BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2010-0108, NPDES Permit No. CAS00-4002, Adopted July 8, 2010[1] Public Information and Participation Program: Parts 4.C.2(c)(1)(C), 4.C.2(c)(2),(6),(8), 4.C.2(d), 4.C.3(a),(b); Reporting Program and Program Effectiveness Evaluation: 4.I.1; 3.E.1(e); Special Studies: 4.E.III.3(a)(1)(D-E); Attachment F, Section F, Part 4.E.IV.4; Part 4.E.III.2(c)(3)-(4); Watershed Initiative Participation: Part 4.B; Vehicle and Equipment Wash Areas: Part 4.G.1.3(a); and Illicit Connection/Illicit Discharge Elimination: Part 4.H.1.3(a) Filed on August 26, 2011 County of Ventura and Ventura County Watershed Protection District, Claimants	Case No.: 11-TC-01 *California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2010-0108* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted September 24, 2021*) (*Served September 29, 2021*)

TEST CLAIM

The Commission on State Mandates adopted the attached Decision on September 24, 2021.

Heather Halsey, Executive Director

[1] The city co-permittees specified in the permit include Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, San Buenaventura (Ventura), Santa Paula, Simi Valley, and Thousand Oaks. Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017 (test claim permit), page 131.

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DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on September 24, 2021. Theresa Dunham appeared on behalf of the County of Ventura and Ventura County Watershed Protection District (claimants). Brittany Thompson appeared on behalf of the Department of Finance (Finance). Jennifer Fordyce appeared on behalf of the State Water Resources Control Board. Renee Purdy appeared on behalf of the Los Angeles Regional Water Quality Control Board.

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

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

[1] The city co-permittees specified in the permit include Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, San Buenaventura (Ventura), Santa Paula, Simi Valley, and Thousand Oaks. Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017 (test claim permit), page 131.

Member	Vote
Lee Adams, County Supervisor	Yes
Natalie Kuffel, Representative of the Director of the Office of Planning and Research	Yes
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	Yes
Sarah Olsen, Public Member	Yes
Yvette Stowers, Representative of the State Controller, Vice-Chairperson	Yes
Spencer Walker, Representative of the State Treasurer	Yes

Summary of the Findings

This Test Claim was filed on a National Pollutant Discharge Elimination System (NPDES) stormwater permit, Order No. R4-2010-0108, by the County of Ventura and the Ventura County Watershed Protection District (claimants).[2]

The Commission finds the test claim was not timely filed pursuant to Government Code section 17551(c) and is, therefore, dismissed.

Statutes of limitation do not begin to run until a cause of action accrues, and a cause of action accrues at "the time when the cause of action is complete with all of its elements."[3] Government Code section 17551(c) provides a period of limitation for test claim filings that states "[l]ocal agency and school district test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later." Thus, the period of limitation in Government Code section 17551(c) begins to run following the effective date of the statute or executive order, and the claimants have 12 months from that date to file a test claim. That deadline can be extended if the claimants show that costs were first incurred after the effective date of the statute or executive order pled in the claim.

In this case, the test claim permit was adopted on July 8, 2010, and states that it became effective the same date provided that the U.S. Environmental Protection Agency (U.S. EPA) had no

[2] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 1. The city co-permittees specified in the permit include Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, San Buenaventura (Ventura), Santa Paula, Simi Valley, and Thousand Oaks. Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 124, 131 (Permit).

[3] *Rubenstein v. Doe No. 1* (2017) 3 Cal.5th 903, 911.

objections.[4] The Test Claim was filed thirteen months after the effective date, on August 26, 2011.[5]

The claimants assert, however, that the Test Claim was timely filed because the effective date of the permit was delayed 50 days (until August 27, 2010) pursuant to the Memorandum of Agreement (MOA) between the State and U.S. EPA.

The Commission finds, based on the administrative records of the Los Angeles Regional Water Quality Control Board (Regional Board) and the State Water Resources Control Board (State Board) (collectively "Water Boards"), that the period of limitation for the permit sections pled by the claimants began to run on August 5, 2009, the effective date of Order No. 09-0057, or at the latest July 8, 2010, the effective date of the test claim permit noticed by the Regional Board, so the test claim filed August 26, 2011, was not timely filed within 12 months following the effective date of the executive order as required by Government Code section 17551(c).

Order No. 09-0057, an executive order within the meaning of article XIII B, section 6 of the California Constitution, was the permit that *first* ordered the requirements that were pled by the claimants, and it was never stayed or vacated by the Regional Board.[6] The Regional Board reconsidered some sections of Order No. 09-0057 when it adopted the test claim permit on July 8, 2010, but did not change the requirements pled by the claimants other than extending some due dates. Thus, even if the test claim permit made the "cause of action . . . complete with all of its elements," then the period of limitation would have accrued and began to run on July 8, 2010, which was the date noticed by the Regional Board as the effective date of the test claim permit. There is no evidence in the record or in documents publicly available of any notices issued by the Regional Board indicating that the test claim permit had a delayed effective date as asserted by the claimants.

The Commission further finds that the claimants' reliance on the MOA is misplaced. The claimants rely on the delay provisions of the MOA, arguing that the 21 comments received before the test claim permit was adopted were significant, and that changes were made to the latest version of the tentative permit that were not to accommodate U.S. EPA requests.[7] The claimants assert that either of these required a 50-day delay in the effective date of the permit to

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[4] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 162 (test claim permit, which states in Finding G4, "This Order shall serve as a NPDES permit, pursuant to CWA § 402, and shall take effect on (Order adoption date) provided the Regional Administrator of the U.S. EPA has no objections.").

[5] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 162 (test claim permit, Finding G4).

[6] *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919-920 (finding that Government Code section 17516 was unconstitutional to the extent it purports to exempt orders issued by Regional Water Boards from the definition of "executive orders.").

[7] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 17; Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, pages 3-4.

provide U.S. EPA time to review the permit changes.[8] The claimants also argue that the MOA is an extension of U.S. EPA's authority under the Clean Water Act and so the provisions of the permit cannot "modify or supersede the provisions in the MOA."[9]

The record in this case shows that U.S. EPA was notified of all 21 comments and made no objection to the tentative permit.[10] U.S. EPA fully supported the terms of the tentative permit, as stated in its June 4, 2010 comments.[11] At the July 8, 2010 hearing, a representative from U.S. EPA expressed support for the terms of the permit, as modified by the Regional Board.[12]

More importantly, the MOA is signed by a State and U.S. EPA, committing them to specific responsibilities relevant to the administration and enforcement of the State's regulatory program and U.S. EPA's program oversight under the Clean Water Act and thus, governs "the working relationship between the State and EPA."[13] It is a contract between those parties.[14] The MOA does *not* provide notice to the permittees of the effective date of an NPDES permit, which is required by the Regional Board when it adopts a quasi-judicial order.[15] All notices issued by the Regional Board indicate that the test claim permit became effective on July 8, 2010.[16] There is no evidence in the record or in documents publicly available that the permit had a delayed effective date.

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[8] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 17; Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, pages 3-4.

[9] Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, page 2.

[10] Exhibit I(1)(k), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Regional Board Memo, July 2, 2010, mailing list, pages 6-7); Exhibit I(1)(l), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Regional Board, Notice of Public Meeting/Hearing, July 8, 2010, pages 7-16).

[11] Exhibit I(1)(m), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (U.S. EPA letter of June 4, 2010, pages 1-2).

[12] Exhibit I(1)(e), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (July 8, 2010 Hearing Transcript, pages 110-113, 155-156).

[13] 40 Code of Federal Regulations, section 123.24; Exhibit A, Test Claim filed August 26, 2011 and revised May 17, 2017, pages 72-73 (Memorandum of Agreement).

[14] *Tyler v. Cuomo* (9th Cir. 2000) 236 F.3d 1124, 1134, analyzing an MOA between U.S. Department of Housing and Urban Development and the City of San Francisco, finding that the MOA is a contract and the City is bound by its terms.

[15] Water Code section 13263(f); *Marathon Oil Co. v. EPA* (1977) 564 F.2d 1253, 1260-1263; *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377, 1385.

[16] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 162 (test claim permit, Finding G4). Exhibit I(4), Regional Board, Region 4, Adopted Orders https://www.waterboards.ca.gov/losangeles/board_decisions/adopted_orders/query.php?id=5894 (accessed April 5, 2021).

Accordingly, this Test Claim is dismissed on the ground that it is not timely filed pursuant to Government Code section 17551(c).

COMMISSION FINDINGS

I. Chronology

08/05/2009 The order prior to the order adopting the test claim permit (Order No. R4-2009-0057), containing the same activities alleged to be newly mandated in this test claim, became effective August 5, 2009.

07/08/2010 The test claim permit (R4-2010-0108) was adopted and states that the permit "shall take effect on (Order adoption date) provided the Regional Administrator of the U.S. EPA has no objections."[17]

08/26/2011 The claimants filed the Test Claim.[18]

09/08/2011 The Test Claim was deemed complete.

03/03/2017 Commission staff issued the Notice of Incomplete Joint Test Claim Filing following review by legal staff.[19]

05/17/2017 The claimants filed their Response to Notice of Incomplete Joint Test Claim Filing and revised the Test Claim.[20]

05/26/2017 Commission staff issued the Notice of Complete Joint Test Claim Filing, Removal From Inactive Status, Schedule for Comments, Renaming of Matter, Request for Administrative Record, and Notice of Tentative Hearing Date.

08/23/2017 The Regional Board filed the administrative record for the 2001 Los Angeles County MS4 permit.[21]

08/23/2017 The State Board filed the administrative record on the 2009 Ventura County MS4 permit.[22]

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[17] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 124, 162 (test claim permit, and Finding G4).

[18] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 1.

[19] Exhibit B, Notice of Incomplete Joint Test Claim Filing, issued March 3, 2017.

[20] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017.

[21] This administrative record for the 2001 Permit is not included as an exhibit to this matter due to its large size (82,219 pages/two gigabytes) which may not be able to be downloaded on many devices and can crash even powerful ones. The Commission's current regulations, which were not in effect when the record was filed, now specify a maximum file size of 500 megabytes to avoid such file size issues in the future. The entire record may be found on the Commission's website at https://www.csm.ca.gov/matters/11-TC-01.php and must be viewed using Adobe Acrobat or free Adobe Reader.

[22] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017.

10/11/2017	The Department of Finance filed comments on the Test Claim.[23]
10/12/2017	The Regional Board filed the administrative record for the 2009 Ventura County MS4 permit and 2010 Ventura County MS4 permit.[24]
10/30/2017	The Water Boards filed late comments.[25]
01/08/2018	The claimants filed rebuttal comments.[26]
05/19/2021	Commission staff issued the Draft Proposed Decision.[27]
06/09/2021	The Water Boards filed comments on the Draft Proposed Decision and requested postponement of the hearing.[28]
06/09/2021	The claimants filed comments on the Draft Proposed Decision and requested postponement of the hearing.[29]

II. Background

On August 26, 2011, the claimants filed this Test Claim on Order No. R4-2010-0108 (the test claim permit), which was adopted by the Regional Board on July 8, 2010. The permit states that it became effective on the adoption date provided that U.S. EPA had no objections.[30] The claimants plead the following permit provisions, arguing that they impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution:

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[23] Exhibit C, Finance's Comments on the Test Claim, filed October 11, 2017, page 1.

[24] This administrative record for the 2009 and 2010 Permits is not included as an exhibit to this matter due to its large size (44,080 pages/two gigabytes) which may not be able to be downloaded on many devices and can crash even powerful ones. The Commission's current regulations, which were not in effect when the record was filed, now specify a maximum file size of 500 megabytes to avoid such file size issues in the future. Relevant excerpts of the administrative record are cited to and included in Exhibit I. The entire record may be found on the Commission's website at https://www.csm.ca.gov/matters/11-TC-01.php and must be viewed using Adobe Acrobat or free Adobe Reader.

[25] Exhibit D, Water Boards' Late Comments on the Test Claim, filed October 30, 2017, page 1.

[26] Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, page 1.

[27] Exhibit F, Draft Proposed Decision, issued May 19, 2021.

[28] Exhibit G, Water Boards' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021.

[29] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021.

[30] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 162 (test claim permit, which states in Finding G4, "This Order shall serve as a NPDES permit, pursuant to CWA § 402, and shall take effect on (Order adoption date) provided the Regional Administrator of the U.S. EPA has no objections.").

- Public Information/Participation Program- Part 4.C.2(c)(1)(C), 4.C.2(c)(2),(6),(8), and 4.C.2(d).; 4.C.3(a),(b).[31] The claimants allege that these sections impose "[n]ew public outreach requirements including: distribution of storm water pollution prevention materials to auto parts stores, home improvement stores, and others; development of an ethnic communities strategy; distribution of school district materials to 50 percent of all K-12 students every two years or development of a youth outreach plan; creation and implementation of a behavioral change assessment; conducting pollutant-specific outreach; conducting corporate outreach; and implementing a business assistance program."[32]
- Reporting Program and Program Effectiveness Evaluation - Part 4.I.1[33]; Part 3.E.1(e).[34] The claimants contend that these sections impose "[n]ew requirements to develop an electronic reporting program and an electronic reporting format; and, a new requirement to conduct a Program Effectiveness Assessment."[35]
- Special Studies - Part 4.E.III.3(a)(1)(D-E)[36]; Attachment F, Section F (monitoring)[37]; Part 4.E.IV.4[38]; Part 4.E.III.2(c)(3)-(4).[39] The claimants allege that these sections impose "[n]ew requirements to conduct or participate in special studies to develop tools to predict and mitigate adverse impacts of hydromodification, and to comply with hydromodification control criteria; new requirements to update and expand the technical guidance manual; and, a requirement to develop an off-site mitigation list of sites/locations and schedule for completion of such projects."[40]

[31] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 17-18, and 173-175 (test claim permit).

[32] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 17-18.

[33] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 18 and 217 (test claim permit).

[34] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 18 and 170 (test claim permit).

[35] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 18.

[36] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 18 and 190 (test claim permit).

[37] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 18 and 285-286 (test claim permit).

[38] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 18 and 196-197 (test claim permit).

[39] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 18 and 188 (test claim permit).

[40] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 18.

- Watershed Initiative Participation – Part 4.B.[41] The claimants contend that this section imposes "[n]ew requirements to participate in the Southern California Storm Water Monitoring Coalition ("SMC"); SMC Regional Bioassessment Monitoring Program; and, Southern California Bight Projects."[42]
- Vehicle and Equipment Wash Areas – Part 4.G.1.3(a).[43] The claimants allege that this section imposes a "[n]ew requirement for elimination of wash water discharges from County facilities for Fire Fighting Vehicles."[44]
- Illicit Connection/Illicit Discharge Elimination – Part 4.H.1.3(a).[45] The claimants contend that this section imposes "[n]ew requirements for mapping the County storm drain system."[46]

The Test Claim was initially deemed complete. However, upon initial legal review, it was determined that the Test Claim was filed beyond the period of limitation required by Government Code section 17551 because it was filed 13 months after the effective date of the permit and there was no showing that costs were first incurred within twelve months of the filing date. Government Code section 17551(c) states that "[l]ocal agency and school district test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later." Thus, a notice of incomplete test claim was issued.[47] The claimants responded with a revised filing and legal arguments on the period of limitations issue, which did not include a showing that the claim was filed within twelve months of first incurring costs, but instead argued that the effective date was later than the date indicated in the order itself.[48] The Test Claim was deemed complete so that a full legal analysis on the timeliness of this Test Claim could be considered by the Commission.

III. Positions of the Parties

A. County of Ventura and the Ventura County Watershed Protection District

The claimants argue that the Test Claim was timely filed because the effective date of the permit was delayed 50 days pursuant to the MOA between the State Water Resources Control Board and the U.S. EPA. The claimants state that Section II.F. of the MOA, attached to the Test Claim,

[41] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 18 and 171-172 (test claim permit).

[42] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 18.

[43] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 18 and 209 (test claim permit).

[44] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 18.

[45] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 18 and 215-216 (test claim permit).

[46] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 18.

[47] Exhibit B, Notice of Incomplete Joint Test Claim Filing, issued March 3, 2017.

[48] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 2 and 17.

provides that permits become effective 50 days after adoption "where the EPA has made no objection to the permit, if (a) there has been significant public comment, or (b) changes have been made to the latest version of the draft permit that was sent to EPA for review (unless the only changes were made to accommodate EPA comments)."[49] In arguing that the MOA's 50-day delay applies, the claimants summarize the following events:

> On May 5, 2010, the Los Angeles Water Board issued a draft Permit, Notice of Written Public Comment Period and Notice of Public Hearing. The EPA made no objection to the draft Permit as proposed by the Los Angeles Water Board on May 5, 2010, or prior to its adoption on July 8, 2010. There was, however, significant written public comment submitted on or before June 7, 2010, which was the closing date for submittal of written public comments. [citation omitted.]
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> In all, 21 written comment letters were submitted to the Los Angeles Water Board on or before June 7, 2010, including from diverse interests such as the Natural Resources Defense Council and the Building Industry Association of Southern California. Further, the National Resources Defense Council and the Building Industry Association of Southern California both requested and received Party status in this quasi-judicial proceeding. After the close of the written comment period, and prior to the close of the Public Hearing on July 8, 2010, further revisions were made to the draft Permit that was issued on May 5, 2010. The additional revisions were not the result of requests made by EPA but were due to comments provided by other interested parties. [citation omitted.]
>
> Accordingly, the Permit adopted by the Los Angeles Water Board on July 8, 2010, was subject to significant written public comment and was revised as compared to the version that was sent to EPA on May 5, 2010. Thus, according to the terms of the binding MOA between EPA and the State Water Resources Control Board, the "effective date" of the Permit was "50 days after adoption." 50 days after the July 8, 2010 adoption date is August 27, 2010. This Test Claim has been timely submitted in that it has been submitted within one year of the effective date of the 2010 Permit.[50]

The claimants further argue that the MOA governs the effective date of the 2010 Permit because the MOA "is an extension of U.S. EPA's federal authority under the CWA [Clean Water Act]," so the Permit's stated effective date "cannot modify or supersede the provisions in the MOA."[51] According to the claimants:

> The 1989 MOA provides that final permits adopted by a RWQCB [Regional Water Quality Control Board] become effective on the date of adoption, 50 days after adoption, or 100 days after adoption, depending upon the nature of the permit and the level of

[49] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 17, 93 (Memorandum of Agreement). The MOA is Exhibit A to the Declaration of Theresa A. Dunham.

[50] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 17.

[51] Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, page 2.

public response to a draft permit. When an individual permit has received significant public comment, or when the final permit has changed from the draft permit sent to U.S. EPA for review other than changes requested by U.S. EPA, that permit "shall become effective on the 50th day after the date of adoption," provided that U.S. EPA has not objected to the permit. [Citation omitted.] This 50-day time period is needed to provide U.S. EPA with adequate time to review a permit that has garnered significant public attention and/or has changed during the approval process. [Citation omitted.]

The 2010 Permit fits both of these criteria, even though only one is necessary to trigger the 50-day time period. First, 21 separate, substantive comments were timely submitted on the 2010 draft permit. [Citation omitted.] Commenters included environmental interest groups and industry groups, and some of those commenters requested and received party status in this proceeding. For instance, the Building Industry Association of Southern California, Building Industry Legal Defense Foundation, and Construction Industry Coalition on Water Quality (collectively, "BIA") submitted comments on the 2010 Permit that focused on the land development section of the 2010 Permit and its request that the Los Angeles Water Board consider including provisions for bio-infiltration designs for new developments and redevelopment projects, among other possible options for maintaining pre-construction hydrology in developments. [Citation omitted.] A letter submitted by the Oxnard Chamber of Commerce also raised concerns about the 2010 Permit's treatment of Low Impact Development best management practices, which could impact opportunities for development and redevelopment in the City of Oxnard. [Citation omitted.] This is significant public comment. Second, revisions were made to the draft permit issued on May 5, 2010 to address some of these comments. [Citation omitted.] Thus, the final permit approved by the Los Angeles Water Board on July 8, 2010 had changed from the draft permit sent to U.S. EPA for review on May 5, 2010, and those changes were not to address U.S. EPA comments. [Citation omitted.] Therefore, the 2010 Permit could not become effective before the U.S. EPA was provided the appropriate time for review as mandated by the MOA – meaning that the permit did not become effective on the date of the Los Angeles Water Board's adoption of the permit, but 50 days after the date of adoption pursuant to the provisions of the 1989 MOA.

The fact that the 2010 Permit is a continuation of Order Number 09-0057 (2009 Permit) does not change this analysis. Initially, the 2009 Permit was appealed to the SWRCB for review by the BIA, which challenged the adoption of the 2009 Permit based on late changes to the permit that were not provided to the public for review and comment. After the Los Angeles Water Board agreed to a voluntary remand of the 2009 Permit, it opened the permit up to public comment on a new tentative version of the permit. As mentioned above, during this reconsideration, the tentative 2010 Permit received significant public comment from stakeholders, several of which urged that the Los Angeles Water Board modify the permit from the version adopted in 2009. This created great uncertainty for the Claimants, because they did not know which provision the Los Angeles Water Board may or may not change, and which comments from the public it would choose to address and incorporate.

. . . The Los Angeles Water Board retained total discretion to alter any provision in its reconsideration of the 2009 Permit and ultimate adoption of the 2010 Permit. Therefore,

> filing a test claim on the 2009 Permit, while the permit was actively being reconsidered by the Los Angeles Water Board would have been premature because the specific mandates in the permit reasonably could have changed upon reconsideration.[52]

In comments on the Draft Proposed Decision, the claimants argue that the 2009 Permit (Order No. 09-0057) was not properly adopted until after it was reconsidered and re-adopted by the Regional Board as the 2010 Permit, so the 2009 Permit is irrelevant to the period of limitation in Government Code section 17551(c). The claimants also reiterate the argument that the 2010 Permit took effect on August 27, 2010 and so the claimants' Test Claim, filed August 26, 2011, was timely filed.[53] In arguing the 2009 Permit's lack of relevancy to the period of limitation, the claimants contend:

> Reconsideration [of the 2009 Permit] was necessary "in light of substantial new information submitted, confusion regarding the record, and other procedural irregularities" in connection with the adoption of the 2009 Permit, but the State Board could not complete its own review within the statutory deadline. [citations omitted.] The Regional Board accepted the State Board's request to remand the matter, thereby negating the need for the State Board to order a stay of the 2009 Permit. The issue for reconsideration was whether to affirm the initial adoption of the 2009 Permit, strongly suggesting the 2009 Permit and its provisions were invalid until they were properly re-adopted on July 8, 2010, after the Regional Board adhered to notice and comment requirements. This is evidenced by the Regional Board's Notice of Public Hearing dated May 5, 2010, which indicates the 2009 Permit was treated as an "original draft permit" being considered for adoption on July 8, 2010.[54]

The claimants also allege that the 2010 Permit was adopted as a reconsideration of the 2009 Permit rather than an amendment or modification, arguing:

> If the State and Regional Boards (Water Boards) sought only a narrow modification of the 2009 Permit, as suggested by Staff, revocation and reissuance of the permit would have been unnecessary. (Draft Decision, p. 37.) Therefore, the 2010 Permit is neither a modification of the 2009 Permit nor a completely new permit. Instead, the Regional Board effectively converted the 2009 Permit into the 2010 Permit after the State Board called for its reissuance. (40 C.F.R. § 122.62 ["When a permit is revoked and reissued, the entire permit is reopened and subject to revision and the permit is reissued for a new term."].) Accordingly, the

[52] Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, pages 3-4.

