegradation policies are interpreted such that "no activity is allowable ... which could partially or completely eliminate any existing use."[366] The federal and State antidegradation policies have that application of the antidegradation policy must ensure that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected" and will not result in water quality less than that prescribed by standards.[367] Much like the other federal mandates requiring mitigation to ensure no impacts to beneficial uses, the antidegradation policies leave no "true choice" for the San Francisco Bay Water Board.

b. Basin Plan Prohibition

Basin Plan Prohibitions are approved by U.S. EPA.[368] Sediment is regulated by Chapter 4 (Implementation), Table 4-1, Basin Plan Discharge Prohibition 9, which *prohibits* the discharge of "[s]ilt, sand, clay, or other earthen materials from any activity *in quantities sufficient* to cause deleterious bottom deposits, turbidity or discoloration in surface waters or *to unreasonably affect or threaten to affect beneficial uses.*"[369] In this case, the record is replete with evidence that the Project proposed impacts that would unreasonably affect beneficial uses.[370] Without mitigation, those impacts are prohibited under the Basin Plan.

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[365] Statutory Background, *supra,* Section I.B.

[366] *Ibid.* (citing EPA, Questions and Answers on Antidegradation 3 (Aug. 1985)). See also 40 C.F.R. § 131.12 (Antidegradation policy and implementation methods).

[367] Bates 015257-015258, State Board Resolution 68-16, Statement of Policy With Respect to Maintaining High Quality of Waters in California (emphasis added). See also 40 C.F.R. § 131.12 (1) (Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected).

[368] 40 C.F.R. § 131.5.

[369] Bates 015254-015256, Basin Plan, Table 4-1 (emphases added).

[370] See, e.g., Bates 001184-001186, Permit at Finding 20 (impacts to beneficial uses); and Bates 009682-009774, San Francisco Regional Water Board Comments on Draft EIR (93 page letter discussing impacts of the Project) (and Bates 009775-009775.007 for the same letter with signature).

c. Dredge and Fill and Wetland Protection Policies

As described in the Statutory Background section, the Basin Plan Chapter 4.20, Dredging and Disposal of Dredged Sediment, identifies potential impacts from discharges associated with dredging in Table 4-12. When there are adverse impacts caused by dredge and fill activities, Chapter 4.23 of the Basin Plan (Wetland Protection and Management) imposes a number of requirements, a requirement that the Water Board *will* refer to the No Net Loss Policy when permitting or otherwise acting on wetland issues.[371] Contrast this language with a subsequent paragraph at the end of Chapter 4.23 which states that the "Water Board *may* also refer to the Estuary Project's Comprehensive Conservation and Management Plan (2007)."[372] The use of mandatory and permissive language in the same paragraph demonstrates that the application of the No Net Loss Policy is mandatory, not discretionary, when permitting activities that impact wetlands.

d. No Net Loss Policy

As discussed above, the State's No Net Loss Policy is incorporated into the water quality standards, which are approved by U.S. EPA.[373] The language of the State's No Net Loss Policy first defines as its objective ensuring "no overall net loss and long-term net gain in the quantity, quality, and permanence of wetlands acreage and values in California...."[374] The language of the Policy leaves no discretion for State agencies:

> All agencies of the State *shall* conduct their activities, consistent with their existing authorities in accordance with these three objectives.[375]

Berryessa Creek is a riverine wetland and Table 2-3 of the Basin Plan lists examples of existing and potential beneficial uses for riverine wetlands. Section 2.2.3 of the Basin Plan provides a list of aquatic features recognized as wetlands, some of which would not be defined as wetlands by the Corps, but are protected under the Basin Plan's identification of designated uses. Some of the listed waterbody types that occur at the Project site, including unvegetated seasonal ponded areas, the inset flood plain within the current channel, and riparian habitat, are considered riparian wetlands based on the Water Board's definition for wetlands.[376]

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[371] Bates 015237.163 - 015237.165, Basin Plan, Ch. 4.23 (emphasis added).