[53] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 2.

[54] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 3.

> 2009 Permit no longer has any significance as an official or applicable permit under the Clean Water Act.[55]

Additionally, the claimants assert that Order 09-0057 is irrelevant for purposes of timeliness under Government Code section 17551(c) because that statute "hinges on the effective date of the executive order being pled for reimbursement." The claimants filed their Test Claim on the final 2010 Permit, an "executive order" with its own effective date for purposes of section 17551(c).[56] According to the claimants:

> That the final 2010 version of the permit imposes requirements originally found in the 2009 version of the permit is irrelevant for purposes of section 1755l(c) because the 2009 version was in reality determined by the Water Boards to not be properly adopted and was rescinded in its entirety by the Regional Board upon reconsideration.[57]

The claimants assert that the fact that the reconsideration was narrow in scope, allowing only limited comments and evidence, "does not change this analysis."[58] And the claimants contend that filing the Test Claim during reconsideration would have been premature because specific mandates in the permit reasonably could have changed upon reconsideration.[59]

The claimants also disagree with the Draft Proposed Decision's characterization of the MOA as a contract governing the relationship between the State and U.S. EPA because doing so "severely oversimplifies the nature of the MOA and its legal effect on the issue presented."[60] The claimants describe the MOA as "a delegation of EPA' s statutory power governing the issuance of NPDES permits as required by the Clean Water Act" that "controls the distribution of NPDES program responsibilities between the EPA, the State Board, and Regional Boards, including EPA's review and comment on draft and adopted permits."[61] The claimants maintain that the MOA delays the effective date of an adopted permit by 50 days if (1) EPA does not object to the

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[55] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 3.

[56] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, pages 3-4.

[57] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 4.

[58] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 4.

[59] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 4.

[60] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 5.

[61] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 5.

permit and (2) the permit has garnered significant public comment and/or has changed during the approval process. The claimants argue that the 2010 Permit fits both of these criteria.[62]

In disputing the conclusion that the MOA does not provide notice regarding the effective date of the permit, the claimants argue that the Draft Proposed Decision "ignores the MOA's control over the effective date and EPA's right to review a permit beyond its adopted date."[63] Because EPA made no objections, the claimants maintain that the permit became effective on August 27, 2010, even though various permit provisions have specific effective dates tied to the permit's adoption date. According to the claimants, the Regional Board's failure to identify the Permit's proper effective date in accordance with the MOA "cannot operate to override the requirements of the Clean Water Act."[64]

The claimants further argue that if NPDES permit provisions are inconsistent with federal law, the contrary permit provisions are superseded by federal law. And because the MOA is an extension of EPA's statutory authority under the Clean Water Act, the MOA has a similar effect on permit provisions that conflict with its plain meaning. Thus, the claimants conclude that the language declaring that the permit "shall take effect on (order adoption date) provided the [U.S. EPA] has no objections" is invalid to the extent that it conflicts with the MOA regarding the effective date of the Permit. Moreover it leads to absurd retroactive results and procedural confusion by "requiring the permit to take effect before EPA has time to meaningfully consider the proposal and make objections, undermining the intent and purposes of the MOA."[65]

B. Department of Finance

Finance's comments address the merits of the Test Claim. Finance "believes claimants do have stormwater fee authority undiminished by Propositions 218 or 26."[66] Finance also argues that claimants have fee authority under their police power for alleged mandated permit activities regardless of whether the fees receive voter approval pursuant to Proposition 218, and Proposition 26 (which excludes assessments and property-related fees imposed in accordance with Proposition 218 from the definition of taxes (art. XIIIC, §1(e)(7))). Citing *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, Finance asserts that claimants can choose "not to put a fee to the voters, or the voters can reject the fee, but not at the state's expense," and sufficient fee authority exists regardless of political feasibility.[67] Finance defers to the Water Boards on whether the Permit imposes a new program or higher level of service and the impact

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[62] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 5.

[63] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 6.

[64] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 6.

[65] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 7.

[66] Exhibit C, Finance's Comments on the Test Claim, filed October 11, 2017, page 1.

[67] Exhibit C, Finance's Comments on the Test Claim, filed October 11, 2017, pages 1-2.

of the Supreme Court's decision in *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749.[68] Finance did not file comments on the Draft Proposed Decision.

C. Water Boards

In their comments on the Test Claim, the Water Boards argue that the Commission does not have jurisdiction over the Test Claim (filed August 26, 2011 and revised May 17, 2017) because it was not filed within 12 months of the effective date of the Permit (effective July 8, 2010). The Water Boards maintain that reliance on the MOA is incorrect because the Permit states it "shall take effect on (Order adoption date) provided the Regional Administrator of the U.S. EPA has no objections." And there is no dispute that the Permit was adopted on July 8, 2010 and U.S. EPA did not object to the Permit.[69] According to the Water Boards:

> The Los Angeles Water Board's decision to have the 2010 Permit take effect immediately upon adoption was intentional. Claimants' reliance on the NPDES MOA between U.S. EPA and the State Water Board is also entirely misplaced as it ignores the context in which the Order was adopted. As described in Section II.C., above, the Los Angeles Water Board specifically declined to stay certain provisions of the 2009 Permit, stating "until the Los Angeles Water Board takes further action on the Ventura County MS4 Permit (which is currently scheduled for July 8, 2010), *the existing permit, including all of its provisions, remain in full force and effect*." [citation omitted.] It was not necessary for the Board to delay the effective date of the 2010 Permit as the requirements in the 2010 Permit are virtually the same as those in the 2009 Permit. Thus, the Permittees had been subject to those same provisions since the effective date of the 2009 Permit and had already been implementing the provisions and, notably, incurring costs to implement those provisions. Moreover, the reconsideration of the permit in 2010 was to allow public comment on the very language that the Permittees, NRDC, and Heal the Bay proposed and advocated for.
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> . . . To the extent that Claimants believe the Los Angeles Water Board's established effective date was contrary to the NPDES MOA with U.S. EPA, Claimants could have raised this issue before the Los Angeles Water Board and, if dissatisfied with the response, filed a petition with the State Water Board challenging the effective date. [Wat. Code, § 13320.] It did neither. The Commission is not the proper forum for Claimants to challenge the effective date.[70]

The Water Boards further argue: (1) the Regional Board found that the Permit provisions were required by Federal law, which findings are entitled to deference under *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749; (2) U.S. EPA has required similar provisions in its Permits; (3) the claimants could have sought substitute best management practices but have not exhausted their administrative remedies for doing so; (3) the challenged

[68] Exhibit C, Finance's Comments on the Test Claim, filed October 11, 2017, page 1.

[69] Exhibit D, Water Boards' Late Comments on the Test Claim, filed October 30, 2017, page 14.

[70] Exhibit D, Water Boards' Late Comments on the Test Claim, filed October 30, 2017, page 15.

permit does not impose new programs or higher levels of service because the Permit adopted in 2009 was prior law, not the 2000 Permit; (4) the Permit does not impose requirements unique to local agencies; and (5) claimants have authority to impose fees for the contested permit provisions.[71]

The Water Boards filed comments concurring with the Draft Proposed Decision.[72]

IV. Discussion

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

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

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[73] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[74]

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

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[75]
2. The mandated activity constitutes a "program" that either:
   a. Carries out the governmental function of providing a service to the public; or
   b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[76]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[77]

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[71] Exhibit D, Water Boards' Late Comments on the Test Claim, filed October 30, 2017, pages 16-28.

[72] Exhibit G, Water Boards' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021.

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

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

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

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

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

4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[78]

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[79] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[80] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[81]

A. The Test Claim Was Not Timely Filed and Is, Therefore, Dismissed.

The law is clear that quasi-judicial administrative agencies, such as the Commission, have only the limited authority that is conferred upon them by law, and the courts will set aside their acts that are beyond their statutory jurisdiction.[82] In this respect, submitting a test claim to the Commission in accordance with Government Code sections 17500 et seq. is the exclusive method for resolving whether a cost is or is not a reimbursable state mandate.[83] Pursuant to Government Code section 17551(b), the Commission's review of a test claim "may be had *only if*" the test claim is filed within the time limits specified in sections 17551(c).[84] Government Code section 17551(c) states that "[l]ocal agency and school district test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later." Thus, the Commission does not have the authority to hear and determine test claims filed beyond

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

[79] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

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

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

[82] *American Federation of Labor v. Unemployment Insurance Appeals Board* (1996) 13 Cal.4th 1017, 1023; *City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 679.

[83] *Grossmont Union High School Dist. v. State Board of Education* (2008) 169 Cal.App.4th 869, 884 citing *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 833-834; see also, Government Code section 17552 ("This chapter shall provide the sole and exclusive procedure by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution.").

[84] Emphasis added.

the period of limitation identified in Government Code section 17551 and any late filings must be dismissed.[85]

In this case, the Test Claim was filed on August 26, 2011, 13 months after the Regional Board adopted the test claim permit on July 8, 2010. The permit stated that it became effective on the date of adoption provided that U.S. EPA had no objections.[86] The claimants assert that the effective date of the permit was delayed 50 days (until August 27, 2010) pursuant to the MOA between the State and U.S. EPA due to significant comments filed on the permit and changes made to the tentative permit prepared by Regional Board staff for the Board's July 8, 2010 hearing and adopted by the Regional Board after the written comment period expired, and so the Test Claim was timely filed.[87]

As explained below, the claimants' reliance on the MOA is misplaced. The Commission finds that the period of limitation for the sections pled by the claimants began to run on August 5, 2009, the effective date of Order No. 09-0057 (which *first* ordered the requirements pled by the claimants and was never stayed or set aside), or at the latest on July 8, 2010, the effective date of the test claim permit (which reconsidered Order No. 09-0057, but did not change the requirements pled by the claimants other than extending some due dates). Thus, the Test Claim filed on August 26, 2011, was not timely filed within 12 months following the effective date of the executive order as required by Government Code section 17551(c).

1. The Provisions of the Test Claim Permit Pled by the Claimants Were Originally Adopted in Order No. 09-0057, Effective August 5, 2009 That Was Never Stayed, and Although Some of the Original Due Dates in Order 09-0057 Were Extended in the Test Claim Permit, the Requirements Remained the Same.

As described below, all of the sections in the test claim permit that were pled by the claimants and alleged to impose a reimbursable state-mandated program were adopted in Order No. 09-0057, effective August 5, 2009. The 2009 permit was corrected in January 2010, consistent with the Regional Board's vote and adoption of Order No. 09-0057, and later remanded back to the Regional Board to consider some perceived due process issues, which resulted in the adoption of the test claim permit on July 8, 2010 (R4-2010-0108). With respect to the sections pled by the claimants, the test claim permit extended some due dates for compliance with some of those sections, giving the claimants more time to comply, but otherwise made no substantive changes to the claimed requirements imposed by Order No. 09-0057. A summary of the relevant events from the administrative records of the Water Boards follows.

[85] California Code of Regulations, title 2, section 1183.1(h).

[86] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 162 (test claim permit, which states in Finding G4, "This Order shall serve as a NPDES permit, pursuant to CWA § 402, and shall take effect on (Order adoption date) provided the Regional Administrator of the U.S. EPA has no objections.").

[87] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 17.

- On May 7, 2009, the Regional Board adopted Order No. 09-0057, with an effective date 90 days thereafter (August 5, 2009).[88] Before the Regional Board's May 7, 2009 hearing, the permittees, the Natural Resources Defense Council (NRDC), and Heal the Bay agreed on permit terms involving new development and redevelopment performance criteria, including onsite retention requirements; a five percent Effective Impervious Area (EIA) limitation, infeasibility criteria, a 30 percent EIA cap, and off-site mitigation provisions; elimination of the municipal action level (MAL) requirements in the tentative permit; and year round beach water quality monitoring at 10 sites.[89] The agreement was submitted to the Regional Board in a letter dated April 10, 2009.[90] At the May 7, 2009 hearing, these interests advocated that their agreement be incorporated into the permit verbatim in its entirety.[91]
- The tentative permit that the Regional Board staff prepared for the May 7, 2009 hearing, included in Part 5, Section E.III. (New Development/ Redevelopment Performance Criteria) section 1 (Integrated Water Quality/Flow Reduction/Resource Management Criterion), section 2 (Hydromodification Control Criteria), and section 3 (Water Quality Mitigation Criteria).[92] Staff did not recommend incorporating the terms of the agreement into the permit.[93]
- At the May 7, 2009 hearing, the Regional Board amended the tentative permit by striking Part 2 (MALs) as well as Section E.III.1 of Part 5, and replacing it with the terms of the agreement.[94] Originally, the Board member stated the motion as striking all of Section E.III, but it was later clarified that she intended to strike only Section E.III.1. That

[88] Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order 09-0057, page 46). Section G.4 of Order No. 09-0057 sets the effective date 90 days from the May 7, 2009 adoption date: "This Order shall serve as a NPDES permit … and shall take effect 90 days from Order adoption date provided the U.S. EPA has no objection.").

[89] Exhibit I(1)(d), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, page 1).

[90] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 535-567.

[91] Exhibit I(1)(d), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, page 1).

[92] Exhibit I(1)(n), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (2009 Revised Tentative Permit, pages 64-74); Exhibit I(1)(b), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Agenda Item for 2009 Tentative Permit, page 12).

[93] Exhibit I(1)(b), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Agenda Item for 2009 Tentative Permit, page 15).

[94] Exhibit I(1)(f), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (May 7, 2009 Hearing Transcript, pages 357-371).

motion was adopted.[95] With the removal of Part 2 (MALs), the agreement became Part 4.E.III.1. and 2. of the 2009 permit (Integrated Water Quality/Flow Reduction/Resources Management Criteria, and Alternative Compliance for Technical Infeasibility).[96]

- On June 2, 2009, the Regional Board issued Order No.09-0057.[97] As issued, it included the terms of the agreement in Part 4.E.III.1 and 2, but did not include Part 4, Sections E.III.3 (addressing Hydromodification), and E.III.4 (Water Quality Mitigation Criteria).[98] As described further below, the omission of these sections was inadvertent and the permit was corrected on January 13, 2010 and re-issued on January 28, 2010.[99]
- Order No. 09-0057, as issued June 2, 2009, contained the following parts (*except for the language in italics that was added when the corrected permit was re-issued on January 28, 2010*) pled by the claimants in the Test Claim:
    - Public Information and Participation Program- Part 4.C.2(c)(1)(C), 4.C.2(c)(2),(6), (8), and 4.C.2(d).; 4.C.3(a),(b).[100]

[95] Exhibit I(1)(f), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (May 7, 2009 Hearing Transcript, pages 357-371), with clarification of the motion and second on page 359, lines 7-11.

[96] Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 72-73).

[97] Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, page 1-2).

[98] Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 76-80).

[99] Exhibit I(2), Regional Board's Corrected 2009 Permit Order No. 09-0057, January 13, 2010, https://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura_ms4/Final_Ventura_County_MS4_Permit_Order_No.09-0057__01-13-2010.pdf (accessed on March 24, 2021), page 631; Exhibit I(3), Regional Board's Letter Issuing the Corrected 2009 Permit Order No. 09-0057, January 28, 2010, https://www.waterboards.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/ventura_ms4/Final%20Transmittal%20_Letter-Corrected_Ventura_County_MS4_Permit,_Order_No.09-0057.pdf (accessed on March 24, 2021).

[100] Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 58-62); Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 27-29, 173-175 (test claim permit).

- Reporting Program and Program Effectiveness Evaluation - Part 4.I.1;[101] Part 3.E.1(e).[102]
- Special Studies - *Part 4.E.III.3(a)(1)(D-E)* (*Section E.III.3 was inadvertently omitted from the issued 2009 permit, but was included in the corrected permit issued in January 2010*);[103] Attachment F, Section F;[104] Part 4.E.IV.4;[105] Part 4.E.III.2(c)(3)-(4).[106]
- Watershed Initiative Participation – Part 4.B.[107]
- Vehicle and Equipment Wash Areas – Part 4.G.1.3(a).[108]
- Illicit Connection/Illicit Discharge Elimination– Part.4.H.1.3(a).[109]

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[101] Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, page 105); Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 34, 170 (test claim permit).

[102] Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, page 56); Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 35.

[103] Exhibit I(2), Regional Board's Corrected 2009 Permit Order No. 09-0057, January 13, 2010, https://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura_ms4/Final_Ventura_County_MS4_Permit_Order_No.09-0057__01-13-2010.pdf (accessed on March 24, 2021), page 631; Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 38, 190 (test claim permit).

[104] Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 215-216); Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 38-39, 285-286 (test claim permit).

[105] Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 83-84); Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 39-40, 196-197 (test claim permit).

[106] Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 78-79); Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 40-41, 188 (test claim permit).

[107] Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 57-58); Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 44-45, 171-172 (test claim permit).

[108] Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, page 97). Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 48, 209 (test claim permit).

[109] Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, page 103); Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 50-51, 215-216 (test claim permit).

- U.S. EPA was involved in stakeholder meetings prior to Order 09-0057's adoption[110] and expressed support for it after adoption.[111]
- On June 8, 2009, the Building Industry Association of Southern California, Building Industry Legal Defense Foundation, and Construction Industry Coalition on Water Quality (collectively, "BIA"), petitioned the State Board to review Order No. 09-0057 based on the following allegations:[112]
    - Violation of due process – the Regional Board adopted a side agreement that was not publicly noticed. The side agreement was a fundamental policy shift, and not a natural evolution of the drafting process. According to the points and authorities – "the Permanent Retention Requirement radically shifts the goal of LID from maintaining the preconstruction natural hydrology to arresting the preconstruction natural hydrology."
    - The permit unlawfully regulates matters that are not subject to the NPDES program; namely, by requiring that all new development and redevelopment retain on site diffuse surface water without showing the nexus to the MS4.
    - The Regional Board disregarded the authority and laws governing local government.
    - The 2009 Permit is not supported by substantial evidence, but instead relied on a secret agreement.
    - The Regional Board did not consider the factors in Water Code 13241.

  The petition also requested that the State Board suspend the permit, and that any application of the permit be stayed.[113]
- On June 24, 2009, the State Board denied the request for a stay of Order No. 09-0057 because it was not supported by an affidavit explaining the facts supporting the request, it did not allege facts regarding substantial harm, and the facts and declaration did not explain actions or costs during the time the State Board will review the petition.[114]

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[110] Exhibit I(1)(b), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Agenda Item for the 2009 Tentative Permit, pages 2-3).

[111] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, pages 602-603 (U.S. EPA letter of March 17, 2010).

[112] Exhibit I(1)(d), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, page 1).

[113] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 5-14; See also the points and authorities, pages 16-36.

[114] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, page 259.

- On July 7, 2009, BIA filed a supplemental request for a stay of the 2009 permit.[115]
- On July 29, 2009, counsel for the claimants filed an opposition to the petition, which also shows the permittees' agreement with the provisions that were added when the Regional Board adopted Order No. 09-0057.[116] The letter states, in relevant part:

  > In this case, as with any negotiation to reach consensus, the Permittees, HTB and NRDC each gave up something from previously entrenched positions. The results of these discussions culminated in the Joint Comment Letter that was submitted to the Regional Water Board as part of its public review process.
  >
  > [¶]. . . [¶]
  >
  > In this case, the Joint Comment Letter contained agreement on four key issues relative to the MS4 Permit: Low Impact Development, Municipal Action Levels, Beach Water Quality Monitoring, and Best Management Performance Criteria. All four of these issues, and many others, were highly debated and discussed by all interested stakeholders that participated in the Regional Water Board's two-year plus process for the development of this MS4 Permit. The Petitioners actively participated in this process, which included many public workshops and stakeholder meetings. More importantly, all four issues identified in the Joint Comment Letter were part of the proposed MS4 Permit that was issued on February 24, 2009, and the version revised on April 30, 2009. Thus, the Regional Water Board's action to adopt the MS4 Permit with amendments reflective of timely submitted comments on four key, highly debated issues, was a logical outgrowth of the proposed permit noticed by the Regional Water Board.[117]

- On August 3, 2009, the Regional Board filed its response to the petition for the stay.[118]
- On August 25, 2009, the State Board denied BIA's request to stay Order No. 09-0057, because BIA did not comply with the regulatory requirement for a stay.[119]
- On January 13, 2010, the Regional Board corrected Order No. 09-0057, reinserting Part 4, E.III.3. and 4. (Hydromodification, and Water Quality Mitigation Criteria), which were

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[115] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 267-280.

[116] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 313-315.

[117] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, page 314.

[118] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 489-496.

[119] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 497-502.

inadvertently omitted.[120] Section G.4 of the corrected permit reiterated the effective date as 90 days from the May 7, 2009 adoption as follows: "This Order shall serve as a NPDES permit … and shall take effect 90 days from Order adoption date (August 5, 2009) provided the U.S. EPA has no objection."[121]

- On January 28, 2010, the Regional Board issued the corrected 2009 permit, stating:

  > The Regional Board has corrected the Final Ventura County MS4 Permit, dated May 7, 2009, pursuant to 40 CFR 122.63(a), to correct omissions, section numbering/pagination, and minor typographical errors. Specifically, subpart 3. Hydromodification (Flow/ Volume/ Duration) Control Criteria, and subpart 4. Water Quality Mitigation Criteria contained in Part 4.E.III - New Development/ Redevelopment Performance Criteria, beginning on page 55 of the enclosed document, were adopted by the Board, but were inadvertently omitted when the Order was finalized after the Board meeting. Additionally, actual calendar dates have been inserted where previously there were references to the time period from permit adoption. The corrected final permit, as it was adopted on May 7, 2009, is transmitted herewith.
  >
  > Board Order R4-2009-0057 shall be effective as of August 5, 2009, 90 days from May 7, 2009, as stated in the Order, and serves as the federal NPDES permit and State waste discharge requirements for storm water (wet weather) and non-storm water (dry weather) discharges from the MS4 within the Ventura County Watershed Protection District, County of Ventura, and the incorporated cities therein. The expiration date of this NPDES permit is May 7, 2014.[122]

- On February 24, 2010, the State Board suspended the deadline for additional comments on BIA's petition for review until further notice because of the Regional Board's January 28, 2010 issuance of the corrected permit containing significant changes.[123]

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[120] Exhibit I(2), Regional Board's Corrected 2009 Permit Order No. 09-0057, January 13, 2010, https://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura_ms4/Final_Ventura_County_MS4_Permit_Order_No.09-0057__01-13-2010.pdf (accessed on March 24, 2021), pages 63-67.

[121] Exhibit I(2), Regional Board's Corrected 2009 Permit Order No. 09-0057, January 13, 2010, https://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura_ms4/Final_Ventura_County_MS4_Permit_Order_No.09-0057__01-13-2010.pdf (accessed on March 24, 2021), page 36.

[122] Exhibit I(3), Regional Board's Letter Issuing the Corrected 2009 Permit Order No. 09-0057, January 28, 2010, https://www.waterboards.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/ventura_ms4/Final%20Transmittal%20_Letter-Corrected_Ventura_County_MS4_Permit,_Order_No.09-0057.pdf (accessed on March 24, 2021).

[123] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 584-585.

- On March 10, 2010, the Chief Counsel of the State Board requested that the Regional Board agree to a voluntary remand of the 2009 permit and that BIA agree to place their petition in abeyance, in light of "apparent irregularities and confusion in this matter" and because the State Board would not have time to review the corrected permit and the arguments before the deadline for the Board to take action on the petition, which dismisses it by default.[124] The March 10th letter noted the following issues: (1) corrections were made to the permit nearly eight months after the adopted permit was circulated; (2) documents were omitted from the administrative record of the permit that was sent to the State Water Board; (3) the Regional Board, in response to the petition, asked the State Board to correct a finding; and (4) [BIA] Petitioners argued that the approved permit should have been recirculated before adoption due to "alleged irregularities in the hearing."[125]
- On March 11, 2010, the Regional Board agreed to a remand in order to address the "perceived procedural issues."[126]
- On March 15, 2010, the Ventura County permittees asked the Regional Board to stay the 2009 permit, and in particular to stay Part 4, Section E (Planning and Land Development

[124] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, page 593-594; Exhibit I(1)(d), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed on October 12, 2017 (Hearing Notice for the test claim permit, page 1).

[125] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, page 593-594; Exhibit I(1)(d), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed on October 12, 2017 (Hearing Notice for the test claim permit, page 1).

[126] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, page 597; Exhibit I(1)(d), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, pages 1-2), which states: "Specifically, the March 10 letter [from the State Board] noted four procedural issues: (1) corrections were made to the permit after the adopted permit was circulated; (2) a significant number of documents were inadvertently omitted from the administrative record that was transmitted to the State Water Board; (3) the Regional Board in its response to the petition asked the State Water Board to correct a finding in the permit; and (4) BIA had argued that the approved version of the permit should have been recirculated prior to adoption because of alleged irregularities at the hearing. On March 11, 2010, the Regional Board agreed to voluntary remand of Order No. 09-0057 in order to address these concerns. Accordingly, the Regional Board proposes to reconsider adoption of Order No. 09-0057 to address the perceived procedural concerns related to incorporation of the Agreement into the adopted permit. *As such, the scope of this hearing is narrow, and the Regional Board will accept only limited comments and evidence as described below in Section II (Scope of Hearing).*" Emphasis added.

requirements, including the LID provisions) and the updated planning guidance manual (E.IV.4(b)) that was due to the Regional Board on May 6, 2010.[127]

- By letter dated March 17, 2010, the BIA argued to the Chief Counsel of the State Board that a voluntary remand of the Order was not appropriate, but BIA would agree to withdraw its petition if the Regional Board would agree to stay the Planning and Land Development provisions in Part 4 E., and begin the permit review process again.[128]
- On March 17, 2010, U.S. EPA filed a letter with the State Board strongly supporting Order No. 09-0057 as adopted on May 7, 2009, including Part 4.E.III., and encouraged the Regional Board to limit remand to the corrections made to (1) the Permit after it was issued on June 2, 2009, (2) the documents that may have been omitted from the administrative record, and (3) the corrected finding requested by the Regional Board.[129]
- On March 18, 2010, NRDC and Heal the Bay filed a letter with the State Board opposing a voluntary remand and explaining that that Order adopted on May 7, 2009 was corrected in January 2010 because the Regional Board reinstated subpart 3, Hydromodification, and subpart 4, Water Quality Mitigation Criteria, both of which are contained in Part 4.E.III. By letter dated January 28, 2010, to the permittees, the Regional Board explained that those sections were inadvertently omitted when it adopted the Order and intended to replace only Section E.III.1, and not all of Section E.III.[130]
- On March 22, 2010, NRDC and Heal the Bay filed a letter with the Regional Board opposing the request for a stay on the ground that there is no legal basis to grant a stay, and because the permittees agreed to the provisions they are now requesting to be stayed.[131]
- On March 25, 2010, the Regional Board's Executive Officer issued a letter denying the permittees' request for a stay, stating "until the Los Angeles Water Board takes further action on the Ventura County MS4 permit (which is currently scheduled for

[127] Exhibit I(1)(i), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Permittee's Letter of March 15, 2010, page 1).

[128] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 599-600.

[129] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 602-603 (U.S. EPA letter of March 17, 2010).

[130] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 608-612.

[131] Exhibit I(1)(g), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (NRDC & Heal the Bay letter of March 22, 2010, pages 1-4).

July 8, 2010), the existing permit, including all of its provisions, remain in full force and effect."[132]

- By letter dated March 30, 2010, the BIA petition was dismissed as a matter of law, effective March 29, 2010, because of the State Board's failure to make a formal disposition on the petition.[133]
- On May 5, 2010, the Regional Board issued a notice of hearing for July 8, 2010 to reconsider "only . . . the portions of the proposed permit that were not previously subject to a notice and comment period outside of the public hearing."[134] The notice states:

> The Regional Board will consider whether to affirm Order No. 09-0057 that was previously adopted on May 7, 2009. Because the majority of the provisions of Order No. 09-0057 were previously subject to public comment, the Regional Board is providing an opportunity for parties and interested persons to comment and submit evidence only on the portions of the proposed permit that were not previously subject to a notice and comment period outside of the public hearing. These portions include provisions that incorporated the Agreement into the permit, as well as new or revised findings and evidence proposed by staff that supported the incorporation of the Agreement into the permit. In a few instances, additional minor modifications are also proposed by staff to be made to the permit to correct typographical errors or to provide greater clarification on non-Agreement related provisions.
>
> [¶] . . . [¶]
>
> Parties and interested persons are advised that, in lieu of affirming Order No. 09-0057 with staff proposed modifications, the Regional Board may adopt the draft permit originally presented to the Regional Board at the May 7, 2009 hearing. Since the entire original draft permit, including the provisions relating to Municipal Action Levels (MALs) and the planning and land development program and their associated findings, was already the subject to a full public notice and comment period, the Regional Board may choose to adopt the draft permit (or certain of its provisions). Moreover, since the entire original draft permit already received full notice and comment, the Regional Board will not accept new comments or evidence on the provisions of the original draft permit that did not change from the original staff proposal to the adopted permit, or on the provisions of the currently noticed permit that the Regional Board did not adopt (i.e., the provisions relating to MALs and the planning and land development program). The comments and evidence

[132] Exhibit I(1)(j), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Regional Board letter of March 25, 2010, page 1).

[133] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, page 613.

[134] Exhibit I(1)(d), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, page 2).

previously submitted for the May 7, 2009 hearing that were included in the Regional Board's May 7, 2009 agenda binder will be recirculated to the Regional Board members.[135]

- The tentative permit issued for comment on May 5, 2010 contains strikeout and underline showing the agreement and staff-proposed modifications to the corrected permit issued January 28, 2010.[136] Part 4, Section E.III.1 and 2 (the agreement) are reinserted and underlined.[137] Also, Findings 16-29 are added to support Part 4, Section E.III.1 and 2.[138] There are other minor non-substantive changes, and some changes to dates.
- Between May 5, 2010 and June 7, 2010, the Regional Board received 21 written comments on the remanded tentative permit.[139] The Regional Board responded in writing to all comments filed.[140]
- On June 4, 2010, U.S. EPA filed comments stating:

> EPA supports the adoption of the permit as proposed in the tentative order. … Although we were not involved in the preparation of alternative suggestions from the Permittees and these non-governmental organizations, nor did we directly receive a copy of their April 10, 2009 letter, we encountered the April 10, 2009 letter on [the Board's] website and concluded that the proposed

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[135] Exhibit I(1)(d), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, pages 2-3). As indicated above, at the May 7, 2009 hearing the Regional Board rejected Part 2, municipal action levels, as well as Section E.III.1.(New Development/ Redevelopment Performance Criteria). Exhibit I(1)(f), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (May 7, 2009 Hearing Transcript, pages 357-371), with clarification of the motion and second on page 359, lines 7-11.

[136] Exhibit I(1)(d), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, page 2). Exhibit I(3), Regional Board's Letter Issuing the Corrected 2009 Permit Order No. 09-057, January 28, 2010, https://www.waterboards.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/ventura_ms4/Final%20Transmittal%20_Letter-Corrected_Ventura_County_MS4_Permit,_Order_No.09-0057.pdf (accessed on March 24, 2021).

[137] Exhibit I(1)(o), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (2010 Tentative Permit, pages 65-67).

[138] Exhibit I(1)(o), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (2010 Tentative Permit, pages 13-19).

[139] Exhibit I(1)(p), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (2010 Tentative Permit Comments, pages 1-261).

[140] Exhibit I(1)(q), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (2010 Tentative Permit Comment Responses, pages 1-259).

> LID provisions met our criteria as a clear, measurable, and enforceable approach.
>
> [¶] . . . [¶]
>
> In conclusion, *we are supportive of the Tentative Permit issued May 5, 2010, and recommend prompt adoption* of the Ventura MS4 permit without further diverting the LARWQCB [Regional Board] staff resources away from other stormwater permitting priorities.[141]

- At the July 8, 2010 hearing, the Regional Board staff stated:

  > The scope [of the public notice for the hearing] specifically excluded the other permit provisions proposed by staff and adopted by the board and therefore subject to full public notice and opportunity for comment before and at the May 2009, hearing.
  >
  > The key elements included in the scope of the recent 2010 public notice were the new development and redevelopment performance criteria specifically those related to on-site retention requirements, the cap on impervious areas, and off-site irrigation requirements, and expanded year round beach water quality monitoring, and additional findings to support the new development and redevelopment performance criteria.
  >
  > And in some instances, additional minor modifications are also proposed by staff to be made to the permit to correct typographical errors, or provide greater clarification on provisions that were not related to the consensus language. These are also shown in changes on the publicly noticed tentative permit.[142]

- After the written comment period and during the Regional Board's July 8, 2010 hearing, the Regional Board made additional changes to the tentative permit, including to section 4.E.III.2.c.2 relating to Alternative Compliance Measures, in order to "eliminate the strict 30% cap on EIA [Effective Impervious Area] and increase the off-site mitigation ratio for these sites."[143] This Test Claim does *not* plead section 4.E.III.2.c.2.

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[141] Exhibit I(1)(m), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (U.S. EPA letter of June 4, 2010, pages 1-2). Emphasis added.

[142] Exhibit I(1)(e), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (July 8, 2010 Hearing Transcript, page 11).

[143] Exhibit I(1)(c), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Change Sheet for the Tentative Ventura County MS4 Order, pages 3-4).

- At the July 8, 2010 hearing, the Regional Board adopted the test claim permit, Order No. R4-2010-0108, including the modification to section 4.E.III.2.c.2.[144]
- The Test Claim filed on Permit R4-2010-0108 contains the following parts (as pled by the claimants):
    - Public Information/Participation Program - Part 4.C.2(c)(1)(C), 4.C.2(c)(2),(6),(8), and 4.C.2(d).; 4.C.3(a),(b):

      These sections are the same in Order No. 09-0057, except that the test claim permit changed the due date from "no later than May 7, 2010 (one year after 09-0057 was adopted)," to "no later than (365 days after Order adoption date)."[145]
    - Reporting Program and Program Effectiveness Evaluation - Part 4.I.1; Part 3.E.1(e):

      Part 4.I.1 is the same in Order No. 09-0057, except that the test claim permit changed the due date from "no later than May 7, 2010" to "no later than one year after the adoption of this permit (July 8, 2011)."[146]

      Part 3.E.1(e) is the same in Order No. 09-0057, and no changes were made.[147]

      Special Studies - Part 4.E.III.3(a)(1)(D-E); Attachment F, Section F; Part 4.E.IV.4; Part 4.E.III.2(c)(3-4):

      Part 4.E.III.3(a)(1)(D-E) is the same in Order No. 09-0057, as corrected on January 13, 2010.[148]

      Attachment F, Section F, is the same in Order No. 09-0057, except that a due date for a letter regarding how permittees will comply with the hydromodification

[144] Exhibit I(1)(e), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (July 8, 2010 Hearing Transcript, pages 166-167).

[145] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 173-175 (test claim permit); Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 58-62).

[146] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 217 (test claim permit); Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, page 105).

[147] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 170 (test claim permit); Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, page 56).

[148] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 190 (test claim permit); Exhibit I(2), Regional Board's Corrected 2009 Permit Order No. 09-0057, January 13, 2010, https://www.waterboards.ca.gov/losangeles/water_issues/programs/stormwater/municipal/ventura_ms4/Final_Ventura_County_MS4_Permit_Order_No.09-0057__01-13-2010.pdf (accessed on March 24, 2021), page 631.

control study is changed from "no later than July 7, 2009" (09-0057) to "no later than 2 months after Order adoption date (R4-2010-0108)."[149]

Part 4.E.IV.4 is the same in Order No. 09-0057 (requiring permittees to update the technical guidance manual on stormwater quality control measures), except that the due date to update the guidance manual is changed from "within 365 days of this order" to "shall update … within (120 days of Order adoption date)."[150]

Part 4.E.III.2(c)(3)-(4) is the same in Order No. 09-0057.[151]

- Watershed Initiative Participation – Part 4.B:

  Part 4.B is the same in Order No. 09-0057.[152]

- Vehicle and Equipment Wash Areas – Part 4.G.1.3(a):

  Part 4.G.1.3(a) is the same in Order No. 09-0057, except that the due date is changed from "May 7, 2010," to "no later (365 days from Order adoption date)."[153]

- Illicit Connection/Illicit Discharge Elimination – Part 4.H.1.3(a):

  Part 4.H.1.3(a) is the same in Order No. 09-0057, except that one of the due dates in A.(i) changed from "no later than May 7, 2010" to "no later than 90 days from adoption Order date (October 6, 2010)."[154]

[149] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 285-286 (test claim permit); Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 215-216).

[150] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 196-197 (test claim permit); Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 83-84).

[151] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 188 (test claim permit); Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 78-79).

[152] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 171-172 (test claim permit); Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 57-58).

[153] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 209 (test claim permit); Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, page 97).

[154] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 215-216 (test claim permit); Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, page 103).

- The test claim permit states in Finding G4, "This Order shall serve as a NPDES permit, pursuant to CWA § 402, and shall take effect on (Order adoption date) provided the Regional Administrator of the U.S. EPA has no objections."[155]

The claimants argue that the focus should be on the 2010 Permit and not on Order 09-0057:

> That the final 2010 version of the permit imposes requirements originally found in the 2009 version of the permit is irrelevant for purposes of section 1755l(c) because the 2009 version was in reality determined by the Water Boards to not be properly adopted and was rescinded in its entirety by the Regional Board upon reconsideration.[156]

The claimants' assertion that the 2009 Permit "was rescinded in its entirety by the Regional Board" is without merit. Rather, the unaltered requirements in Order 09-0057 remained in effect from their August 5, 2009 effective date to the test claim permit's adoption, as those unaltered provisions carried forward to the test claim permit. As the Regional Board declared in the test claim permit:

> Prior to the issuance of this permit, storm water discharges from the Ventura County MS4 were covered under the countywide waste discharge requirements contained in Order 09-0057, adopted by the Regional Water Board on May 7, 2009, ... Order 09-0057 also served as a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of municipal storm water.[157]

As explained above, all of the sections in the test claim permit that were pled by the claimants and alleged to impose a reimbursable state-mandated program were originally adopted in Order No. 09-0057, effective August 5, 2009. The 2009 permit was corrected in January 2010, consistent with the Regional Board's vote and adoption of Order No. 09-0057, and later remanded back to the Regional Board to consider some alleged procedural issues that resulted in the adoption of the test claim permit on July 8, 2010 (R4-2010-0108). The test claim permit extended some due dates for compliance with some of the sections pled, giving the claimants more time to comply, but otherwise made no substantive change to the provisions in Order No. 09-0057 that included the same requirements.

[155] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 162 (test claim permit).

[156] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 4.

[157] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 131 (test claim permit).

2. The Period of Limitation for the Permit Sections Pled by the Claimants Began to Run on August 5, 2009, the Effective Date of Order No. 09-0057, or at the Latest July 8, 2010, the Effective Date that the Regional Board Noticed in the Test Claim Permit, so the Test Claim Filed August 26, 2011, Was Not Timely Filed Within 12-Months Following the Effective Date of the Executive Order as Required by Government Code Section 17551(c). The Claimants' Reliance on the MOA Is Misplaced.

The courts treat deadlines to file claims before administrative agencies the same as statutes of limitation.[158] The California Supreme Court explained that a statute of limitation accrues, or begins to run, when the cause of action is complete with all of its elements:

> Statutes of limitation do not begin to run until a cause of action accrues. (*Romano v. Rockwell International, Inc*. (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].) [¶] Generally speaking, a cause of action accrues at "the time when the cause of action is complete with all of its elements." [Citations.]'[159]

For the purposes of filing a test claim, the period of limitation in Government Code section 17551(c) begins to run following the effective date of the statute or executive order pled, and the claimant has 12 months from that date to file a test claim.[160] That deadline can be extended if the claimant can show that costs were first incurred after the effective date of the statute or executive order pled in the claim, but the claimants do not assert an extension on that basis.

Rather, the claimants request that the Commission ignore the effective date of the test claim permit noticed by the Regional Board (July 8, 2010), to find that the Test Claim was timely filed because the permit's effective date was delayed 50 days pursuant to the MOA between the State and U.S. EPA. The claimants argue that the MOA delay provision applies due to the "significant" number of comments received by the Regional Board, and because the permit adopted on July 8, 2010 was revised from the tentative permit issued on May 5, 2010, and the revision was not to accommodate U.S. EPA comments.[161] The claimants also argue that the MOA is an extension of U.S. EPA's authority under the Clean Water Act and so the provisions of the permit cannot "modify or supersede the provisions in the MOA."[162]

As explained below, the claimants' reliance on the MOA is misplaced. The Commission finds that the period of limitation for the sections of the test claim permit pled by the claimants began

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[158] *Bi-Rite Meat & Provisions Co. v. City of Hawaiian Gardens Redevelopment Agency* (2007) 156 Cal.App.4th 1419, 1429-1434; *International Union of Operating Engineers, Local No. 12 v. Fair Employment Practices Commission* (1969) 276 Cal.App.2d 504, 510.

[159] *Rubenstein v. Doe No. 1* (2017) 3 Cal.5th 903, 911.

[160] Government Code section 17551(c); see also, *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 179. ["The Legislature consistently limited reimbursement of costs by reference to the effective dates of statutes and executive orders and nothing indicates the state intended recovery of costs to be open-ended."]

[161] Exhibit A, Test Claim filed August 26, 2011 and revised May 17, 2017, page 17. Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, pages 3-4.

[162] Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, page 2.

to run on August 5, 2009, the effective date of Order No. 09-0057, or at the latest on July 8, 2010, the effective date of the test claim permit. Thus, the Test Claim filed on August 26, 2011, was not timely filed within 12 months following the effective date of the executive order as required by Government Code section 17551(c).

a. The period of limitation for the permit sections pled by the claimants began to run on August 5, 2009, the effective date noticed by the Regional Board in Order No. 09-0057, or at the latest July 8, 2010, the effective date noticed in the test claim permit.

Government decisions that are "adjudicative" in nature are subject to procedural due process principles, including requirements for notice of administrative decisions.[163] The NPDES permitting process is quasi-judicial:[164]

> Permit issuance is a quasi-judicial, not a quasi-legislative, rule-making proceeding: "The exercise of discretion to grant or deny a license, permit or other type of application is a quasi-judicial function." [Citations omitted.]
>
> Instead, the Regional Board correctly followed the administrative adjudication procedures (Gov. Code, § 11445.10 et seq.) and the companion regulations at California Code of Regulations, Title 23, sections 647–648.8 or informal adjudicative public hearings.[165]

Notice is expressly required by Water Code section 13263(f), which states:

> The regional board shall notify in writing the person making or proposing the discharge or the change therein of the discharge requirements to be met. After receipt of the notice, the person so notified shall provide adequate means to meet the requirements.

Thus, the Regional Board is required to provide notice of the permit requirements and when those requirements become effective.

As stated above, Order No. 09-0057 included all the provisions pled in the Test Claim and continued to be effective until the adoption of the test claim permit. Both the State and Regional Boards rejected requests to stay Order No. 09-0057.[166] As noted in the March 25, 2010 letter from the Regional Board's Executive Officer denying the permittees' request for a stay of Order 09-0057: "until the Los Angeles Water Board takes further action on the Ventura County MS4 permit (which is currently scheduled for July 8, 2010), the existing permit, including all of its

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[163] *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612-613.

[164] *Marathon Oil Co. v. EPA* (1977) 564 F.2d 1253, 1260-1263.

[165] *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377, 1385.

[166] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 497-502 (State Board Letter of August 25, 2009). Exhibit I(1)(j), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Regional Board letter of March 25, 2010, page 1).

provisions, *remains in full force and effect*."[167] And the test claim permit itself states that Order No. 09-0057 governed discharges before the test claim permit was adopted.[168]

As an order issued by a state agency, Order No. 09-0057 is an executive order within the meaning of Government Code section 17516 and article XIII B, section 6 of the California Constitution.[169] In order to seek reimbursement for the provisions required by Order No. 09-0057, the claimants had to file the test claim within 12 months of its effective date, which as stated in that permit was 90 days after the May 7, 2009 adoption date, or August 5, 2009.[170]

Even the permit provision on Special Studies (Part 4.E.III.3(a)(1)(D-E)), which was inadvertently left out of Order No. 09-0057 as originally issued, was effective no later than the corrected 2009 permit that was issued on January 28, 2010.[171]

In comments on the Draft Proposed Decision, the claimants allege that Order No. 09-0057 is irrelevant to the period of limitation because it was "revoked" and "invalid" until it was re-adopted on July 8, 2010 as the 2010 Permit, arguing:

> The Regional Board accepted the State Board's request to remand the matter [2009 Permit], thereby negating the need for the State Board to order a stay of the 2009 Permit. The issue for reconsideration was whether to affirm the initial adoption of the 2009 Permit, strongly suggesting the 2009 Permit and its provisions were invalid until they were properly re-adopted on July 8, 2010, after the Regional Board adhered to notice and comment requirements. This is evidenced by the Regional Board's Notice of Public Hearing dated May 5, 2010, which indicates the 2009 Permit was treated as an "original draft permit" being considered for adoption on July 8, 2010.[172]

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[167] Exhibit I(1)(j), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Regional Board letter of March 25, 2010, page 1). Emphasis added.

[168] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 131 (test claim permit).