[372] *Ibid.* (emphasis added).

[373] *Ibid.*

[374] Bates 015259-015261, Executive Order 59-93, No Net Loss Policy.

[375] *Ibid.* (emphasis added).

[376] Bates 013608-013612, Wetlands Classification (2013), pp. 15-19.

The language in that Policy is mandatory, not discretionary – agencies "shall" conduct their activities in accordance with the Policy's objective to "ensure that no overall net loss and long-term net gain in the quantity, quality, and permanence of wetlands acreage and values in California."[377] As discussed in the Statutory Background, the Corps is also subject to the federal No Net Loss Policy, which independently advises federal agencies to ensure no loss of wetlands in projects they authorize or perform.[378] Pursuant to both the State and federal No Net Loss Policies, the District (and Corps) were required to provide compensatory mitigation for impacts to wetlands.

e. 404(b)(1) Guidelines Require Mitigation

As detailed in the Statutory Background, the U.S. EPA 404(b)(1) guidelines require mitigation and both U.S. EPA and the Corps have issued regulations and guidance documents outlining the types of mitigation conditions, that must be placed on dredge and fill permits when there are impacts to aquatic resources.[379] Also described in the Statutory Background, the water quality standards (Basin Plan) incorporate by reference the 404(b)(1) Guidelines,[380] which require mitigation for impacts. Not only are the 404(b)(1) Guidelines a federal mandate by their own terms, therefore, they are also a federal mandate as incorporated into the applicable water quality standards.

Notably, the Corps' Regional Compensatory Mitigation and Monitoring Guidelines identify "questionable design features that should be avoided":

> Presence of structures that require long-term maintenance and/or disrupt or replace natural hydrology, such as … buried structures (e.g. riprap) … and engineered slopes.[381]

These are precisely the types of impacts the San Francisco Bay Water Board has required the Corps and District to mitigate here.

The Corps' and U.S. EPA's regulations are clear that compensatory mitigation is not optional where there are impacts to aquatic resources. The Corps' regulations mandate that:

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[377] *Ibid.*

[378] Statutory Background, *supra*, Section I.B.4.

[379] See Statutory Background, *supra*, Section I.B.5.

[380] *Ibid.* See also Bates 015249-015253, Basin Plan, § 4.34.4.

[381] Bates 013096-014065, Regulatory and Compensatory Mitigation and Monitoring Guidelines for South Pacific Division (Jan. 12, 2015) at pp. 27-28 (Bates 014022-014023).

> Consideration of mitigation *will occur* throughout the permit application review process and includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses. Losses *will be avoided* to the extent practicable.[382]

The U.S. EPA similarly emphasizes avoiding discharges, remarking on the irreversible nature of those impacts:

> (c) Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact....
>
> [N]o discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem....[383]

In cases where impacts cannot be avoided, the U.S. EPA and Corps' joint issuance of regulations governing compensatory mitigation requires mitigation for impacts:

> Compensatory mitigation requirements *must be* commensurate with the amount and type of impact that is associated with a particular [Corps] permit.[384]

As described in the Statutory Background, the process for what "must" be assessed in determining whether mitigation is adequate is compulsory, not discretionary.[385]

The 404(b)(1) Guidelines state that "Permit applicants are responsible for proposing an appropriate compensatory mitigation option to offset unavoidable impacts."[386] The 404(b)(1) Guidelines further require that the proposed mitigation plan must include a description of objectives, site selection, site protection instrument, baseline information, determination of credits, mitigation work plan, maintenance plan, performance standards, monitoring requirements, long-term management plan, adaptive management plan, financial assurances and other information as required regarding the appropriateness, feasibility and practicability of the compensatory mitigation project.[387]

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[382] 33 C.F.R. § 320.4, subd. (r) (emphases added).

[383] 40 C.F.R. § 230.10, subd. (a).

[384] 40 C.F.R. § 340.94, subd. (a)(1) and 33 C.F.R. 332.3, subd. (a)(1) (emphasis added).