[169] *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919-920 (finding that Government Code section 17516 was unconstitutional to the extent it purports to exempt orders issued by Regional Water Boards from the definition of "executive orders.").

[170] Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order 09-0057, page 46).

[171] Exhibit I(3), Regional Board's Letter Issuing the Corrected 2009 Permit Order No. 09-057, January 28, 2010, https://www.waterboards.ca.gov/rwqcb4/water_issues/programs/stormwater/municipal/ventura_ms4/Final%20Transmittal%20_Letter-Corrected_Ventura_County_MS4_Permit,_Order_No.09-0057.pdf (accessed on March 24, 2021).

[172] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 2.

The Commission disagrees. There is nothing in the record to suggest that Order No. 09-0057 was revoked or was invalid before being superseded by the 2010 Permit. The State Board twice, on June 24, 2009,[173] and on August 25, 2009,[174] denied a request for a stay of Order No. 09-0057, long before the Regional Board agreed to a remand on March 11, 2010.[175] The claimants also ignore the Regional Board's March 25, 2010 letter denying the permittees' request for a stay and stating: "until the Los Angeles Water Board takes further action on the Ventura County MS4 permit (which is currently scheduled for July 8, 2010), the existing permit, including all of its provisions, remain in full force and effect."[176] The claimants also overlook the following finding in the 2010 Permit that states that Order No. 09-0057 governed discharges before the 2010 Permit's adoption:

> Prior to the issuance of this permit, storm water discharges from the Ventura County MS4 were covered under the countywide waste discharge requirements contained in Order 09-0057, adopted by the Regional Water Board on May 7, 2009, ... Order 09-0057 also served as a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of municipal storm water.[177]

To support their allegation that Order No. 09-0057 is invalid until adoption of the new permit on July 8, 2010, the claimants cite the Regional Board's May 5, 2010 notice that references the

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[173] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, page 259.

[174] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, pages 497-502.

[175] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, filed August 23, 2017, page 597; Exhibit I(1)(d), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, pages 1-2), which states: "Specifically, the March 10 letter [from the State Board] noted four procedural issues: (1) corrections were made to the permit after the adopted permit was circulated; (2) a significant number of documents were inadvertently omitted from the administrative record that was transmitted to the State Water Board; (3) the Regional Board in its response to the petition asked the State Water Board to correct a finding in the permit; and (4) BIA had argued that the approved version of the permit should have been recirculated prior to adoption because of alleged irregularities at the hearing. On March 11, 2010, the Regional Board agreed to voluntary remand of Order No. 09-0057 in order to address these concerns. Accordingly, the Regional Board proposes to reconsider adoption of Order No. 09-0057 to address the perceived procedural concerns related to incorporation of the Agreement into the adopted permit. *As such, the scope of this hearing is narrow, and the Regional Board will accept only limited comments and evidence as described below in Section II (Scope of Hearing).*" Emphasis added.

[176] Exhibit I(1)(j), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Regional Board letter of March 25, 2010, page 1).

[177] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 131 (test claim permit).

original draft permit.[178] But the claimants mischaracterize the "original draft" as the adopted Order No. 09-0057. As indicated in the following quotation from the Regional Board's May 5, 2010 notice, the original draft permit was the permit presented to the Regional Board at the May 7, 2009 hearing, and the notice refers to un-adopted provisions of that permit such as Municipal Action Levels and the planning and land development program:

> Parties and interested persons are advised that, in lieu of affirming Order No. 09-0057 with staff proposed modifications, the Regional Board may adopt the draft permit originally presented to the Regional Board at the May 7, 2009 hearing. Since the entire original draft permit, including the provisions relating to Municipal Action Levels (MALs) and the planning and land development program and their associated findings, was already the subject to a full public notice and comment period, the Regional Board may choose to adopt the draft permit (or certain of its provisions). Moreover, since the entire original draft permit already received full notice and comment, the Regional Board will not accept new comments or evidence on the provisions of the original draft permit that did not change from the original staff proposal to the adopted permit, or on the provisions of the currently noticed permit that the Regional Board did not adopt (i.e., the provisions relating to MALs and the planning and land development program). The comments and evidence previously submitted for the May 7, 2009 hearing that were included in the Regional Board's May 7, 2009 agenda binder will be recirculated to the Regional Board members.[179]

The claimants also argue that filing a test claim on Order No. 09-0057, while the permit was actively being reconsidered by the Regional Board, would have been premature because the specific mandates in the permit reasonably could have changed upon reconsideration.[180] This ignores the limited nature of the reconsideration and assumes that the reconsideration would change the permit when that may not have been the case. The May 5, 2010 Regional Board notice for July 8, 2010 hearing was to reconsider "only . . . the portions of the proposed [2009] permit that were not previously subject to a notice and comment period outside of the public

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[178] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 2.

[179] Exhibit I(1)(d), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, pages 2-3). As indicated above, at the May 7, 2009 hearing the Regional Board rejected Part 2, municipal action levels, as well as Section E.III.1.(New Development/ Redevelopment Performance Criteria). Exhibit I(1)(f), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (May 7, 2009 Hearing Transcript, pages 357-371), with clarification of the motion and second on page 359, lines 7-11.

[180] Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, pages 3-4. See also Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 4.

hearing."[181] Those were the provisions of the agreement that became Part 4.E.III.1. and 2. of Order No. 09-0057,[182] but those were *not* pled in the Test Claim.

The test claim permit did extend the due dates for some of the provisions in Order No. 09-0057, such as the Public Information/Participation Program, Part 4.C.2(c)(1)(C), 4.C.2(c)(2),(6),(8), and 4.C.2(d).; 4.C.3(a),(b); Reporting Program and Program Effectiveness Evaluation, Part 4.I.1; Special Studies, Attachment F, Section F, and Part 4.E.IV.4; Vehicle and Equipment Wash Areas, Part 4.G.1.3(a); and Illicit Connection/Illicit Discharge Elimination, Part 4.H.1.3(a). Otherwise the requirements first imposed by Order No. 09-0057 remained the same in the test claim permit. Thus, even if the later-adopted test claim permit made the "cause of action . . . complete with all of its elements," then the period of limitation would have accrued and began to run on July 8, 2010, the date noticed by the Regional Board as the effective date of the test claim permit. As it states in Finding G4, "This Order shall serve as a NPDES permit, pursuant to CWA § 402, and shall take effect on (Order adoption date) provided the Regional Administrator of the U.S. EPA has no objections."[183] The record indicates that U.S. EPA expressed support for Order No. 09-0057 and the test claim permit both in writing[184] and in testimony at the July 8, 2010 hearing.[185] Furthermore, the Regional Board's website currently states that the test claim permit became effective on July 8, 2010 ("Effective Date: 2010-07-08").[186]

None of the claimants' public documents indicate that the test claim permit became effective later than July 8, 2010. According to the Ventura County Stormwater Quality Management Program website: "The current Ventura Countywide Stormwater Permit Order No. R4-2010-0108 was adopted in 2010 for a five-year term. The Permit expired on July 8, 2015 [five years from the effective date of July 8, 2010], but is on administrative extension until a new Permit is adopted."[187] The cover letter for their 2009-2010 annual report indicates that the 2010 Permit

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[181] Exhibit I(1)(d), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Hearing Notice for the test claim permit, page 2).

[182] Exhibit I(1)(h), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Order No. 09-0057, pages 72-73).

[183] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 162 (test claim permit).

[184] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, pages 602-603 (U.S. EPA letter of March 17, 2010); Exhibit I(1)(m), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits (U.S. EPA letter of June 4, 2010, pages 1-2).

[185] Exhibit I(1)(e), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (July 8, 2010 Hearing Transcript, pages 110-113, 155-156).

[186] Exhibit I(4), Regional Board, Region 4, Adopted Orders, https://www.waterboards.ca.gov/losangeles/board_decisions/adopted_orders/query.php?id=5894 (accessed April 5, 2021).

[187] Exhibit I(6), Ventura County Stormwater Quality Management Program, Our MS4 Permit, https://vcstormwater.org (accessed March 26, 2021).

was adopted on July 8, 2010, and mentions no delayed effective date.[188] In addition, a staff recommendation dated October 7, 2014, to the Ventura County Watershed Protection District to approve a consultant services contract for storm drain mapping to comply with the requirements of Order No. R4-2010-0108, indicates that the test claim permit was adopted on July 8, 2010, and mentions no delayed effective date.[189]

Thus, there is no evidence in the record or in documents publicly available of any notices issued by the Regional Board indicating that the permit had a delayed effective date as asserted by the claimants. All documents issued by the Regional Board provide notice that the effective date of the permit was July 8, 2010.

In sum, the period of limitation for the sections pled by the claimants began to run on August 5, 2009, the effective date of Order No. 09-0057, or at the latest July 8, 2010, the effective date of the test claim permit. Thus, the Test Claim filed on August 26, 2011, was not timely filed within 12 months following the effective date of the executive order as required by Government Code section 17551(c).

b. The claimants' reliance on the MOA is misplaced. The 50-day delay of implementation in the MOA between the State Board and U.S. EPA does not apply to the test claim permit.

The claimants argue that the Test Claim was timely filed because the effective date of the test claim permit was delayed 50 days pursuant to the MOA between the State and U.S. EPA due to the "significant" number of comments received by the Regional Board, and because the permit adopted on July 8, 2010 was revised from the draft permit issued on May 5, 2010, and the revision was not to accommodate U.S. EPA comments.[190] The claimants also argue that the MOA is an extension of U.S. EPA's authority under the Clean Water Act, so the permit provisions cannot "modify or supersede the provisions in the MOA."[191] Reiterating these arguments in comments on the Draft Proposed Decision, the claimants contend that the Regional Board's failure to identify the Permit's proper effective date in accordance with the MOA "cannot operate to override the requirements of the Clean Water Act."[192]

The claimants' reliance on the MOA is misplaced. The terms of the MOA between the State and U.S. EPA have to be understood in light of the Clean Water Act and the roles that the state and federal government play in the NPDES permitting process. Under the federal Clean Water Act,

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[188] Exhibit I(7), Ventura County Stormwater Quality Management Program, Transmittal letter for the 2009-2010 Annual Report, December 15, 2010, https://vcstormwater.org/images/stories/NPDES_Documents/2009-10_Report/TransmittalLetter_2010_VenturaCountywideAnnualReport.pdf (accessed March 26, 2021).

[189] Exhibit I(8), Ventura County Watershed Protection District Staff Recommendation.

[190] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 17; Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, pages 3-4.

[191] Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, page 2.

[192] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 6.

U.S. EPA is authorized to issue NPDES permits for any pollutant discharges that will satisfy the requirements of the Clean Water Act or the U.S. EPA Administrator.[193] States may administer their own permitting system if authorized by U.S. EPA.[194] If U.S. EPA concludes that a state has adequate authority to administer a NPDES program, it must grant approval and suspend its own issuance of permits.[195] However, U.S. EPA retains some supervisory authority over the States' programs. States must inform U.S. EPA of all permit applications received and of any action related to the consideration of a submitted application, and U.S. EPA can withdraw approval of a State's program if a State fails to comply with the Clean Water Act.[196]

In order to obtain the authority to administer the NPDES program, the State is required to enter into an MOA with U.S. EPA (in this case, the regional administrator of U.S. EPA Region IX).[197] The MOA is signed by each agency, committing them to specific responsibilities relevant to the administration and enforcement of the State's regulatory program and U.S. EPA's program oversight. According to the Federal Regulation:

> Any State that seeks to administer a program under this part shall submit a Memorandum of Agreement. The Memorandum of Agreement shall be executed by the State Director and the Regional Administrator and shall become effective when approved by the Administrator. In addition to meeting the requirements of paragraph (b) of this section [regarding the transfer of pending permit applications from U.S. EPA to the State], the Memorandum of Agreement may include other terms, conditions, or agreements consistent with this part and relevant to the administration and enforcement of the State's regulatory program. The Administrator shall not approve any Memorandum of Agreement which contains provisions which restrict EPA's statutory oversight responsibility.[198]

The MOA that governs adoption of NPDES permits in California became effective in September 1989.[199] Its purpose is to "redefine the working relationship between the State and EPA pursuant to the Federal regulatory amendments that have been promulgated since 1973. . . . The basic requirements of this MOA shall override any other State/EPA agreements as required by 40 CFR 123.24(c)."[200] The MOA includes the following provisions:

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[193] 33 United States Code section 1342(a)(1), (a)(2).

[194] 33 United States Code section 1342(b).

[195] 33 United States Code section 1342(b), (c).

[196] 33 United States Code section 1342(c)(3), (d); *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 756 and fn. 4.

[197] 40 Code of Federal Regulations section 123.24.

[198] 40 Code of Federal Regulations section 123.24(a).

[199] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 72-120 (Memorandum of Agreement).

[200] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 72-73 (Memorandum of Agreement).

1. Authorizes U.S. EPA to comment upon or object to the issuance of a permit or the terms or conditions therein. Neither the State Board nor the Regional Boards shall adopt or issue a NPDES permit until all objections made by EPA have been resolved pursuant to 40 CFR 123.44 and this MOA, and that permit review will be coordinated "through frequent telephone contact designed to not cause significant delays." The MOA states the following:

   > The State Board and Regional Boards have primary authority for the issuance of NPDES permits. EPA may comment upon or object to the issuance of a permit or the terms or conditions therein. Neither the State Board nor the Regional Boards shall adopt or issue a NPDES permit until all objections made by EPA have been resolved pursuant to 40 CFR 123.44 and this MOA. The following procedures describe EPA permit review, comment, and objection options that may delay the permit process. These options present the longest periods allowed by 40 CFR 123.44. However, the process should normally require far less time.
   >
   > The State Board, Regional Boards, and EPA agree to coordinate permit review through frequent telephone contact. Most differences over permit content should be resolved through telephone liaison. Therefore, permit review by the State and EPA should not delay issuing NPDES permits. However, if this review process causes significant delays, the Chief, Division of Water Quality (DWQ) of the State Board (or his or her designee), and the Director, Water Management Division (WMD) of EPA (or his or her designee) agree to review the circumstances of the delays. The State Board and EPA shall determine the reasons for the delays and take corrective action.[201]

2. Provides that Final permits (except general permits) become effective upon adoption when:

   - EPA has made no objections to the permit;
   - There has been no significant public comment;
   - There have been no changes made to the latest version of the draft permit that was sent to EPA for review (unless the only changes were made to accommodate EPA comments); and
   - The State Board or Regional Board does not specify a different effective date at the time of adoption.[202]

3. Provides that Final permits (except general permits) become effective 50 after days after adoption when:

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[201] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 78 (Memorandum of Agreement, paragraph II.A.).

[202] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 93 (Memorandum of Agreement, paragraph F.1.).

- There has been significant public comment; or
- Changes have been made to the latest version of the draft permit that was sent to EPA for review (unless the only changes were made to accommodate EPA comments).[203]

The claimants rely on the last provision, arguing that the 21 comments received before the test claim permit was adopted were significant, and that changes were made to the latest version of the draft permit that were not to accommodate U.S. EPA requests. The claimants assert that either of these reasons required a delay in the effective date of the permit.[204] The claimants also state that the delay provisions in the MOA are intended to provide U.S. EPA time to review permit changes.[205]

The record in this case shows that U.S. EPA was notified of all 21 comments and made no objection to the tentative permit.[206] In fact, it fully supported the terms of the tentative permit, as stated in its June 4, 2010 comments.[207] At the July 8, 2010 hearing, a representative from U.S. EPA expressed support for the terms of the tentative permit.[208] And although the tentative

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[203] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 93 (Memorandum of Agreement, paragraph F.2.).

[204] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 17; Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, pages 3-4.

[205] Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, page 3.

[206] On June 28, 2010, the parties and interested persons to the permit, including U.S. EPA, were provided notice of the availability to a link to open all comments and responses to comments for the 2010 permit. (Exhibit I(1)(q), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (2010 Tentative Permit Comment Responses, page 257), with U.S. EPA listed on the service list on page 259, service to sofranko.anna@epa.gov.) The notice and agenda for the July 8, 2010 was served, and U.S. EPA received service. (Exhibit I(1)(l), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Regional Board, Notice of Public Meeting/Hearing, July 8, 2010, page 1), with U.S. EPA listed on the service list on page 10, service to fleming.terrence@epa.gov and hashimoto.janet@epa.gov, page 15 service to stuber.robyn@epa.gov.)

[207] Exhibit I(1)(m), Excerpt of the Regional Boards' Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (U.S. EPA letter of June 4, 2010, pages 1-2).

[208] Exhibit I(1)(e), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (July 8, 2010 Hearing Transcript, pages 110-113). John Kemmerer of U.S. EPA testified in support of the Permit, stating in relevant part:

> As you know, we've all seen that this category of discharges represents the primary cause of water quality (inaudible) in coastal waters in California. Last May, I expressed E.P.A. support for the low impact development provisions that were ultimately adopted by this permit. Those adopted provisions included what we saw as unambiguous performance

permit was modified during the hearing as described in the change sheet, U.S. EPA did not object to the modifications.[209,210]

The claimants state that the purpose of the 50-day delay in the MOA is to "provide U.S. EPA with adequate time to review a permit that has garnered significant public attention and/or has changed during the approval process."[211] Since U.S. EPA at all times expressed agreement with both Order 09-0057,[212] and the test claim Permit,[213] the purpose of EPA scrutiny was not furthered by the 50-day delay provision in the MOA.

More importantly, the MOA governs "the working relationship between the State and EPA."[214] It is a contract between those parties.[215] The claimants disagree, arguing that this characterization of the MOA "severely oversimplifies the nature of the MOA and its legal effect

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criteria providing the valuable framework for controlling stormwater discharges for new development and redevelopment.

And one of the issues that we've had over the years here in looking at stormwater permits across our region is trying to ensure that we have clear, measurable and enforceable performance requirements in the permits. I think what you adopted last May and what's in front of you tonight provide those sort of clear requirements. Today we're supportive of the permit your staff had proposed for adoption, and we agree with the presentation your staff made of the benefits of on-site retention. We recommend you adopt the permit as proposed and look forward to working with your staff on other storm work like the L.A., the county permit and the Long Beach permit. (Exhibit I(1)(e), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (July 8, 2010 Hearing Transcript, pages 110-111).

[209] Exhibit I(1)(c), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Change Sheet for the Tentative Ventura County MS4 Order, pages 3-4).

[210] Exhibit I(1)(e), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (July 8, 2010 Hearing Transcript, pages 155-156).

[211] Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, page 3.

[212] Exhibit I(5), State Board's Administrative Record for the Petition on the 2009 Permit, pages 602-603 (U.S. EPA letter of March 17, 2010). See also Exhibit I(1)(b), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Agenda Item for the 2009 Tentative Permit, pages 2-3), where U.S. EPA is described as a stakeholder involved in Order 09-0057.

[213] Exhibit I(1)(e), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits (July 8, 2010 Hearing Transcript, pages 110-113, 155-156).

[214] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 72-73 (Memorandum of Agreement).

[215] *Tyler v. Cuomo* (9th Cir. 2000) 236 F.3d 1124, 1134, analyzing an MOA between U.S. Department of Housing and Urban Development and the City of San Francisco, finding that the MOA is a contract and the City is bound by its terms.

on the issue presented."[216] The claimants describe the MOA as "a delegation of EPA' s statutory power governing the issuance of NPDES permits as required by the Clean Water Act" that "controls the distribution of NPDES program responsibilities between the EPA, State Board, and Regional Boards, including EPA's review and comment on draft and adopted permits."[217] According to the claimants, the Regional Board's failure to identify the Permit's proper effective date in accordance with the MOA "cannot operate to override the requirements of the Clean Water Act [CWA]."[218]

The CWA, however, does not govern the effective date of the test claim permit. The MOA does *not* provide notice to the permittees of the effective date of an NPDES permit, which is required by the Regional Board when it adopts a quasi-judicial order.[219] As discussed above, all notices issued by the Regional Board indicate that the test claim permit became effective on July 8, 2010.[220] There is no evidence in the record or in documents publicly available of a delayed effective date.

Accordingly, the claimants' reliance on the MOA is misplaced.

V. Conclusion

Based on the foregoing analysis, the Commission dismisses this Test Claim because it was not timely filed within 12 months of the effective date of the executive order pled pursuant to Government Code section 17551(c).

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[216] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 5.

[217] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 5.

[218] Exhibit H, Claimants' Comments on the Draft Proposed Decision and Request for Postponement of Hearing, filed June 9, 2021, page 6.

[219] Water Code section 13263(f); *Marathon Oil Co. v. EPA* (1977) 564 F.2d 1253, 1260-1263; *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377, 1385.

[220] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 162 (test claim permit). Exhibit I(4), Regional Board, Region 4, Adopted Orders, https://www.waterboards.ca.gov/losangeles/board_decisions/adopted_orders/query.php?id=5894 (accessed April 5, 2021).

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Elections Code Section 2170 as Amended by Statutes 2019, Chapter 565 (SB 72) Filed on December 23, 2020 County of San Diego, Claimant	Case No.: 20-TC-02 *Extended Conditional Voter Registration* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted December 3, 2021*) (*Served December 6, 2021*)

TEST CLAIM

The Commission on State Mandates adopted the attached Decision on December 3, 2021.

Heather Halsey, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Elections Code Section 2170 as Amended by Statutes 2019, Chapter 565 (SB 72) Filed on December 23, 2020 County of San Diego, Claimant	Case No.: 20-TC-02 *Extended Conditional Voter Registration* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted December 3, 2021*) (*Served December 6, 2021*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on December 3, 2021. Christina Snider and Cynthia Paes appeared on behalf of the County of San Diego (claimant). Chris Hill appeared on behalf of the Department of Finance (Finance).

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

The Commission adopted the Proposed Decision to deny the Test Claim by a vote of 5-2, as follows:

Member	**Vote**
Lee Adams, County Supervisor	No
Natalie Kuffel, Representative of the Director of the Office of Planning and Research	Yes
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	Yes
Renee Nash, School District Board Member	Yes
Sarah Olsen, Public Member	No
Yvette Stowers, Representative of the State Controller, Vice Chairperson	Yes
Spencer Walker, Representative of the State Treasurer	Yes

Summary of the Findings

This Test Claim filed by the County of San Diego (claimant) alleges that reimbursement is required for state-mandated activities arising from Statutes 2019, chapter 565 (SB 72), which amended Elections Code section 2170 by expanding the locations at which county elections officials provide conditional voter registration and related provisional voting (CVR and CVR provisional voting).

The Commission finds that the Test Claim was timely filed within one year of the effective date of the test claim statute.

The Commission further finds that the test claim statute does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Prior to the test claim statute, the county elections official was required by state law to provide CVR and CVR provisional voting to any voter requesting them at its permanent offices during the 14-day period prior to election day and on election day.[1] In addition, pursuant to Elections Code section 4005, all vote centers for counties that chose to operate under the Voter's Choice Act were required to provide CVR and CVR provisional voting pursuant to Elections Code section 2170.[2] Under prior law, counties were permitted, but not required, to provide CVR and CVR provisional voting at satellite offices of the county elections official during the 14-day period prior to election day and on election day.[3]

The test claim statute amended Elections Code section 2170(d) and (e) to extend the requirement for elections officials to provide CVR and CVR provisional voting at all satellite offices and polling places in the county, and polling places are defined in the Elections Code to include vote centers.[4] Providing CVR and CVR provisional ballots requires county elections officials to provide a voter registration affidavit pursuant to Elections Code section 2170(d)(1) and perform the activities specified in Elections Code section 2170(d)(2) through (d)(5) to process conditional voter registrations and include CVR provisional ballots in the official canvass, and requires county elections officials in non-Voter's Choice Act counties to follow the procedures specified in Elections Code section 2170(e)(1) through (e)(3) when providing a CVR voter with a provisional ballot.

However, the Commission finds that Elections Code section 2170, as amended by the test claim statute, does not mandate a new program or higher level of service on county elections officials

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[1] Elections Code section 2170(d)(1), (e) (Stats. 2012, ch. 497, § 2); California Code of Regulations, title 2, section 20023(b).

[2] Elections Code sections 4005(a)(2)(A)(ii), 4007 (Stats. 2016, ch. 832); Exhibit A, Test Claim, filed December 23, 2020, page 161 (California Secretary of State, About California's Voter's Choice Act).

[3] Elections Code section 2170(d)(1), (e) (Stats. 2012, ch. 497, § 2); Statutes 2015, chapter 734, section 2.

[4] Elections Code sections 338.5, 357.5 (which defines "vote center" as "a location established for holding elections that offers the services described in Sections 2170, 4005, and 4007 [the Voter's Choice Act].").

and, thus, does not impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution because:

- The requirement to provide CVR and CVR provisional voting at vote centers and satellite offices of the county elections official is not mandated by the state because county elections officials are not required by state law to participate in the Voter's Choice Act and have vote centers, or to establish satellite offices;[5] and
- The test claim statute does not impose a new program or higher level of service. Elections have always been conducted by local elections officials, not the state; the cost of which is borne by the counties.[6] Thus, no costs have been shifted from the state to local government. Furthermore, county elections officials have a preexisting duty to provide CVR and CVR provisional voting to any voter requesting them, regardless of cost. The test claim statute expands the locations where CVR and CVR voting are required to be provided by the counties to existing polling places and satellite offices, but does not expand the times for which these services are provided by the counties or require the counties to create new locations where voters have access to CVR and CVR voting. Nor does the test claim statute impose any new or additional activities on county elections officials. Even without the test claim statute, counties are required to provide and process CVRs and CVR provisional ballots, and that has not changed.[7] Under the test claim statute, county elections officials are simply performing the same activities during the same time period as required under preexisting law, except now at additional, existing locations. Thus, the activities of providing CVR and CVR provisional voting at satellite offices and polling places do not constitute a new program or higher level of service.

Accordingly, the Commission denies this Test Claim.

COMMISSION FINDINGS

I. Chronology

01/01/2020 Effective date of Statutes 2019, chapter 565, amending Elections Code section 2170.

[5] Elections Code sections 3018(b), 4005, 4007; *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 743 and 754 (agreeing with the court's analysis in *City of Merced v. State of California* (1984) 153 Cal.App.3d 777); *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1368.

[6] Elections Code section 13001 (Stats. 2008, ch. 179) provides that "[a]ll expenses authorized and necessarily incurred in the preparation for, and conduct of, elections as provided in this code shall be paid from the county treasuries, except that when an election is called by the governing body of a city the expenses shall be paid from the treasury of the city."

[7] Elections Code sections 2170(d) (Stats. 2012, ch. 497, § 2, eff. Jan. 1, 2017), 14310.

12/23/2020 The claimant, County of San Diego, filed the Test Claim.[8]

04/02/2021 The Department of Finance (Finance) filed comments on the Test Claim.[9]

05/05/2021 The claimant filed rebuttal comments.[10]

09/29/2021 Commission staff issued the Draft Proposed Decision.[11]

10/20/2021 The claimant filed comments on the Draft Proposed Decision.[12]

II. Background

This Test Claim alleges reimbursable state-mandated activities and costs arising from Elections Code section 2170, as amended by Statutes 2019, chapter 565 (SB 72), effective January 1, 2020. Elections Code section 2170 was amended by the test claim statute to expand the locations at which county elections officials must provide conditional voter registration and provisional voting to conditional voter registrants from permanent offices of the county elections official and vote centers to also include all satellite locations of the county elections office and all polling places in the county.

A. Conditional Voter Registration

To register to vote in California, an eligible person must properly execute an affidavit of voter registration to be postmarked or received by the county elections official on or before the fifteenth day prior to an election.[13] An affidavit of registration may also be submitted to the Department of Motor Vehicles or any other public agency designated as a voter registration agency under the federal National Voter Registration Act of 1993, provided the affidavit is submitted at least 15 days before the election.[14] Affidavits of registration may be completed in paper form or online through the Secretary of State's website.[15]

In 2012, the Legislature enacted Elections Code 2170 et seq., establishing conditional voter registration and related provisional voting (CVR and CVR provisional voting).[16] CVR gives eligible persons, who missed the traditional registration deadline, another opportunity to register or reregister to vote. Under Elections Code section 2170(a), a person who is otherwise qualified to vote, but who did not register or reregister by the 15-day registration deadline, is able to

[8] Exhibit A, Test Claim, filed December 23, 2020.

[9] Exhibit B, Finance's Comments on the Test Claim, filed April 2, 2021.

[10] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021.

[11] Exhibit D, Draft Proposed Decision, issued September 29, 2021.

[12] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021.

[13] Elections Code section 2102(a).

[14] Elections Code section 2102(a)(2).

[15] Elections Code section 2102(a).

[16] Statutes 2012, chapter 497 (AB 1436).

conditionally register to vote and provisionally vote during the 14 days prior to and on election day, if certain requirements are met.[17]

> "Conditional voter registration" means a properly executed affidavit of registration that is delivered by the registrant to the county elections official during the 14 days immediately preceding an election or on election day and which may be deemed effective pursuant to this article after the elections official processes the affidavit, determines the registrant's eligibility to register, and validates the registrant's information, as specified in subdivision (c).[18]

While enacted in 2012, CVR and CVR provisional voting did not become operative until January 1, 2017, following the Secretary of State's certification of a statewide voter registration database (VoteCal).[19]

CVR and CVR provisional voting were added in order to increase voter participation by providing a mechanism for eligible voters to retain the opportunity to register to vote and to vote, despite missing the 15-day registration deadline, as was seen in other states that adopted a similar process.

> Citizen participation in elections is the bedrock of our representative democracy. Yet, in California, voter participation has fallen to troubling levels. In the November 2010 general election just 44.1% of eligible voters cast a vote. Fortunately there is more that we can do to promote increased participation, thus ensuring that election results reflect the will of the people to the greatest extent possible. Currently, individuals who are eligible to vote must submit a voter affidavit at least 15 days prior to an election. Unfortunately, the registration deadline hinders voter participation. This is illustrated by the ten states that allow some form of same-day registration and voting. All but one have higher voter participation rates than California—where only 44.1% of eligible voters participated in the 2010 general election. In comparison, Iowa, Wisconsin and Minnesota had respective rates of 50.0%, 52.1%, and 55.4% in the 2010 general election. Research also shows that same-day registration and voting lead to increased participation. North Carolina implemented same-day voter registration in 2007 and saw an 8% increase in voter turnout during the 2008 presidential election compared to the 2004 presidential election.[20]

The statute as originally enacted required county elections officials to provide CVR and CVR voting at all permanent offices of the county elections official during the 14-day period prior to election day and on election day, and permitted county elections officials to provide CVR and

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[17] Elections Code section 2170(a).

[18] Elections Code section 2170(a).

[19] Statutes 2012, chapter 497; Exhibit A, Test Claim, filed December 23, 2020, page 75.

[20] Exhibit F(1), Assembly Committee on Elections and Redistricting, Analysis of AB 1436 (2011-2012 Reg. Sess.), as amended March 20, 2012, page 3.

CVR voting at satellite offices of the county elections office on election day only.[21] In 2015, Elections Code section 2170 was amended to also permit CVR and CVR voting at satellite offices of the county elections office during the 14-day period prior to election day.[22] In addition to the test claim statute, Elections Code section 2170 was separately amended in 2019 to permit an elections official to provide a nonprovisional ballot to a conditional voter registrant, if certain requirements are satisfied.[23] The statute was also amended in 2020 to make non-substantive changes.[24]

Conditional voter registrants use the same affidavit of registration to register to vote as other voters – either a paper form or online through the Secretary of State's website.[25] The elections official must advise conditional voter registrants that a conditional voter registration is effective only if the registrant is determined to be eligible to register to vote and the information on the registration affidavit is verified.[26]

A conditional voter registration is processed in the same manner as a "regular" registration:[27] The county elections official must determine the registrant's eligibility and attempt to validate the registrant's information.[28] For conditional voter registration to be deemed effective, the registrant must be found eligible to register and the information provided by the registrant on the affidavit of registration verified before or during the canvass period for the election.[29] If a voter is otherwise eligible to vote, but the information provided on the affidavit cannot be verified using a Department of Motor Vehicles or federal Social Security Administration database, the registrant is issued a unique identification number for voter registration identification purposes and the conditional voter registration is deemed effective.[30] Upon finding a conditional

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[21] Elections Code section 2170(d)(1), (e) (Stats. 2012, ch. 497, § 2).

[22] Statutes 2015, chapter 734, section 2.

[23] Statutes 2019, chapter 99. As a result of this separate 2019 amendment, the language of subdivision (d)(1) was changed as follows:

> (d)(1) The elections official shall provide conditional voter registration and ~~provisional~~ voting pursuant to this article at all permanent offices of the county elections official in the county.[23]

[24] Statutes 2020, chapter 370.

[25] California Code of Regulations, title 2, section 20022; see Elections Code sections 2102, 2150, 2170(a).

[26] Elections Code section 2170(d)(2).

[27] Elections Code section 2171(b).

[28] Elections Code section 2170(d)(4).

[29] Elections Code section 2170(a), (c).

[30] Elections Code section 2170(c)(2); see Elections Code section 2150(a)(7)(C).

registration effective, the corresponding provisional ballot is included in the official canvass for the election.[31]

B. Provisional Voting

Provisional voting has been in effect in California since 1984 and is meant to ensure that "no properly registered voter is denied their right to cast a ballot if that voter's name is not on the polling place roster due to a clerical, processing, computer, or other error" and "that no voter votes twice, either intentionally or inadvertently, in a given election."[32] Any voter who claims to be properly registered but whose qualifications cannot be immediately determined is entitled to cast a provisional ballot.[33] Common circumstances when an elections official will require a voter to cast a provisional ballot include: when a person is voting for the first time in a federal election and cannot provide the required proof of identification;[34] when a voter has moved within the same county but has not reregistered to vote;[35] a vote-by-mail voter voting in person;[36] and when a voter is not on the polling place roster for an unknown reason.[37]

An elections official must advise any voter who falls into any of these categories or otherwise claims to be properly registered, but whose voter eligibility cannot be determined, of the voter's right to cast a provisional ballot, and must provide the voter with a provisional ballot, written instructions regarding the process and procedures for casting the ballot, and a written affirmation regarding the voter's registration and eligibility to vote.[38] The written instructions provided to a provisional voter must include the following information from Elections Code section 14310(c) and (d):

- During the official canvass, the elections official shall examine the records with respect to all provisional ballots cast. Using the procedures that apply to the comparison of signatures on vote by mail ballots pursuant to Section 3019, the elections official shall compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration or other signature in the voter's registration record. If the signatures do not compare or the provisional ballot envelope is not signed, the ballot shall be rejected.

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[31] Elections Code section 2170(d)(5).

[32] Exhibit F(4), California Secretary of State, Provisional Voting, https://www.sos.ca.gov/elections/voting-resources/provisional-voting (accessed on June 2, 2021), page 2.

[33] Elections Code sections 2300, 14310.

[34] California Code of Regulations, title 2, sections 19075, 20107.

[35] Elections Code section 14311.

[36] Elections Code section 3016.

[37] Elections Code section 14310(a); see also Exhibit F(4), California Secretary of State, Provisional Voting, https://www.sos.ca.gov/elections/voting-resources/provisional-voting (accessed on June 2, 2021), page 3.

[38] Elections Code section 14310(a)(1), (a)(2).

- Provisional ballots shall not be included in any semiofficial or official canvass unless one or more of the following conditions are met: (1) the elections official establishes prior to the completion of the official canvass, from the records in his or her office, the claimant's right to vote; (2) the provisional ballot has been cast and included in the canvass pursuant to Elections Code section 2170 et seq. (with CVR and CVR provisional voting); or (3) upon order of a superior court in the county of the voter's residence.
- A voter may seek the court order regarding his or her own ballot at any time prior to completion of the official canvass.
- The provisional ballot of a voter who is otherwise entitled to vote shall not be rejected because the voter did not cast his or her ballot in the precinct to which he or she was assigned by the elections official.

  If the ballot cast by the voter contains the same candidates and measures on which the voter would have been entitled to vote in his or her assigned precinct, the elections official shall count the votes for the entire ballot.

  If the ballot cast by the voter contains candidates or measures on which the voter would not have been entitled to vote in the voter's assigned precinct, the elections official shall count only the votes for the candidates and measures on which the voter was entitled to vote in the voter's assigned precinct.
- Any voter who casts a provisional ballot may access a free access system established by the Secretary of State to discover whether the voter's provisional ballot was counted and, if not, the reason why it was not counted.[39]

The voter must then execute the written affirmation in the presence of an elections official, stating that the voter is eligible to vote and is registered in the county.[40]

A provisional ballot is simply a regular ballot that is sealed in an envelope that demarcates it as provisional prior to being placed in the ballot box.[41] Provisional ballot envelopes must be of a different color than the envelopes used for vote-by-mail ballots, but printed substantially similar to and completed in the same manner.[42]

No provisional ballot is counted or rejected until the elections official goes through a detailed process to determine whether the ballot should be counted.[43] As explained in the written information provided to the voter, provisional ballots are processed and counted in the same

[39] Elections Code section 14310(a)(2).

[40] Elections Code section 14310(a)(3).

[41] Elections Code section 14310.

[42] Elections Code section 14310(b).

[43] Elections Code sections 14310, 15350, and 15100-15112; see also Exhibit F(4), California Secretary of State, Provisional Voting, https://www.sos.ca.gov/elections/voting-resources/provisional-voting (accessed on June 2, 2021), page 3.

manner as vote-by-mail ballots.[44] During the official canvass period, the elections official compares the signature on the provisional ballot envelope with the signature in the voter's registration record using the procedures applicable to comparing signatures for vote-by-mail ballots.[45]

If the signatures do not compare or the provisional ballot envelope is not signed, the ballot is rejected.[46] Provisional ballots are only included in any semiofficial or official canvass if at least one of the following is true: (1) the provisional voter's right to vote is established; (2) the provisional ballot is cast and included in the canvass under the rules governing CVR and CVR provisional voting; or (3) by order of a superior court in the voter's county of residence.[47]

A provisional ballot cast by an eligible voter shall not be rejected because it is cast at a location other than the voter's assigned precinct.[48] The voter is entitled to have only the votes counted that are cast on the candidates and measures that the voter would have been entitled to vote on at the voter's assigned precinct.[49] Additionally, any voter who casts a provisional ballot is entitled to find out whether their ballot was counted and, if not, the reason why it was not counted.[50] This information is made available on the Secretary of State's "My Voter Status" page, along with the voter's participation history.[51]

Provisional ballots cast by conditional voter registrants[52] are subject to the same requirements as provisional ballots generally.[53] Thus, a "CVR provisional ballot" is a provisional ballot that is issued to a conditional voter registrant.[54] The ballot envelope in which the CVR provisional ballot is placed prior to being cast in the ballot box must look visibly different from all other

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[44] Elections Code sections 14310(c)(1), 15350, 15100-15112.

[45] Elections Code sections 14310(c)(1). The procedures for comparing signatures for vote-by-mail ballots are specified in Elections Code section 3019.

[46] Elections Code section 14310(c)(1).

[47] Elections Code section 14310(c)(2)(A).

[48] Elections Code section 14310(c)(3).

[49] Elections Code section 14310(c)(3)(A), (c)(3)(B).

[50] Elections Code section 14310(d); California Code of Regulations, title 2, sections 19093 (provisional ballots generally), 20025(f) (CVR provisional ballots).

[51] California Code of Regulations, title 2, sections 19093 (provisional ballots generally), 20025(f) (CVR provisional ballots).

[52] The Secretary of State's regulations governing the conditional voter registration provisions of the Elections Code use the term "CVR voter" to mean a conditional voter registrant who requests a CVR provisional ballot. (California Code of Regulations, title 2, section 20021(b).)

[53] Elections Code sections 2171(c), 14310-14314.

[54] California Code of Regulations, title 2, section 20021(c).

ballot envelopes, which may include a different envelope color or placing a stamp or mark using a marking mechanism on the ballot envelope.[55]

If a conditional voter registration is deemed effective under Elections Code section 2170, the corresponding CVR provisional ballot must be processed in accordance with sections 20025 and 20026 of the Secretary of State's regulations.[56]

C. Voter's Choice Act

In 2016, the Legislature enacted the Voter's Choice Act, which authorized the counties of Calaveras, Inyo, Madera, Napa, Nevada, Orange, Sacramento, San Luis Obispo, San Mateo, Santa Clara, Shasta, Sierra, Sutter, and Tuolumne to conduct any election as an all-mailed ballot election beginning January 1, 2018, if certain conditions are satisfied, including requirements for ballot drop-off locations, vote centers, and election administration plans.[57] Beginning January 1, 2020, any county may choose to conduct an election under the Voter's Choice Act if specified requirements are met.[58] By the 2018 elections, five counties had implemented the Voter's Choice Act: Madera, Napa, Nevada, Sacramento, and San Mateo. By December 2020, 15 of 58 counties had implemented the Voter's Choice Act.[59]

Under the Voter's Choice Act, counties conduct elections in which all registered voters receive a ballot by mail.[60] Voters may then choose to mail in their ballot, drop off the ballot at a secure drop-off location, or vote in person at a vote center.[61] Beginning 10 days before the election and continuing through the Friday before election day, at least one vote center is required for every

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[55] California Code of Regulations, title 2, section 20024.

[56] California Code of Regulations, title 2, section 19095.

[57] Statutes 2016, chapter 832 (SB 450).

[58] Elections Code sections 4005, 4007. Los Angeles County is subject to the same general requirements specified in Elections Code section 4005, with certain exceptions as specified in Elections Code section 4007.

[59] Exhibit F(5), California Secretary of State, Voter's Choice Act Participating Counties, https://www.sos.ca.gov/elections/voters-choice-act/vca-counties (accessed on June 2, 2021). Voter's Choice Act counties include: Amador, Butte, Calaveras, El Dorado, Fresno, Los Angeles, Madera, Mariposa, Napa, Nevada, Orange, Sacramento, San Mateo, Santa Clara, and Tuolumne.

[60] Exhibit A, Test Claim, filed December 23, 2020, page 160 (California Secretary of State, About California's Voter's Choice Act).

[61] Exhibit A, Test Claim, filed December 23, 2020, page 160 (California Secretary of State, About California's Voter's Choice Act).

50,000 registered voters.[62] On election day and the Saturday, Sunday, and Monday prior, one vote center is required for every 10,000 registered voters.[63]

Under the Voter's Choice Act, vote centers replace traditional polling places and provide the following expanded voter services:

- Vote in-person;
- Secure ballot drop off;
- Get a replacement ballot;
- Vote using an accessible voting machine;
- Get help and voting material in multiple languages; and
- *Register to vote or update voter registration, pursuant to Elections Code section 2170.*[64]

Thus, under the Voter's Choice Act, participating counties must offer CVR and CVR provisional voting at all vote centers pursuant to Elections Code 2170.[65]

D. Test Claim Statute

As indicated above, before the test claim statute was enacted, Elections Code 2170 required county elections officials to provide CVR and CVR provisional voting to any voter that requested them at all permanent offices of the county elections official during the 14-day period prior to election day and on election day, and permitted county elections officials to provide CVR and CVR provisional voting at satellite locations of the county elections office during the 14-day period prior to election day and on election day.[66] In addition, Elections Code section 4005 required vote centers to provide CVR and CVR provisional voting pursuant to section 2170.[67]

The test claim statute, Statutes 2019, chapter 565 (SB 72), became effective on January 1, 2020, amending Elections Code section 2170(d) and (e) to *require* county elections officials to provide CVR and CVR provisional voting at all satellite offices of the county elections official and all

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[62] Elections Code section 4005(a)(4)(A); Exhibit A, Test Claim, filed December 23, 2020, page 161 (California Secretary of State, About California's Voter's Choice Act).

[63] Elections Code section 4005(a)(3)(A); Exhibit A, Test Claim, filed December 23, 2020, page 161 (California Secretary of State, About California's Voter's Choice Act).

[64] Exhibit A, Test Claim, filed December 23, 2020, pages 160-161 (California Secretary of State, About California's Voter's Choice Act); Elections Code section 4005(a)(2)(A). Emphasis added.

[65] Elections Code section 4005(a)(2)(A)(ii), 4007 (Stats. 2016, ch. 832); California Code of Regulations, title 2, section 20023(b).

[66] Elections Code section 2170(d)(1), (e) (Stats. 2012, ch. 497, § 2); Statutes 2015, chapter 734, section 2.

[67] Elections Code section 4005(a)(2)(A)(ii).

polling places in the county, and to specify the procedures that county elections officials in non-Voter's Choice Act counties must follow in providing a provisional ballot to a conditional voter registrant. Elections Code section 2170 was amended as follows:

> (d) The county elections official shall offer conditional voter registration and provisional voting pursuant to this article, in accordance with all of the following procedures:
>
> > (1) The elections official shall provide conditional voter registration and provisional voting pursuant to this article at all permanent and satellite offices of the county elections official and all polling places in the county.
> >
> > (2) The elections official shall advise registrants that a conditional voter registration will be effective only if the registrant is determined to be eligible to register to vote for the election and the information provided by the registrant on the registration affidavit is verified pursuant to subdivision (c).
> >
> > (3) The elections official shall conduct the receipt and handling of each conditional voter registration and offer and receive a corresponding provisional ballot in a manner that protects the secrecy of the ballot and allows the elections official to process the registration, determine the registrant's eligibility to register, and validate the registrant's information before counting or rejecting the corresponding provisional ballot.
> >
> > (4) After receiving a conditional voter registration, the elections official shall process the registration, determine the registrant's eligibility to register, and attempt to validate the registrant's information.
> >
> > (5) If a conditional registration is deemed effective, the elections official shall include the corresponding provisional ballot in the official canvass.
>
> (e) ~~The count elections official may offer~~After receiving a conditional voter registration ~~and provisional voting pursuant to this article at satellite offices of the county elections office~~, the elections official shall provide the voter a provisional ballot in accordance with the following procedures: ~~specified in paragraphs (2) to (5), inclusive, of lsubdivision (d).~~
>
> > (1) If the elections office, satellite office, or polling place is equipped with an electronic poll book, or other means to determine the voter's precinct, the elections official shall provide the voter with a ballot for the voter's precinct if the ballot is available. The ballot may be cast by any means available at the elections office, satellite office, or polling place.
> >
> > (2) If the elections official is unable to determine the voter's precinct, or a ballot for the voter's precinct is unavailable, the elections official shall provide the voter with a ballot and inform the voter that only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted pursuant to paragraph (3) of subdivision (c) of Section 14310. The ballot may be cast by any means available at the elections office, satellite office, or polling place.