[385] See Statutory Background, *supra*, Section I.B.5, citing 40 C.F.R. § 230.93, subd. (a) and 33 C.F.R. § 332.3, subd. (a) ("will consider;" "must assess" and "must be commensurate").

[386] 40 C.F.R. §230.93, subd. (a)(1) and 33 C.F.R § 332.3, subd. (a)(a). See also 40 C.F.R. § 230.94, subd. (c)(1)(i) and 33 C.F.R. § 332.4 (c)(1)(i).

[387] 40 C.F.R. § 332.4 and 33 C.F.R. § 230.94.

In keeping with the 404(b)(1) Guidelines, the Permit requires the District to prepare a mitigation plan:[388]

- The MMP shall include a proposal, workplan, monitoring plan, performance standards, and all other information, as appropriate, sufficient to ensure the mitigation of permanent and temporal losses in functions and values of waters of the State and to ensure the Project results in no net loss and a long-term net gain in wetland and waters area, function, and value…
- The MMP shall include … the vegetation performance standards and success criteria, or comparable standards, as those in Attachment B....
- Plantings … shall be monitored for a minimum period of five years for grasses, forbs, and shrubs and ten years for trees, until the success criteria in the MMP are achieved.
- The Discharger shall ensure invasive plant species in the Project site do not exceed cover of more than 10 percent based on the percent cover of, specifically, "highly" invasive plant species as defined by the California Invasive Plant Council.
- [t]he MMP shall identify other appropriate performance standards and success criteria based on the mitigation plan, habitat features, and other factors, as appropriate to the proposed mitigation project(s).
- The MMP shall include methods for performing an assessment of whether the low-flow channel has recovered within the first five years after construction, using data collected for the Adaptive Management Plan (see Provision 18). If the low flow channel does not recover within five years, the Discharger shall provide additional mitigation to compensate for the temporal loss in function and value due to the impacts of creek widening, consistent with Finding 21.
- The MMP shall incorporate the reporting requirements stipulated in Provisions 24 through 28.[389]

In this case, as described in the Factual Background, the San Francisco Bay Water Board moved the permit along as quickly as possible to accommodate the Corps and District's construction timetable, so, unlike the requirements in the Code of Federal Regulations, the mitigation plan was not prepared and approved until months after completion of construction.[390] The 404(b)(1) Guidelines are therefore more onerous and require more than the Permit required.[391]

In this case, the Corps was a partner in the Project. The Corps acknowledges in the Code of Federal Regulations its duty to abide by the federal No Net Loss Policy in ensuring there are no

[388] Bates 001199-001200, Permit at Provision B.19.

[389] Bates 001199-001200, Permit at Provision B.19.

[390] Bates TC-000033.001-017 - TC-000033.001-018.

[391] Bates 001199- 001200, Permit at Provision B.19; and 001186-001186, Permit at Finding 21.

impacts to wetland acreage, function and value.[392] The requirement therefore appears twice in the water quality standards: once under the 404(b)(1) Guidelines and is independently required in the No Net Loss Policy, discussed above.

Here, the San Francisco Bay Water Board had no choice but to require mitigation for the Project's impacts in order to comply with Clean Water Act Section 401's requirement that any certification ensure protection of water quality standards.

3. Other Appropriate Requirements of State Law

Clean Water Act Section 401 requires the permitting entity to take into account a number of factors, including "any other appropriate requirement of State law."[393] The word "shall" creates a mandatory duty, as opposed to a permissive act, that must be undertaken by the permitting agency. Thus, the State does not exceed federal law in imposing permit provisions that are required by State law to ensure the dredge and fill activity meets water quality standards.[394] If the Board failed to include applicable State laws to ensure the activity met water quality standards, it would violate the Clean Water Act's specific mandate to do so. As the Supreme Court noted in *Jefferson County*, "[a] certification requirement that an applicant operate the project consistently with state water quality standards—*i.e.,* consistently with the designated uses of the water body and the water quality criteria—is both a 'limitation" to assure "compl[iance] with ... limitations" imposed under § 303, and an 'appropriate' requirement of state law."[395] Other "appropriate requirements of State law" are contained in CEQA and Porter-Cologne.

a. CEQA

The San Francisco Bay Water Board, as a responsible agency under CEQA, must require additional mitigation if it finds, after reviewing a project's plans and details after an EIR is adopted, that the proposed mitigation does not adequately meet the requirements that are under its jurisdiction. The CEQA Guidelines explicitly imposes a duty to add requirement for mitigation upon the responsible agency:

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[392] 73 Fed. Reg. 19594.