(3) Notwithstanding paragraph (2), if the elections official is able to determine the voter's precinct, but a ballot for the voter's precinct is unavailable, the elections official may inform the voter of the location of the voter's polling place. A voter described in this paragraph shall not be required to vote at the voter's polling place and may instead, at the voter's choosing, cast a ballot pursuant to paragraph (2).

(4) This subdivision does not apply to elections conducted pursuant to Section 4005 or 4007 [under the Voter's Choice Act].[68]

1. Secretary of State's Interpretation of the Test Claim Statute.

The Secretary of State is the chief elections officer of the state and is responsible for administering the provisions of the Elections Code.[69] According to a Secretary of State memorandum issued to county elections officials statewide, the test claim statute "amends Elections Code section 2170 to require county elections officials to offer CVR and CVR provisional voting at all permanent and satellite offices and all polling places in the county."[70]

The Secretary of State's guidance for providing CVR and CVR provisional voting at all permanent and satellite county elections offices is as follows:

- Provide the individual a voter registration application.
- Once the voter completes the application, the county elections official determines the CVR voter's precinct.
- Provide the CVR voter a ballot for the voter's precinct.
- Voter places the voted ballot in a CVR provisional ballot envelope.[71]

The Secretary of State's guidance for providing CVR and CVR provisional voting at polling locations tracks Elections Code section 2170(e)(1) through (e)(3), which address the various circumstances that may arise at polling places depending on whether the polling place has technology to determine the CVR voter's precinct and whether the ballot for the CVR voter's assigned precinct is available.[72]

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[68] Statutes 2019, chapter 565.

[69] Government Code section 12172.5(a).

[70] Exhibit A, Test Claim, filed December 23, 2020, page 107 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019). The courts will give weight and appropriate deference to the interpretation of a statute by the agency charged with its implementation. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.)

[71] Exhibit A, Test Claim, filed December 23, 2020, page 108 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019).

[72] Exhibit A, Test Claim, filed December 23, 2020, pages 110-111 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019).

If the polling location has technology to determine the CVR voter's precinct and:

Ballot for that precinct is available:

- Provide the individual a voter registration application.
- Once the voter completes the application, the county elections official determines the CVR voter's precinct.
    - The Secretary of State recommends having a minimum of two workers at the polling place who have credentials to access the technology that can determine a CVR voter's precinct in order to ensure adequate coverage.
- Provide the CVR voter a ballot for the voter's precinct.
    - The Secretary of State recommends having a minimum of two workers at the polling place who have access to the ballots for all the precincts in the county to ensure adequate coverage.
    - If access to all precinct ballots within the county is through the use of an electronic ballot marking device, poll workers should be made aware that a voter might refuse to use that voting option. If so, the CVR voter should be:
        - informed of the location of their correct polling place where the ballot for their precinct is available, or
        - given a ballot that is available at the precinct with information that only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted.
- Voter places the voted ballot in a CVR provisional ballot envelope.

Ballot for that precinct is NOT available:

- Inform the voter of the location of their correct polling place and their option to vote at the correct polling place or at their current location.
- If the individual does not wish to go to their polling place, provide the individual a voter registration application.
    - Once the voter completes the application, the county elections official determines the CVR voter's precinct.
        - The Secretary of State recommends having a minimum of two workers at the polling place who have credentials to access the technology that can determine a CVR voter's precinct.
    - Give the CVR voter:
        - a ballot that is available at the precinct, and

        - inform the voter that only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted.
    - Voter places the voted ballot in a CVR provisional ballot envelope.

If polling location does NOT have technology to determine the CVR voter's precinct -OR- the ballot for the voter's precinct is NOT available:

- If possible, inform the individual of the location of their correct polling place where the ballot for their precinct is available, and their option to vote at the correct polling place or at their current location.
- If the individual does not wish to go to their polling place (or if the polling location does not have the technology to determine the CVR's precinct), provide the individual a voter registration application.
    - Give the CVR voter:
        - a ballot that is available at the precinct, and
        - information that only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted.
    - Voter places the voted ballot in a CVR provisional ballot envelope.[73]

2. Legislative History of the Test Claim Statute.

According to the legislative history, the purpose of the test claim statute was "to expand access to same day voter registration and voting" by "requir[ing] all counties to permit eligible voters to register and vote on Election Day at every polling site."[74]

Additionally, the legislative history indicates that because voters who wish to change their political party preference in order to vote in a particular party's presidential primary may do so either prior to the registration deadline or through the conditional voter registration process, providing CVR and CVR provisional voting at more locations may reduce some of the related voter confusion and frustration that reportedly occurred in California during the 2016 presidential primary election.[75]

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[73] Exhibit A, Test Claim, filed December 23, 2020, pages 110-111 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019), emphasis in original.

[74] Exhibit A, Test Claim, filed December 23, 2020, pages 134-135 (Senate Committee on Elections and Constitutional Amendments, Analysis of SB 72 (2019-2020 Reg. Sess.), as amended March 25, 2019, pages 7-8).

[75] Exhibit A, Test Claim, filed December 23, 2020, page 133 (Senate Committee on Elections and Constitutional Amendments, Analysis of SB 72 (2019-2020 Reg. Sess.), as amended March 25, 2019, page 6).

E. Past Commission Decisions on Elections Law

The Commission has not received a prior test claim on Elections Code 2170, but has heard and decided a number of test claims on elections law, the following of which are relevant to this Test Claim.

Voter Identification Procedures, 03-TC-23

On October 4, 2006, the Commission approved the *Voter Identification Procedures*, 03-TC-23 Test Claim, finding that Elections Code section 14310(c)(1), as amended by Statutes 2000, chapter 260, imposed a reimbursable state-mandated program on city and county elections officials to compare the signature on each provisional ballot envelope with the signature on the voter's affidavit of registration, and to reject any ballot when the signatures do not compare, for statutorily required elections.

Fifteen Day Close of Voter Registration, 01-TC-15

On October 31, 2006, the Commission partially approved the *Fifteen Day Close of Voter Registration*, 01-TC-15 Test Claim.[76] At issue were changes to the voter registration deadline prior to an election. The test claim statute amended, repealed, and reenacted several Elections Code sections to allow new registrations or changes to voter registrations through the 15th day prior to an election. Under prior law, the registration period closed 29 days before an election. The claimant sought mandate reimbursement for costs incurred to register voters during the 28-day through 15-day period prior to an election, including implementation, planning, revising training programs, conducting an informational medial campaign, answering questions about the new law, and hiring additional staff.

In finding that most of the statutory amendments by Statutes 2000, chapter 899, did not impose a new program or higher level of service on county elections officials with the meaning of article XIII B, section 6, the Commission determined that processing and accepting voter registration affidavits and changes of address were not newly required activities because county elections officials had been required to perform those activities since long before the enactment of the test claim statute.[77] Therefore, because processing and accepting new voter registrations and changes of address constitute an existing program, increases in the cost of that program that result from the changed timeframes do not impose a state-mandated program or higher level of service within the meaning of article XIII B, section 6.[78]

Vote by Mail Ballots: Prepaid Postage, 19-TC-01

On July 24, 2020, the Commission partially approved the *Vote by Mail Ballots: Prepaid Postage*, 19-TC-01 Test Claim, finding that Elections Code Section 3010, as amended by Statutes 2018, chapter 120, imposes a reimbursable state-mandated program on city and county

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[76] Exhibit F(6), Excerpt from Commission on State Mandates, Statement of Decision for *Fifteen Day Close of Voter Registration*, 01-TC-15, page 1.

[77] Exhibit F(6), Excerpt from Commission on State Mandates, Statement of Decision for *Fifteen Day Close of Voter Registration*, 01-TC-15, pages 1-2.

[78] Exhibit F(6), Excerpt from Commission on State Mandates, Statement of Decision for *Fifteen Day Close of Voter Registration*, 01-TC-15, pages 1-2.

elections officials to provide prepaid postage on identification envelopes delivered with vote-by-mail ballots for all state and local elections, except for those held at the discretion of the local governing body, or elections for which counties or cities have fee authority within the meaning of Government Code section 17556(d).[79]

III. Positions of the Parties

A. County of San Diego

The claimant alleges that the test claim statute imposes a reimbursable state-mandated program on counties under article XIII B, section 6 and Government Code section 17514, by requiring county elections officials to offer conditional voter registration (CVR) at satellite offices of the county elections official and polling places in the county during the 14-day period prior to the election and on election day.[80] The claimant interprets the mandate as applying to all elections conducted by the county elections official only in counties that have *not* implemented the Voter's Choice Act (Elections Code section 4005 et seq.).[81]

These requirements are new because under prior law, CVR and CVR provisional voting was only required at the county elections office during the 14-day period prior to the election and on election day, was optional at satellite offices, and was neither optional nor required at polling places.[82] The claimant states that because polling places in San Diego County are only open on election day, the claimant must now offer CVR and CVR provisional voting at all satellite offices of the county elections official during the 14-day period prior to the election, and at all satellite offices and polling places on election day.[83]

The claimant argues that the test claim statute constitutes a new program or higher level of service.[84] The new requirements under Elections Code section 2170(d)(1) carry out "the governmental function of providing services to the public – i.e., allowing voters to register to vote for the first time or re-register to vote just before (or on) election day so that they can vote in that election."[85] Furthermore, the new requirements are unique to local government: only the county elections official is required to provide conditional voter registration.[86] Alternatively, the claimant argues, the test claim statute imposes a "higher level of service" on local governments

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[79] Exhibit F(7), Excerpt from Commission on State Mandates, Decision for *Vote by Mail Ballots: Prepaid Postage*, 19-TC-01, adopted July 24, 2020, pages 1-5.

[80] Exhibit A, Test Claim, filed December 23, 2020, page 10.

[81] Exhibit A, Test Claim, filed December 23, 2020, page 11.

[82] Exhibit A, Test Claim, filed December 23, 2020, page 11.

[83] Exhibit A, Test Claim, filed December 23, 2020, page 12. The claimant notes that the "November 2020 election was unusual because polling places were open for 4 days total due to changes in the election due to the COVID-19 pandemic" and "therefore CVR had to be offered at polling places on all four of those days."

[84] Exhibit A, Test Claim, filed December 23, 2020, page 12.

[85] Exhibit A, Test Claim, filed December 23, 2020, page 13.

[86] Exhibit A, Test Claim, filed December 23, 2020, page 13.

because in addition to offering CVR and CVR provisional voting at the permanent office of the county elections official, counties must extend CVR and CVR provisional voting to satellite offices and polling places.[87]

The claimant states that its Registrar of Voters implemented CVR during the June 2018 gubernatorial primary election, when voter turnout was only 39.8 percent.[88] CVR was first widely utilized by voters in the county during the November 2018 gubernatorial general election, when voter turnout reached 66.42 percent.[89] 2,353 individuals utilized CVR during the November 2018 election, with 1,555 individuals (66 percent) using CVR on election day.[90]

The claimant alleges that as a result of the test claim statute, it incurred increased costs during the 2019-2020 fiscal year as follows:[91]

Activity	Date(s) Performed	Description	Total Cost	Fee Authority	Reimbursable Cost Claimed
1) Staffing costs	FY 2019-2020	Plan, prepare and design envelopes	$29,019	N/A	$29,019
2) Staffing costs	FY 2019-2020	Conduct additional data entry and process CVR ballots	$123,965	$27,648	$96,317
3) Training	FY 2019-2020	Create new training materials for poll workers and train poll workers	$32,166	$7,174	$24,992
4) Election staffing	FY 2019-2020	Recruit and hire temporary staff and poll workers	$96,608	$21,546	$75,062
5) Ballot processing	FY 2019-2020	Additional CVR ballot processing	$10,773	$2,403	$8,370
6) Supplies	FY 2019-2020	CVR envelopes for satellite offices and polling places	$91,476	$20,402	$71,074
7) Satellite locations	FY 2019-2020	Open and operate four new satellite locations	$236,287	$52,698	$183,589
TOTAL			$620,294	$131,871	**$488,423**

[87] Exhibit A, Test Claim, filed December 23, 2020, page 14.

[88] Exhibit A, Test Claim, filed December 23, 2020, page 14.

[89] Exhibit A, Test Claim, filed December 23, 2020, page 14.

[90] Exhibit A, Test Claim, filed December 23, 2020, page 14.

[91] Exhibit A, Test Claim, filed December 23, 2020, pages 5-7.

The claimant alleges that the activities listed above were performed as part of the March 2020 presidential primary election.[92] The claimant asserts that because of the large CVR voter turnout during the November 2018 election, there was concern that polling places would be overwhelmed during the March 2020 election.[93] As of February 2019, there were over 480,000 eligible electors in San Diego County who could potentially register to vote through the CVR process, not including voters reregistering to vote through CVR.[94] The claimant asserts that an added complication during the March 2020 election was that it was required to make a total of 40 different variations of ballots available, which, when coupled with the requirements under the test claim statute, "made the March 2020 election administratively complex."[95]

While the claimant concedes that the test claim statute did not directly require it to open additional satellite offices for the March 2020 election, the claimant argues that it was necessary to create four satellite offices so that traditional polling places would not be overwhelmed by large numbers of CVR voters, and potential voters would not have to endure long wait times.[96] These satellite offices were open February 29, 2020 through March 2, 2020 (Saturday through Monday before election day), and on March 3, 2020 (election day).[97] The claimant reports that 13,452 individuals used CVR during the March 2020 election.[98]

Offering CVR and CVR provisional voting at satellite offices during the 14-day period before election day and at satellite offices and polling places on elections day required the claimant, through its Registrar of Voters, to incur planning and preparation costs to "design and develop the necessary envelopes and training and create the necessary workflows" and to hire additional temporary staff to complete data entry and to process the additional CVRs and CVR provisional ballots.[99] The claimant also alleges that because of the test claim statute, the Registrar of Voters must train poll workers on the new processes for CVR and CVR provisional voting and update the poll worker training handbook to reflect these new processes.[100] Because of the anticipated increased voter turnout generated by CVR and CVR provisional voting, the claimant states that it was forced to recruit and hire additional temporary staff and poll workers.[101]

Because the test claim statute directly resulted in an increased number of CVR provisional ballots, the claimant alleges that it was required to process and sort CVR provisional ballot

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[92] Exhibit A, Test Claim, filed December 23, 2020, pages 16-22.

[93] Exhibit A, Test Claim, filed December 23, 2020, page 15.

[94] Exhibit A, Test Claim, filed December 23, 2020, page 14.

[95] Exhibit A, Test Claim, filed December 23, 2020, page 15.

[96] Exhibit A, Test Claim, filed December 23, 2020, pages 15-16, 21-22; Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 6.

[97] Exhibit A, Test Claim, filed December 23, 2020, page 16.

[98] Exhibit A, Test Claim, filed December 23, 2020, page 16.

[99] Exhibit A, Test Claim, filed December 23, 2020, page 17.

[100] Exhibit A, Test Claim, filed December 23, 2020, pages 17-18.

[101] Exhibit A, Test Claim, filed December 23, 2020, page 18.

envelopes using automated processing equipment, for which it incurred additional costs.[102] The claimant also argues that the test claim statute directly resulted in the need to purchase new CVR provisional ballot envelopes for satellite locations and polling places.[103] According to the claimant, the new CVR provisional ballot envelope served as the affidavit of registration for CVR voters at all locations.[104]

The claimant cites to the Commission's recent Decision in *Vote by Mail Ballots: Prepaid Postage*, 19-TC-01, for the proposition that it can recover some of the costs of administering elections from the jurisdictions whose elections are consolidated with the primary and general elections.[105] However, the claimant maintains that it cannot recover the additional internal planning and preparation costs it is forced to incur as a result of the test claim statute.[106]

The claimant states that for the November 2020 election, it incurred $191,154 in total additional costs, but anticipates receiving reimbursement from other jurisdictions for additional staffing and training costs, such that the estimated total additional costs after reimbursement are $123,800.[107] The claimant may also receive federal Help America Vote Act funds to defray some of these costs.[108] The claimant notes that there were large-scale changes to the conduct of elections during the November 2020 elections as a result of the COVID-19 pandemic but that they did not affect the counties' obligations under the test claim statute.[109] The claimant conducted the November 2020 elections using the "consolidated polling place" method, wherein in-person voting was offered for 29 days at one location (the permanent county elections office) and at 235 consolidated polling places for 4 days.[110] The claimant did not use satellite offices during the November 2020 election.[111]

The claimant anticipates incurring $30,177 in additional costs to conduct a special primary election in April 2021 to fill a vacancy in Assembly District 79.[112] Because this special election is not consolidated with other local elections, the claimant cannot receive reimbursement to

[102] Exhibit A, Test Claim, filed December 23, 2020, page 19.

[103] Exhibit A, Test Claim, filed December 23, 2020, pages 19-20.

[104] Exhibit A, Test Claim, filed December 23, 2020, page 20.

[105] Exhibit A, Test Claim, filed December 23, 2020, page 17.

[106] Exhibit A, Test Claim, filed December 23, 2020, page 17.

[107] Exhibit A, Test Claim, filed December 23, 2020, page 24.

[108] Exhibit A, Test Claim, filed December 23, 2020, page 24.

[109] Exhibit A, Test Claim, filed December 23, 2020, pages 22-23.

[110] Exhibit A, Test Claim, filed December 23, 2020, page 23.

[111] Exhibit A, Test Claim, filed December 23, 2020, page 23.

[112] Exhibit A, Test Claim, filed December 23, 2020, pages 24-25; Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 7.

offset costs.[113] The claimant will not use satellite offices for the April 2021 election and anticipates having 51 polling places open on election day.[114]

The claimant estimates the statewide cost of implementing the test claim statute for fiscal year 2020-2021 at $331,154 – 722,934.[115]

In rebuttal comments, the claimant asserts that Finance concedes that the test claim statute creates an unfunded mandate and that training and supply costs were necessarily incurred.[116] The claimant disputes Finance's challenge to the following four categories of costs: (1) Registrar of Voters staffing; (2) election staffing; (3) CVR ballot processing; and (4) creation of new satellite locations.[117] The claimant argues that while the Commission first determines in a test claim decision whether a statute imposes reimbursable state-mandated activities, and then, at the parameters and guidelines phase, separately determines whether certain costs are "reasonably necessary" to carry out the mandate, these inquiries overlap and intertwine and should therefore be considered in tandem.[118]

The claimant argues that because the test claim statute required for the first time that poll workers offer CVR at polling places, the Registrar of Voters was required to incur additional staffing costs to plan new workflows and develop new CVR envelopes.[119] Thus, these planning activities were not only reasonably necessary, but were required.[120] Similarly, the expected increase in CVR voters caused the Registrar to hire additional election workers.[121] Because the legislative history of the test claim statute expressly anticipated an increase in voter turnout, increased staffing costs were required as a result of the test claim statute.[122] The claimant maintains that using automated equipment to sort CVR ballots was a required labor cost, and not discretionary as Finance alleges.[123] The claimant was required to use automated equipment to reduce labor costs for CVR ballot processing.[124] While the claimant concedes that the test claim statute does not directly require satellite offices, satellite offices were necessary "to mitigate long

[113] Exhibit A, Test Claim, filed December 23, 2020, page 25.

[114] Exhibit A, Test Claim, filed December 23, 2020, page 24.

[115] Exhibit A, Test Claim, filed December 23, 2020, page 26.

[116] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 1.

[117] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, pages 1-2.

[118] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 3.

[119] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, pages 4-5.

[120] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, pages 4-5.

[121] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 5.

[122] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 5.

[123] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 5.

[124] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, pages 5-6.

lines and wait times at the polling places," a reasonably anticipated result of expanding CVR services to all polling places.[125]

In comments on the Draft Proposed Decision, the claimant frames the requirements imposed by the test claim statute as an expansion of the existing CVR program.[126] The claimant challenges what it describes as the conclusion of the Draft Proposed Decision that "because elections officials were already required to conduct the 'actual activities' of providing CVR services prior to SB 72, the fact that elections officials now have to do so in new locations for longer periods of time is not a new program or higher level of service" but rather solely an increase in the cost of providing the same services that were required under prior law.[127]

The claimant argues that case law demonstrates that a "statute imposes a new program or higher level of service when it requires counties to offer 'expanded' services."[128] In contrast, the claimant argues, a statute imposes increased costs alone when there is no government program or specific public service provided.[129] To support this point, the claimant distinguishes the test claim statute from the statutes at issue in *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1196, *City of Anaheim v. State* (1987) 189 Cal.App.3d 1478, and *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, arguing that those cases "involved mandates that (1) applied to the private and public sector alike and only incidentally impacted local government, or (2) had the effect of governments paying additional compensation to their government employees" and "did *not* require that governments provide expanded services to the public."[130] Conversely, the claimant asserts:

> SB 72 [the test claim statute] expressly requires local governments to provide additional services to the public. That was expressly not true in the cases above. *City of Anaheim*, 189 Cal. App. 3d at 1484; *County of Los Angeles*, 43 Cal. 3d at 58 ("Workers' compensation is not a program administered by local agencies to provide service to the public"); *City of Richmond*, 64 Cal. App. 4th at 1196 (paying employees more benefits is not a "peculiarly local government function";

[125] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 6.

[126] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 1.

[127] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 1.

[128] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 4.

[129] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 2.

[130] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 2, emphasis in original.

> "[a] higher cost to the local government for compensating its employees is not the same as a higher cost of providing services to the public.")[131]

The claimant asserts that, "in contrast to merely imposing a 'higher costs,' [sic] when a statute requires that local government must provide an 'expanded' version of a service it is already providing to the public (as is true here), this is a reimbursable mandate."[132] To highlight the distinction between "higher costs" and "higher level of service," the claimant cites to *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521 (requirement to update fire safety equipment to firefighters was a "new program"), *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 877-879 (new duties constitute a "higher level of service" because they impose an "increase in the actual level or quality of services provided"), and *Department of Finance. v. Commission State Mandates* (2021) 59 Cal.App.5th 546 (despite county already providing stormwater drainage and flood control services, new requirements imposed a "higher level of service" because they reduced pollution and increased compliance and a "new program" because they provided a government service that was not previously mandated).[133]

The claimant argues the county elections officials' "expanded" duties under the test claim statute constitute a "higher level of service" because they are new in comparison to the prior level of service and were intended to provide an enhanced service to the public.[134] To support this position, the claimant cites to the test claim statute's legislative history, which the claimant alleges shows that the test claim statute was intended to expand voter services and voting, a traditional governmental function and service.[135]

Additionally, the claimant argues that "by expanding the dates and locations on which these [CVR] services must be offered," the test claim statute increased the "actual level or quality" of counties' preexisting CVR duties, which "constitutes a 'new program' because the requirements to offer CVR in polling places and at satellite locations during the 14-day period prior to the election and on election day were new and provided a uniquely governmental service."[136]

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[131] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 3.