[393] 33 U.S.C. § (d) ("Any certification provided under this section *shall* set forth any effluent limitations and other limitations ... necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this title, standard of performance under section 306 of this title, or prohibition, effluent standard, or pretreatment standard under section 307 of this title, and with any other appropriate requirement of State law set forth in such certification, and *shall* become a condition on any Federal license or permit subject to the provisions of this section.") (emphases added).

[394] By analogy, in CERCLA, "State regulations under Federally authorized programs are considered to be Federal requirements." (EPA, *CERCLA Compliance with State Requirements* (Dec. 1989), at § IV.) (See Bates TC-000033.045-001 - TC-000033.045-005.)

[395] *Jefferson County, supra,* 511 U.S. at pp. 714–715. The same reasoning extends to the State antidegradation policy, which is required by and consistent with antidegradation requirements, and the State No Net Loss Policy, which similarly reflects a federal mandate.

• "When considering alternatives and mitigation measures, a responsible agency *has responsibility for mitigating* or avoiding the direct or indirect environmental effects of those parts of the project which it decides to approve."[396]

• "When an EIR has been prepared for a project, the Responsible Agency *shall not* approve the project as proposed if the agency finds any feasible alternative or feasible mitigation measures within its powers that would substantially lessen or avoid any significant effect the project would have on the environment."[397]

CEQA case law provides that the San Francisco Bay Water Board may require additional mitigation for a project's design based on agency consultations after the EIR is adopted. *Riverwatch v. Olivenhain Mun. Water Dist.* (2009) states that a responsible agency "generally" relies on the information in the CEQA document, as the San Francisco Bay Water Board did here, but, the critical function of a responsible agency is to adopt feasible alternatives or mitigation measures that will lessen or avoid significant effects and the responsible agency must "reach its own conclusions on whether and how to approve the project involved."[398] As discussed in the Factual Background, the Staff were extremely vocal in every step of the process, consistently identifying the shortcomings of the EIR and the Project, generally, as it pertained to biological and hydrological impacts and mitigation.[399] As just a few examples:

- "Water Board staff does not agree that the impacts would be less than significant, given that the DEIR contains no plans or evidence to support that the same or comparable hydrophytic vegetation would colonize naturally and meet or surpass the functions and values of the existing vegetation. In addition, the District plans to remove sediment and vegetation (section 2.5.5), so the assumption that the impacted vegetation would recolonize is unfounded.[400]

- "Please revise the DEIR to recognize the Project reach's designated beneficial uses and a plan to appropriately mitigate any unavoidable impacts on the creek habitat, especially the REC-2 and WILD beneficial uses;"[401]

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[396] Cal. Code Regs., tit. 14, § 15096, subd. (g) (1) (emphasis added).

[397] *Id.* at § 15096, subd. (g)(2) (emphasis added).

[398] *Riverwatch v. Olivenhain Mun. Water Dist.(2009)* 170 Cal. App.4th 1186, 1202, 1215.

[399] See Factual Background, supra, Section II.B.2, *supra*, and Bates 009682- 009774, Letter B. Hurley (Nov. 12, 2015).

[400] Bates 009685, Letter B. Hurley (Nov. 12, 2015).

[401] *Id.* at 009686.

- The DEIR does not include any mitigation for this potential impact on the post-Project hydrology."[402]

In this case, where the San Francisco Bay Water Board is a responsible agency under CEQA, the law requires additional mitigation to address significant impacts, and such a requirement is an "appropriate requirement of State law."

b. Porter-Cologne

Water Code section 13263(a) requires the Water Board to "implement any relevant water quality control plans that have been adopted, and *shall take into consideration* the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of Section 13241."[403] This Code section adds little to the water quality standards discussion above, but is yet another authority requiring mitigation for impacts to aquatic resources.

4. The California Supreme Court Encourages Deference to the Agency's Finding that the Mitigation Provision Was Necessary to Meet the Federal Standard.

As discussed above, the Permit's requirement to mitigate for impacts was based entirely on federal law. The United States Supreme Court notes that these exact types of conditions must be appended to water quality certifications to prevent impacts to water quality.[404] Moreover, the Permit declares the San Francisco Bay Water Board's finding that mitigation was "necessary" to certify that the Project activities would not have adverse impacts to water quality:

> This Order also covers the mitigation and monitoring requirements *necessary* for compliance with federal and State regulations....[405]

The California Supreme Court noted the absence of similar findings in the Los Angeles municipal separate stormwater system permit, and further opined that such findings would be entitled to deference.[406] Here, where the San Francisco Bay Water Board has made an express finding that mitigation is required to meet the federal standard, and supported that finding with evidence, the Commission should uphold the San Francisco Bay Water Board's findings and decline to order subvention.

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[402] *Ibid.*

[403] Emphasis added.

[404] *Jefferson County, supra,* 511 U.S. at pp. 714–715.

[405] Bates 001177-001179, Permit, Finding 7.

[406] *Department of Finance (2016), supra,* 1 Cal. 5th at p. 768.

IV. CONCLUSION

As the Regional Board has shown, the District may not seek reimbursement for multiple reasons, each of which would independently be sufficient to defeat the District's mandates claims. Not only did the District voluntarily seek the permit, but it is, by its own admissions, financing the mitigation requirements through means other than raising taxes. Federal law requires the mitigation. Mitigation requirements apply to public and private project proponents alike, and are included in all dredge and fill project with permanent impacts. More broadly, dredge and fill projects for flood control purposes (and the associated mitigation requirements) are not peculiarly governmental, much less within the exclusive purview of local governments. The requirements to mitigate for impacts of those projects are not a new program or higher level of service, as evidenced by the United States Supreme Court opinion, federal laws and regulations dating back to the 1970s, and prior permits issued to the District. Here, where the San Francisco Bay Water Board has determined that mitigation is necessary pursuant to federal law, the Commission should give deference to that determination. The Commission may decline the District's request for subvention based on any one of these reasons, which, taken together, overwhelmingly weigh against the District's request for reimbursement.

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.

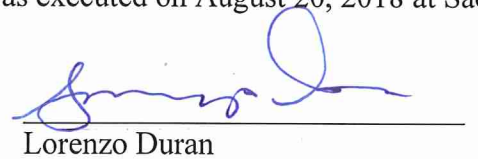
On August 20, 2018, I served the:

- **SFRWQCB's Comments on the Test Claim filed August 15, 2018**
- **Administrative Record on Order No. R2-2017-0014, California Regional Water Quality Control Board, San Francisco Bay Region filed August 15, 2018**

  Waste Discharge Requirements and Water Quality Certification for: Santa Clara Valley Water District and U.S. Army Corps of Engineers, Upper Berryessa Creek Flood Risk Management Project, 17-TC-04
  San Francisco Bay Regional Water Quality Control Board (SFRWQCB) Order No. R2-2017-0014, Provision B. 19, effective April 12, 2017
  Santa Clara Valley Water District, 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 August 20, 2018 at Sacramento, California.



Lorenzo Duran
Commission on State Mandates
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 8/10/18

Claim Number: 17-TC-04

Matter: Waste Discharge Requirements and Water Quality Certification for: Santa Clara Valley Water District and U.S. Army Corps of Engineers, Upper Berryessa Creek Flood Risk Management Project

Claimant: Santa Clara Valley Water District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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