[132] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 4.

[133] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, pages 4-5.

[134] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 5.

[135] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 6.

[136] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 5.

B. Department of Finance

Finance does not dispute the claimant's position that as a result of the test claim statute, claimant's county elections official was required to update its training handbook, train poll workers on the CVR process, and purchase new CVR envelopes for both polling and satellite locations.[137] However, Finance challenges the claimant's assertion that it was required to incur staffing, equipment, and satellite office expenses, arguing that those activities are not required by the amended statute.[138] Specifically, Finance asserts that the test claim statute does not require the claimant to recruit and hire additional temporary staff and poll workers, use automated processing equipment to process and sort ballots, or create additional satellite offices, and therefore, the claimant exercised discretion in choosing to perform these activities.[139] As such, costs relating to the non-required activities of staffing, ballot processing equipment, and satellite offices are not reimbursable.[140] Finance did not file comments on the Draft Proposed Decision.

IV. Discussion

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

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

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[141] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[142]

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

- A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[143]
- The mandated activity constitutes a "program" that either:
  a. Carries out the governmental function of providing a service to the public; or

[137] Exhibit B, Finance's Comments on the Test Claim, filed April 2, 2021, page 1.

[138] Exhibit B, Finance's Comments on the Test Claim, filed April 2, 2021, page 2.

[139] Exhibit B, Finance's Comments on the Test Claim, filed April 2, 2021, page 2.

[140] Exhibit B, Finance's Comments on the Test Claim, filed April 2, 2021, page 2.

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

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

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

b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[144]

- The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[145]
- The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[146]

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[147] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[148] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[149]

A. The Test Claim Was Timely Filed.

Government Code section 17551(c) requires that a test claim be filed "not later than 12 months after the effective date of the statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later." Section 1183.1(c) of the Commission's regulations defines 12 months as 365 days.[150] Government Code section 17557(e) requires a test claim to be submitted by June 30 following a fiscal year in order to establish reimbursement eligibility for that fiscal year.

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

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

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

[147] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

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

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

[150] California Code of Regulations, title 2, section 1183.1(c).

The test claim statute became effective on January 1, 2020.[151] The Test Claim was filed on December 23, 2020, within 365 days of the test claim statute's effective date. Accordingly, the Test Claim was timely filed.

B. Elections Code Section 2170, as Amended by the Test Claim Statute, Does Not Mandate a New Program or Higher Level of Service on Counties and, Therefore, Does Not Constitute a Reimbursable State-Mandated Program Within the Meaning of Article XIII B, Section 6 of the California Constitution.

The Commission finds that Elections Code section 2170, as amended by the test claim statute (Stats. 2019, ch. 565), does not impose a reimbursable state-mandated program on county elections officials. County elections officials have a preexisting duty to provide CVR and CVR provisional voting. The test claim statute simply expands the locations where these preexisting services must be provided to include satellite offices and polling places (defined to include vote centers), but does not otherwise change the actual activities that must be performed by a county elections official when offering CVR and CVR provisional voting. Thus, there are no new required activities. In addition, providing CVR and CVR provisional voting at vote centers and satellite offices is not mandated by the state because the decision to have a vote center or satellite office is a local discretionary decision.[152] Thus, the activities of providing CVR and CVR provisional voting at the new locations do not mandate a new program or higher level of service.

1. The Test Claim Statute Requires County Elections Officials to Provide Conditional Voter Registration and Provisional Voting at More Locations (Satellite Election Offices and Polling Places) and Identifies the Required Activities to Provide These Services.

Prior to the test claim statute, the county elections official was required to provide CVR and CVR provisional voting at its permanent offices during the 14-day period prior to election day and on election day.[153] In addition, pursuant to Elections Code section 4005, all vote centers for counties that chose to operate under the Voter's Choice Act were required to provide CVR and CVR provisional voting pursuant to Elections Code section 2170.[154] Under prior law, counties were permitted to provide CVR and CVR provisional voting at satellite offices of the county elections official during the 14-day period prior to election day and on election day, but were not required to do so.[155]

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[151] Statutes 2019, chapter 565.

[152] Elections Code sections 3018(b), 4005, 4007.

[153] Elections Code section 2170(d)(1), (e) (Stats. 2012, ch. 497, § 2); California Code of Regulations, title 2, section 20023(b).

[154] Elections Code section 4005(a)(2)(A), 4007 (Stats. 2016, ch. 832); Exhibit A, Test Claim, filed December 23, 2020, page 161 (California Secretary of State, About California's Voter's Choice Act).

[155] Elections Code section 2170(e) (Stats. 2015, ch. 734, § 2).

a. The test claim statute expands the locations where CVR and CVR voting are required to be provided by the counties to existing polling places (defined to include vote centers) and satellite offices, but does not expand the times for which these services are provided by the counties or require the counties to create new locations where voters have access to CVR and CVR voting.

The test claim statute amended Elections Code section 2170(d) and (e) to extend the requirement for county elections officials to provide CVR and CVR provisional voting to all satellite offices of the county elections official and all polling places in the county, as follows in underline and strikeout:

> (a) "Conditional voter registration" means a properly executed affidavit of registration that is delivered by the registrant to the county elections official during the 14 days immediately preceding an election or on election day and which may be deemed effective pursuant to this article after the elections official processes the affidavit, determines the registrant's eligibility to register, and validates the registrant's information, as specified in subdivision (c).
>
> (b) In addition to other methods of voter registration provided by this code, an elector who is otherwise qualified to register to vote under this code and Section 2 of Article II of the California Constitution may complete a conditional voter registration and cast a provisional ballot, or nonprovisional ballot under subdivision (f), during the 14 days immediately preceding an election or on election day pursuant to this article.
>
> (c)(1) A conditional voter registration shall be deemed effective if the county elections official is able to determine before or during the canvass period for the election that the registrant is eligible to register to vote and that the information provided by the registrant on the registration affidavit matches information contained in a database maintained by the Department of Motor Vehicles or the federal Social Security Administration.
>
> (2) If the information provided by the registrant on the registration affidavit cannot be verified pursuant to paragraph (1) but the registrant is otherwise eligible to vote, the registrant shall be issued a unique identification number pursuant to Section 2150 and the conditional voter registration shall be deemed effective.
>
> (d) The county elections official shall offer conditional voter registration and provisional voting pursuant to this article, in accordance with all of the following procedures:
>
> > (1) The elections official shall provide conditional voter registration and provisional voting pursuant to this article at all permanent and satellite offices of the county elections official and all polling places in the county.
> >
> > (2) The elections official shall advise registrants that a conditional voter registration will be effective only if the registrant is determined to be eligible to register to vote for the election and the information provided by the registrant on the registration affidavit is verified pursuant to subdivision (c).
> >
> > (3) The elections official shall conduct the receipt and handling of each conditional voter registration and offer and receive a corresponding

provisional ballot in a manner that protects the secrecy of the ballot and allows the elections official to process the registration, determine the registrant's eligibility to register, and validate the registrant's information before counting or rejecting the corresponding provisional ballot.

(4) After receiving a conditional voter registration, the elections official shall process the registration, determine the registrant's eligibility to register, and attempt to validate the registrant's information.

(5) If a conditional registration is deemed effective, the elections official shall include the corresponding provisional ballot in the official canvass.

(e) ~~The count elections official may offer~~After receiving a conditional voter registration ~~and provisional voting pursuant to this article at satellite offices of the county elections office~~, the elections official shall provide the voter a provisional ballot in accordance with the following procedures: ~~specified in paragraphs (2) to (5), inclusive, of subdivision (d).~~

(1) If the elections office, satellite office, or polling place is equipped with an electronic poll book, or other means to determine the voter's precinct, the elections official shall provide the voter with a ballot for the voter's precinct if the ballot is available. The ballot may be cast by any means available at the elections office, satellite office, or polling place.

(2) If the elections official is unable to determine the voter's precinct, or a ballot for the voter's precinct is unavailable, the elections official shall provide the voter with a ballot and inform the voter that only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted pursuant to paragraph (3) of subdivision (c) of Section 14310. The ballot may be cast by any means available at the elections office, satellite office, or polling place.

(3) Notwithstanding paragraph (2), if the elections official is able to determine the voter's precinct, but a ballot for the voter's precinct is unavailable, the elections official may inform the voter of the location of the voter's polling place. A voter described in this paragraph shall not be required to vote at the voter's polling place and may instead, at the voter's choosing, cast a ballot pursuant to paragraph (2).

(4) This subdivision does not apply to elections conducted pursuant to Section 4005 or 4007 [under the Voter's Choice Act].[156]

Polling places are typically open on election day, and not during the 14 days prior to the election.[157] However, the Elections Code broadly defines "polling place" as "a location where a

[156] Statutes 2019, chapter 565.

[157] Elections Code section 14212 provides: "The polls shall be open at 7 a.m. of the day of any election, and shall be kept open until 8 p.m. of the same day, when the polls shall be closed, except as provided in Sections 4005, 4007, and 14401." Elections Code section 14401 provides that "if at the hour of closing there are any other voters in the polling place, or in line at the door,

voter casts a ballot, including a vote center."[158] "Vote center" is defined as "a location established for holding elections that offers the services described in Sections 2170, 4005, and 4007."[159] As indicated above, sections 4005 and 4007 address the Voter's Choice Act, where counties that choose to participate in the Voter's Choice Act conduct elections using vote centers that are open before election day and on election day, and are required to provide CVR and CVR provisional voting pursuant to section 2170.[160] Thus, Elections Code section 2170(d)(1), as amended by the test claim statute, requires counties to provide CVR and CVR provisional voting at all polling places (defined to include vote centers), and at all satellite offices, beginning January 1, 2020.

The claimant also contends the test claim statute requires counties to provide CVR "at expanded times."[161] However, the plain language of the test claim statute does not change the time periods during which CVR and CVR provisional voting are offered by a county (14 days prior to election day and on election day at all permanent election offices), or require counties to create new polling places, vote centers, or satellite offices. In addition, according to the Secretary of State's memorandum issued to county elections officials statewide, the test claim statute requires polling places to offer CVR on election day only.[162] Thus, there is no requirement under the test claim statute that polling places provide CVR during the 14 days prior to election day.[163] The

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who are qualified to vote and have not been able to do so since appearing, the polls shall be kept open a sufficient time to enable them to vote."

[158] Elections Code section 338.5.

[159] Elections Code section 357.5.

[160] Elections Code sections 4005 and 4007. Section 4005 provides that counties participating in the Voter's Choice Act must allow voters residing in the county to "[r]egister to vote, update the voter's voter registration, and vote pursuant to Section 2170 [CVR and CVR provisional voting]." (Elec. Code, § 4005(a)(2)(A)(ii) (Stats. 2016, ch. 832).) See also, Exhibit A, Test Claim, filed December 23, 2020, pages 160-161 (California Secretary of State, About California's Voter's Choice Act).

[161] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 6.

[162] Exhibit A, Test Claim, filed December 23, 2020, pages 108-109 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019) ("During this time period [E-14 through E-1], CVR must be offered at all permanent and satellite county elections offices and all vote centers."…"In addition to CVR being offered at all permanent and satellite county elections offices and all vote centers, CVR must be offered at all polling locations on Election Day.").

[163] Statutes 2021, chapter 34, added sections 1600 to 1606 to the Elections Code beginning June 28, 2021, for elections conducted in non-Voter's Choice Act counties prior to January 1, 2022. (Elec. Code, § 1600.) For these elections, counties may choose to consolidate polling locations to be open from the Saturday prior to the day of the election through the Monday prior to the day of the election and on election day. (Elec. Code, § 1602(b).) The Test Claim states: "The November 2020 election was unusual because polling places were open for 4 days total due to changes in the election due to the COVID-19 pandemic, as discussed below,

Secretary of State's memorandum further provides that vote centers and satellite offices are required to provide CVR and CVR provisional voting "during" the 14-day period before election day and on election day.[164] However, pursuant to the Voter's Choice Act, counties that choose to operate vote centers are only required to provide CVR and CVR provisional voting services *ten* days before election day and on election day (a time "during" the 14-day period identified in section 2170).[165] The test claim statute did not expand the time for vote centers to provide these services. Similarly, counties that have satellite offices are required to provide CVR and CVR provisional voting "during" the 14-day period before election day, on the days that those locations are open, and on election day. The claimant concedes that it provided those services for just four days before election day and on election day for the March 2020 election as follows:

> [T]he County created four satellite offices for the March 2020 election. These locations were open from February 29, 2020 through March 2, 2020 from 8:00

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and therefore CVR had to be offered at polling places on all four of those days." (Exhibit A, Test Claim, filed December 23, 2020, page 12.) Elections Code sections 1600-1606, as added by Statutes 2021, chapter 34 have not been pled in a test claim.

[164] Exhibit A, Test Claim, filed December 23, 2020, pages 108-109 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019) ("During this time period [E-14 through E-1], CVR must be offered at all permanent and satellite county elections offices and all vote centers").

[165] Elections Code section 4005(a)(2)(A), 4007 (Stats. 2016, ch. 832). Elections Code section 4005(a)(2)(A)(ii) provides that the county elections official at a vote center is required to permit a voter residing in the county to "register to vote, update his or her voter registration, and vote pursuant to Section 2170." Section 4005, however, only requires counties operating under the Voter's Choice Act to have one vote center for every 50,000 registered voters open ten days before election day and have one vote center for every 10,000 registered voters open on election day. (Elec. Code, § 4005(a)(3)(A) and (4)(A).)

Under the rules of statutory construction, the statute that is more specific to the subject matter (the Voter's Choice Act) controls over the more general provisions of conditional voter registration in section 2170, and thus, vote centers under the Voter's Choice Act are required to provide CVR and CVR voting ten days before election day and on election day. (*Arbuckle-College City Fire Protection Dist. v. County of Colusa* (2003) 105 Cal.App.4th 1155, 1166 ("It is a general rule of statutory interpretation that, in the event of statutory conflict, a specific provision will control over a general provision. . . . Generally, it can be presumed that when the Legislature has enacted a specific statute to deal with a particular matter, it would intend the specific statute to control over more general provisions of law that might otherwise apply.").) This interpretation is consistent with the interpretation of the Secretary of State's Office. (Exhibit A, Test Claim, filed December 23, 2020, page 161 (California Secretary of State, About California's Voter's Choice Act).)

a.m. through 5:00 p.m., and on March 3, 2020 from 7:00 a.m. through 8:00 p.m.[166]

Thus, the test claim statute only expands the locations where CVR and CVR voting are required to be provided by the counties to existing satellite offices and polling places, but does not expand the times for which these services are provided by the counties or require the counties to create new locations where voters have access to CVR and CVR voting.

b. Elections Code section 2170(d) and (e) identify the activities required to provide CVR and CVR provisional voting.

Elections Code section 2170(d) and (e) identify the procedures for providing CVR and CVR provisional ballots at all existing satellite offices and polling places. The plain language of section 2170(d) states that it is "the county elections official" that shall offer CVR and CVR provisional voting under the procedures set forth in subparts (d)(1) through (d)(5). However, subdivision(d)(1), which contains the specific requirement that CVR and CVR provisional voting be provided at satellite offices and polling places, uses the more general term "elections official," as do the other four subparts of subdivision (d). Subdivision (e) also uses "elections official" when describing the process for providing the CVR provisional ballot to a voter that conditionally registered.

The Elections Code broadly defines "elections official" as "any of the following: (a) A clerk or any person who is charged with the duty of conducting an election. (b) A county clerk, city clerk, registrar of voters, or elections supervisor having jurisdiction over elections within any county, city, or district within the state."[167] However, under the Elections Code, county elections officials are the only local elections officials authorized to receive and process affidavits of registration.[168]

This limitation as applied to CVR is reflected in the language of Elections Code section 2170(a), which first uses the specific term "*county* elections official" to refer to whom a conditional voter registration must be returned and then uses the more general term "elections official" to refer back to the county elections official. Given that subdivision (d) similarly uses *county* elections official to specify "who shall offer conditional voter registration and provisional voting pursuant to this article," the use of the more general "elections official" in subdivisions (d)(1) and (e) also refers back to the *county* elections official.[169] This interpretation is consistent with guidance from the Secretary of State, which expressly states that the test claim statute applies to county elections officials only.[170] Therefore, the requirements under subdivisions (d)(1) and (e) to

[166] Exhibit A, Test Claim, filed December 23, 2020, page 33 (Declaration of L. Michael Vu, Registrar of Voters for the County of San Diego from December 2012 to January 7, 2021).

[167] Elections Code section 320.

[168] Elections Code section 2102.

[169] Elections Code section 2170(d)(1), emphasis added.

[170] Exhibit A, Test Claim, filed December 23, 2020, page 107 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019).

provide CVR and CVR provisional voting at all satellite offices and polling places in the county applies to county elections officials only.

While the plain language of Elections Code section 2170(d)(1) makes clear that county elections officials must now "provide" CVR and CVR provisional voting at all existing satellite offices of the county elections official and at all existing polling places in the county, further interpretation is required to determine what activities a county elections official is required to perform when "providing" CVR and CVR provisional voting at satellite offices and polling places.

i. Providing CVR and CVR provisional voting at satellite offices and polling places requires county elections officials to provide a voter registration affidavit pursuant to Elections Code section 2170(d)(1).

Elections Code section 2170(d)(1) states that that the elections official must provide "conditional voter registration." Subdivision (a) defines a "conditional voter registration" as "a properly executed affidavit of registration that is delivered by the registrant to the county elections official during the 14 days immediately preceding an election or on election day."[171] The Secretary of State's existing regulations specify that conditional voter registrants "shall use the same affidavit of registration as other voters–either a paper form or online through the Internet Web site of the Secretary of State."[172]

Therefore, because a "conditional voter registration" means a properly executed affidavit of registration that is delivered by the CVR registrant to the county elections official during the 14-day period before an election or on election day, providing "conditional voter registration" at all satellite offices and polling places must include providing an affidavit of registration. This interpretation is supported by the Secretary of State's guidance to county elections officials, which states that in providing CVR, county elections officials must "[p]rovide the individual a voter registration application."[173]

ii. Providing CVR and CVR provisional voting at existing satellite offices and polling places and processing the registrations and ballots requires county elections officials to perform the activities specified in Elections Code section 2170(d)(2) through (d)(5).

There are specific activities that county elections officials are required to perform as part of offering CVR and CVR provisional voting at satellite offices and polling places. When providing a CVR and CVR provisional ballot at a satellite office or polling place, county elections officials are required to: advise CVR registrants regarding the requirements for a CVR to be deemed effective (section 2170(d)(2)); conduct the receipt and handling of the conditional voter registration (section 2170(d)(3)); and offer and receive a corresponding provisional ballot (section 2170(d)(3)).[174]

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[171] Elections Code section 2170(a).

[172] California Code of Regulations, title 2, section 20022 (Register 2018, No. 10).

[173] Exhibit A, Test Claim, filed December 23, 2020, pages 109-111 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019).

[174] Elections Code section 2170(d)(2) through (d)(3).

Elections Code section 2170(d)(4) and (d)(5) then requires the county elections official to:

- process the CVR registration, determine the CVR registrant's eligibility to register, and validate the registrant's information before counting or rejecting the CVR voter's ballot (Elections Code section 2170(d)(4)); and
- if the CVR is deemed effective, include the CVR voter's ballot in the official canvass. (Elections Code section 2170(d)(5).

iii. County elections officials in non-Voter's Choice Act counties are required to follow the procedures specified in Elections Code section 2170(e)(1) through (e)(3) when providing the CVR voter with a provisional ballot.

The plain language of Elections Code section 2170(e), as amended by Statutes 2019, chapter 565 (the test claim statute), specifies the manner in which county elections officials must provide a CVR voter with a provisional ballot after receiving a conditional voter registration.

After receiving a conditional voter registration, an elections official must provide the CVR voter with a provisional ballot in the following manner:

(1) If the permanent or satellite office of the county elections official is equipped with an electronic poll book or other means to determine the CVR voter's precinct, the elections official must provide the voter with a ballot for the voter's precinct, if available.[175]

(2) If the elections official is unable to determine the CVR voter's precinct, or a ballot for the voter's precinct is unavailable, the elections official must provide the voter with a ballot and inform the voter that pursuant to Elections Code section 14310(c)(3), only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted.[176]

(3) Notwithstanding paragraph (2), if the elections official is able to determine the voter's precinct, but a ballot for the voter's precinct is unavailable, the elections official may inform the voter of the location of the voter's polling place.[177]

Subdivision (e)(4) specifies that the procedures in subdivision (e) do *not* apply to elections conducted under the Voter's Choice Act.[178]

Prior law required county elections officials at satellite offices to have the means to determine a CVR voter's precinct and access to all of the precinct ballots in the county, but not at polling

[175] Elections Code section 2170(e)(1).

[176] Elections Code section 2170(e)(2).

[177] Elections Code section 2170(e)(3).

[178] Elections Code section 2170(e)(4).

places, unless the county elections official specifically designated a polling place as a satellite county elections office.[179] This is still the case under the test claim statute.

The legislative history indicates that the procedures outlined in subdivision (e) are intended to address the various situations that may uniquely arise when county elections officials provide CVR provisional voting at polling places.

> While this bill requires CVR to be available at every polling place, it does not mandate that each CVR location be able to provide the correct ballot for every voter. Instead, this bill anticipates and provides for situations in which a CVR location is unable to provide the correct ballot for a voter.[180]

The distinction between the activities county elections officials must perform when providing CVR provisional voting at satellite county elections offices versus at polling places is readily apparent from the Secretary of State's guidance to county elections officials regarding the changes in law following the test claim statute. According to the Secretary of State, providing CVR and CVR provisional voting at satellite county elections offices requires county elections officials to perform the following activities:

- Provide the individual a voter registration application.
- Once the voter completes the application, the county elections official determines the CVR voter's precinct.
- Provide the CVR voter a ballot for the voter's precinct.
- Voter places the voted ballot in a CVR provisional ballot envelope.[181]

In comparison, the Secretary of State's guidance for the activities to be performed by county elections officials when providing CVR and CVR provisional voting at polling places depends on whether the polling place has the means to determine the CVR voter's precinct and whether the ballot for the CVR voter's assigned precinct is available.[182] If the polling place has the means to determine the CVR voter's precinct and the ballot for that precinct is available, the Secretary of State advises that the county elections official must adhere to the following process:

- Provide the individual a voter registration application.
- Once the CVR voter completes the application, determine the voter's precinct.

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[179] California Code of Regulations, title 2, section 20023.

[180] Exhibit F(2), Assembly Committee on Elections and Redistricting, Analysis of SB 72 (2019-2020 Reg. Sess.), as amended May 17, 2019, page 5.

[181] Exhibit A, Test Claim, filed December 23, 2020, page 108 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019). These procedures also apply to vote centers under the Voter's Choice Act. Pursuant to California Code of Regulations, title 2, section 20023, vote centers are also required to have the means to determine a CVR voter's precinct and access to all of the precinct ballots in the county.

[182] Exhibit A, Test Claim, filed December 23, 2020, pages 110-111 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019).

- Provide the voter a ballot for the voter's precinct.
- Voter places the voted ballot in a CVR provisional ballot envelope.[183]

If the polling place has the means to determine the CVR voter's precinct, but the ballot for that precinct is not available, then the county elections official is required to:

- Inform the voter of the location of their correct polling place and their option to vote at the correct polling place or at their current location.
- If the individual does not wish to go to their polling place, provide the individual a voter registration application.
    - Once the CVR voter completes the application, determine the voter's precinct.
    - Give the voter:
        - a ballot that is available at the precinct, and
        - inform the voter that only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted.
    - Voter places the voted ballot in a CVR provisional ballot envelope.[184]

Finally, if the polling place does not have the means to determine the CVR voter's precinct, or the ballot for the voter's precinct is not available:

- If possible, inform the individual of the location of their correct polling place where the ballot for their precinct is available, and their option to vote at the correct polling place or at their current location.
- If the individual does not wish to go to their polling place or if the polling place does not have the means to determine the individual's precinct, provide a voter registration application.
    - Give the voter:
        - a ballot that is available at the precinct, and
        - information that only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted.
    - Voter places the voted ballot in a CVR provisional ballot envelope.[185]

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[183] Exhibit A, Test Claim, filed December 23, 2020, page 110 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019).

[184] Exhibit A, Test Claim, filed December 23, 2020, pages 110-111 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019).

[185] Exhibit A, Test Claim, filed December 23, 2020, pages 110-111 (California Secretary of State CC/ROV Memorandum #19125, November 20, 2019), emphasis in original.

The Secretary of State guidance tracks the requirements under Elections Code section 2170(e)(1) through (e)(3) and is consistent with the plain language of the statute.

Therefore, county elections officials in non-Voter's Choice Act counties are required to follow the procedures specified in Elections Code section 2170(e)(1) through (e)(3) when providing the CVR voter with a provisional ballot at satellite election offices and polling places.

2. The Requirement to Provide CVR and CVR Provisional Voting at Vote Centers and Satellite Offices of the County Elections Official Is Not Mandated by the State Because County Elections Officials Are Not Required by State Law to Create Vote Centers and Satellite Offices.

The test claim statute requires that all county polling places, defined to include vote centers, and satellite offices provide CVR and CVR provisional voting. The claimant has not participated in the Voter's Choice Act and has not created vote centers.[186] However, the claimant seeks reimbursement for the cost of creating four satellite county elections offices for the March 2020 election.[187] The claimant concedes that while the test claim statute does not directly require a county elections official to establish satellite locations, it was necessary to do so "to mitigate long lines and wait times at the polling places, when such long lines and wait times were a reasonably-anticipated result" of the test claim statute.[188]

Based on the analysis below, the requirement to provide CVR and CVR provisional voting at vote centers and satellite offices stems from an *initial discretionary decision* by the county elections official to participate in the Voter's Choice Act and establish vote centers, and establish satellite offices, and therefore, the requirements are not mandated by the state for county vote centers and satellite election offices.

As discussed above, sections 4005 and 4007 address the Voter's Choice Act, which authorizes counties to conduct any election as an all-mailed ballot election, provided certain conditions are met.[189] Elections Code section 4005 states in relevant part:

> Notwithstanding Section 4000 or any other law, on or after January 1, 2018, the Counties of Calaveras, Inyo, Madera, Napa, Nevada, Orange, Sacramento, San

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[186] At the time the Test Claim was filed, the claimant did not participate in the Voter's Choice Act. On October 19, 2021, the County of San Diego Board of Supervisors directed the Registrar of Voters to transition to the Voter's Choice Act model beginning with the June 2022 gubernatorial primary election cycle. (Exhibit F(8), Excerpt from County of San Diego Board of Supervisors, Statement of Proceedings for October 19, 2021 Regular Meeting, https://www.sandiegocounty.gov/content/dam/sdc/bos/agenda/sop/10192021sop.pdf (accessed on November 2, 2021), pages 2-4.)

[187] Exhibit A, Test Claim, filed December 23, 2020, pages 15-16.

[188] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 6. See also Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, pages 6-7.

[189] Elections Code sections 4005, 4007 (Stats. 2016, ch. 832). Los Angeles County is subject to the same general requirements specified in Elections Code section 4005, with certain exceptions as specified in Elections Code section 4007.

> Luis Obispo, San Mateo, Santa Clara, Shasta, Sierra, Sutter, and Tuolumne, and, except as provided in Section 4007, on or after January 1, 2020, any county *may* conduct any election as an all-mailed ballot election if all of the following apply…[190]

Elections Code section 4007, which applies exclusively to Los Angeles County, states in pertinent part as follows:

> On or after January 1, 2020, the County of Los Angeles *may* conduct any election as a vote center election if all of the following apply:
>
> (1) The county elections official complies with all the provisions of subdivision (a) of Section 4005 that are not inconsistent with this section.[191]

Amongst the provisions enumerated in Elections Code section 4005(a) is the requirement that the county elections officials conduct elections using vote centers, that are open before election day and on election day, and which must provide voters with a number of voter services, including the opportunity to "[r]egister to vote, update the voter's voter registration, and vote pursuant to Section 2170 [CVR and CVR provisional voting]."[192]

> (2) The county elections official permits a voter residing in the county to do any of the following at a *vote center*:
>
> (i) Return, or vote and return, the voter's vote by mail ballot.
>
> (ii) *Register to vote, update the voter's voter registration, and vote pursuant to Section 2170.*
>
> (iii) Receive and vote a provisional ballot pursuant to Section 3016 or Article 5 (commencing with Section 14310) of Chapter 3 of Division 14.
>
> (iv) Receive a replacement ballot upon verification that a ballot for the same election has not been received from the voter by the county elections official. If the county elections official is unable to determine if a ballot for the same election has been received from the voter, the county elections official may issue a provisional ballot.

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[190] Elections Code section 4005(a) (Stats. 2016, ch. 832), emphasis added.

[191] Elections Code section 4007(a)(1) (Stats. 2016, ch. 832), emphasis added.

[192] Elections Code sections 4005 and 4007 address Voter Choice Act counties, where counties agree to open one vote center per 50,000 registered voters ten days before the election and continuing through the Friday before election day, and one voter center per 10,000 registered voters beginning the Saturday before the election and continuing through election day. (Elec. Code, § 4005(a)(3)(A), (a)(4)(A)); Exhibit A, Test Claim, filed December 23, 2020, pages 160-161 (California Secretary of State, About California's Voter's Choice Act).

> (v) Vote a regular, provisional, or replacement ballot using accessible voting equipment that provides for a private and independent voting experience.[193]

Thus, while counties that conduct elections under the Voter's Choice Act are required to have vote centers under the plain language of section 4005 and 4007, participation is optional ("any county *may* conduct any election as an all-mailed ballot election if all of the following apply…").[194] Elections Code section 354 states that "'Shall' is mandatory and 'may' is permissive." Therefore, counties are permitted, but not required, to have vote centers.

Government Code section 12172.5(d) authorizes the Secretary of State to adopt regulations "to assure the uniform application and administration of state election laws."[195] Section 20021 of the Secretary of State's regulations, which provides definitions pertaining to conditional voter registration, defines "satellite office" as follows:

> (d) "Satellite office" has the same meaning as "satellite location," as used in subdivision (b) of Elections Code section 3018.[196]

Elections Code section 3018, which governs the procedures for vote by mail applications and voting, states in pertinent part: "(b) For purposes of this section, the office of an elections official *may* include satellite locations."[197] Therefore, a county elections official is permitted, but not required, to have satellite offices.

In *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.), the California Supreme Court held "that the proper focus under a legal compulsion inquiry is upon the nature of claimants' participation in the underlying programs themselves."[198] The court left open the possibility that where no "legal" compulsion exists, "practical" compulsion may be found if the local agency faces "certain and severe…penalties" such as "double…taxation" or other "draconian" consequences if they fail to comply with the statute.[199]

In *Department of Finance v. Commission on State Mandates* (*POBRA*), the court emphasized that practical compulsion requires a *concrete* showing in the record that a failure to engage in the activities at issue will result in certain and severe penalties or other draconian consequences,

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[193] Elections Code section 4005(a)(2)(A) (Stats. 2016, ch. 832), emphasis added.

[194] Elections Code section 4005(a) (Stats. 2016, ch. 832), emphasis added; Elections Code section 4007(a) (Stats. 2016, ch. 832) ("the County of Los Angeles may conduct any election as a vote center election if all of the following apply…").

[195] Government Code section 12172.5(d).

[196] California Code of Regulations, title 2, section 20021.

[197] Elections Code section 3018(b), emphasis added.

[198] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 743 (agreeing with the court's analysis in *City of Merced v. State of California* (1984) 153 Cal.App.3d 777).

[199] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 754.

such that the local government entity must comply in order to perform its core essential functions.[200] In *Department of Finance (POBRA),* the court addressed legislation that provided procedural protections to peace officers employed by counties, cities, and school districts, when the officer is subject to investigation or discipline.[201] Because school districts are authorized, but not required, to hire peace officers, the court held that school districts were not legally compelled to comply with the legislation.[202] In dismissing the argument that local government entities must employ peace officers when necessary to carry out their basic functions, the court said "it is not manifest on the face of the statute cited nor is there any showing in the record that [a school district] hiring its own peace officers, rather than relying upon the county or city in which it is embedded, is the only way as a practical matter to comply."[203] Thus, the court found that school districts were not mandated by the state to comply with the test claim statute.

Here, a county elections official has no legal compulsion to establish vote centers or satellite election offices, but has the discretion to do so. Thus, the requirements imposed by the test claim statute, which are triggered by that discretionary decision, are not legally compelled by state law.

Furthermore, there is no evidence in the record to support a finding that county elections officials are practically compelled to have vote centers or satellite election offices; that they will face certain or severe penalties or other draconian consequences if they fail to establish vote centers or satellite election offices to carry out their core functions. The declaration of L. Michael Vu, who was the Registrar of Voters for the claimant from December 2012 to January 7, 2021, states that "it was necessary during the March 2020 election for the County to create satellite offices of the Registrar's permanent office at which potential voters could register through CVR" as follows:

> 7. Section 2170 of the Elections Code, which first required elections officials to offer CVR, was enacted in 2012 but not effective until the Secretary of State certified the VoteCal Statewide Voter Registration Database in 2016. Therefore, the County of San Diego first implemented CVR during the June 2018 gubernatorial primary election.
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> 8. The voter turnout for the June 2018 election was 39.8%. Attached as Exhibit 1 is a true and correct copy of a report of Registered Voters and Vote by Mail Ballot Voter Turnout maintained by our office and publicly available at https://www.sdvote.com/content/dam/rov/en/reports/voter_turnouts.pdf
>
> 9. The first election in which CVR was widely utilized by potential voters in the County was the November 6, 2018 gubernatorial general election. At that

[200] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1367.

[201] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355.

[202] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1368.

[203] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1367.

election, the County offered CVR at the Registrar's permanent office (located at 5600 Overland Avenue, San Diego, CA 92123). The County did not implement satellite offices.

10. During the November 6, 2018 election, there was a 66.42% voter turnout. (See Exhibit 1.) During that election, 2,353 individuals exercised CVR. Of this number, 1,555 individuals did so on election day. On election day, a line wrapped around the Registrar's building equal to the length of over 5 football fields. Although the polls closed at 8:00 p.m., the last potential voter who had been standing in line since the polls closed entered the building at around midnight. This potential voter registered by CVR. The last voter left the building at approximately 1:00 a.m. on November 7, 2018.

11. Attached as Exhibit 2 is a true and correct copy of the California Secretary of State's Report of Registration as of February 10, 2019, which is publicly available at https://elections.cdn.sos.ca.gov/ror/ror-odd-year-2019/county.pdf. According to this document, as of February 2019, there were 2,229,766 individuals eligible to vote in the County of San Diego and only 1,747,383 registered voters. That meant there were 482,383 individuals who had not registered to vote but could potentially opt to do so by CVR. This was in addition to voters who needed to or would choose to re-register to vote by CVR.

12. After SB 72's amendment to Section 2170(d)(1), which mandated that county elections officials offer CVR at any satellite offices of the elections official during the 14-day period prior to the election, and offer CVR at both satellite offices and polling places on election day, there was a very real possibility that polling places would be overwhelmed with the same long lines and wait times experienced at the Registrar's permanent location in November 2018. Further, the March 2020 election was a presidential primary, and in 2016 the primary had significant voter turnout of 50.94%. (See Exhibit 1.)

13. Additionally, for the March 2020 primary election, the Registrar's office was required to make available at satellite offices and polling places a variety of ballot styles pursuant to California law. (Cal. Elec. Code § 13102.) The Registrar's office was required to make available at the polls eight different styles of ballots (for eight variations: American Independent, Democratic, Green, Libertarian, No Party Preference, No Party Preference requesting to vote in the Democratic primary, Peace & Freedom, and Republican) in five different languages (English, Spanish, Filipino, Vietnamese, and Chinese, pursuant to Voting Rights Act requirements), for a total of 40 variations of ballots. This requirement made the March 2020 election administratively complex. That complexity was compounded by SB 72's amendment to Section 2170(d)(1), which mandated that county elections officials offer CVR at any satellite offices of the elections official during the 14-day period prior to the election, and offer CVR at both satellite offices and polling places on election day. The Registrar's office anticipated this complexity would be particularly acute for poll workers who would actually be interacting with voters on election day.

> 14. In my then-capacity as Registrar, I collaborated with staff at the Registrar's office and determined that because of SB 72's amendment to Section 2170(d)(1), it was necessary during the March 2020 election for the County to create satellite offices of the Registrar's permanent office at which potential voters could register through CVR. This was necessary to avoid even longer line and wait times than voters experienced in the November 2018 election, and it was necessary to keep that traffic away from the traditional polling places.
>
> 15. Therefore, the County created four satellite offices for the March 2020 election. These locations were open from February 29, 2020 through March 2, 2020 from 8:00 a.m. through 5:00 p.m., and on March 3, 2020 from 7:00 a.m. through 8:00 p.m. Additionally, there were 1,548 polling places at the March 2020 election.[204]

The Registrar's statements do not evidence that the claimant will face certain or severe penalties or other draconian consequences if it fails to establish satellite election offices to carry out its core elections functions. Mr. Vu cites to several factors as contributing to the "necessity" of establishing four satellite offices for the November 2020 election. He states that due to the high voter turnout during the November 2018 election, satellite offices were needed "to avoid even longer line and wait times," and "to keep that traffic away from traditional polling places" because "there was a very real possibility that polling places would be overwhelmed."[205] Because the March 2020 election was a presidential primary, Mr. Vu believed that voter turnout would be high.[206] He also cites to eligible voter statistics from February 2019 showing that nearly half a million residents of San Diego County were eligible but not registered to vote, whom he characterizes as potential CVR voters, in addition to any registered voters who need to re-register by CVR.[207] Finally, Mr. Vu "anticipated" that the administrative complexity caused by the convergence of the test claim statute and a separate requirement to provide 40 variations of ballots would be particularly challenging for poll workers at polling places.[208]

None of the facts alleged by Mr. Vu provide concrete evidence that any actual severe penalty or consequence would ensue if the claimant did not establish satellite offices. Instead, Mr. Vu's statements about the necessity of four satellite offices during the March 2020 election are based on hypothetical outcomes that the claimant seeks to prevent, without supporting evidence to show that such outcomes are certain or even likely ("*avoid* longer line and wait times," "*real possibility* that polling places would be overwhelmed," "482,383 individuals…*could potentially* opt to do so by CVR").[209]

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[204] Exhibit A, Test Claim, filed December 23, 2020, pages 30-33.

[205] Exhibit A, Test Claim, filed December 23, 2020, pages 32-33.

[206] Exhibit A, Test Claim, filed December 23, 2020, page 32.

[207] Exhibit A, Test Claim, filed December 23, 2020, pages 31-32.

[208] Exhibit A, Test Claim, filed December 23, 2020, page 32.

[209] Exhibit A, Test Claim, filed December 23, 2020, pages 31-33, emphasis added.

Furthermore, long lines and wait times and inundated polling places do not prevent the claimant from conducting elections. While the declaration puts forth facts showing that during the November 2018 election, there was "a line wrapped around the Registrar's building equal to the length of over 5 football fields" and the last potential voter, who registered by CVR, did not leave the building until around 1:00 a.m., even if these circumstances were to occur in later elections, they do not establish that but for satellite offices, the claimant would be unable to comply with the test claim statute or carry out its other core elections functions. There is no evidence that the high voter turnout on election day November 2018 caused voters to be unable to register to vote or vote, or prevented the county elections official from performing any of its core elections functions. The evidence provided by the claimant does not show that establishing new satellite offices is the only way as a practical matter to comply with the test claim statute.

Therefore, the requirement to provide CVR and CVR provisional voting at vote centers and satellite offices of the county elections official is not mandated by the state.

3. Although Counties Are Now Required to Perform CVR and CVR Provisional Voting Activities at Existing Satellite Offices and Polling Places, the Test Claim Statute Does Not Require Counties to Perform Any New or Additional Activities or Shift Financial Responsibility for Conducting Elections From the State to the Counties and, Thus, the Test Claim Statute Does Not Impose a New Program or Higher Level of Service.

Courts have repeatedly held that local government entities are not entitled to reimbursement simply because a state law or order increases the costs of providing mandated services.[210] Rather, reimbursement under article XIII B, section 6 requires that all elements be met, including that the increased costs result from a new program or higher level of service mandated by the state on the local agency.[211] To determine whether a test claim statute imposes a new program or higher level of service, the required activities imposed by the state must be new *and* impose a program subject to article XIII B, section 6 (by carrying out the governmental function of providing a service to the public, or imposing unique requirements on the local agency).[212] Alternatively, a new program or higher level of service can occur if the state transfers to local agencies complete or partial financial responsibility for a required program for which the state previously had complete or partial financial responsibility.[213]

The primary issue in this case is whether the test claim statute imposes any new or additional activities or duties on counties, or shifts new costs from the state to local government. To determine if a mandated activity or shift in costs from the state is new, the courts have used the

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[210] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal. 4th 859, 877; *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1196; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

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

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

[213] California Constitution, article XIII B, section 6(c).

ordinary meaning of the word "new" and have found that if local government was not required to perform the activity or incur the cost shifted from the state at the time the test claim statute or regulation became effective (which, in effect, requires a comparison of the law immediately before the effective date of the test claim statute or regulation), the mandated activity or shifted cost is new.

For example, in *Lucia Mar Unified School Dist.*, the 1981 test claim statute required local school districts to pay the cost of educating pupils in state schools for the severely handicapped – costs that the state had previously paid in full until the 1981 statute became effective.[214] The court held that the requirement imposed on local school districts to fund the cost of educating these pupils was new "*since at the time [the test claim statute] became effective* they were not required to contribute to the education of students from their districts at such schools."[215] The same analysis was applied in *County of San Diego*, where the court found that the state took full responsibility to fund the medical care of medically indigent adults in 1979, which lasted until the 1982 test claim statute shifted the costs back to counties.[216] In *City of San Jose*, the court addressed the1990 test claim statute, which authorized counties to charge cities for the costs of booking into county jails persons who had been arrested by employees of the cities.[217] The court denied the city's claim for reimbursement, finding that the costs were not shifted by the state since "*at the time [the 1990 test claim statute] was enacted*, and indeed long before that statute, the financial and administrative responsibility associated with the operation of county jails and detention of prisoners was borne entirely by the county."[218] In *San Diego Unified School District*, the court determined that the required activities imposed by 1993 test claim statutes, which addressed the suspension and expulsion of K-12 students from school, were "new in comparison with the preexisting scheme in view of the circumstances that they did not exist prior to the enactment of [the 1993 test claim statutes]."[219] And in *Department of Finance. v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, the court found that installing and maintaining trash receptacles at transit stops and performing certain inspections were both *new duties* that local governments were required to perform, when compared to prior law.[220]

The purpose of article XIII B, section 6 is to prevent the state from forcing extra programs on local government each year in a manner that negates their careful budgeting of increased expenditures that are counted against the local government's annual spending limit.[221] Thus,

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

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

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

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

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

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

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

[221] California Constitution, articles XIII B, sections 1, 8(a) and (b); *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig* (1988) 44

article XIII B, section 6 requires a comparison of the law as it existed immediately before the effective date of the test claim statute or regulation to determine if the state has mandated local government to perform new or additional activities and incur new costs shifted from the state that require reimbursement.

As explained below, the test claim statute here does not require counties to perform any new or additional activities or shift financial responsibility for conducting elections from the state to the counties and, thus, does not impose a new program or higher level of service.

a. The test claim statute does not require counties to perform any new or additional activities or shift financial responsibility for conducting elections from the state to the counties.

Here, the test claim statute requires that CVR and CVR provisional voting *also* be provided at existing satellite offices and polling places. However, the actual government services provided by county elections officials – providing CVR and CVR provisional voting to any voter – are not new and have not changed as a result of the test claim statute, nor have the activities that county elections officials must carry out in order to provide these services. County elections officials perform the same activities they performed under preexisting law during the same time period, except at more existing locations. Expanding the locations where the same government services are provided does not, without requiring counties to perform new activities, amount to an increase in the level or quality of those services. Nor has the test claim statute transferred financial responsibility from the state to local government. Elections have always been conducted by local government, and not by the state.[222] Thus, the test claim statute does not constitute a new program or higher level of service.

As explained in the Background, the Legislature enacted Elections Code 2170 et seq. in 2012, establishing CVR and CVR provisional voting.[223] Under Elections Code section 2170(a), a person who is otherwise qualified to vote, but who did not register or reregister by the 15-day registration deadline, is able to conditionally register to vote and provisionally vote during the 14 days prior to and on election day, if certain requirements were met.[224] While enacted in 2012, CVR and CVR provisional voting did not become operative until January 1, 2017, following the Secretary of State's certification of a statewide voter registration database (VoteCal).[225]

Elections Code section 2170 as originally enacted required county elections officials to provide CVR and CVR voting at all permanent offices of the county elections official during the 14-day

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Cal.3d 830, 835; *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1595; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283.

[222] Elections Code section 13001 (Stats. 2008, ch. 179) provides that "[a]ll expenses authorized and necessarily incurred in the preparation for, and conduct of, elections as provided in this code shall be paid from the county treasuries, except that when an election is called by the governing body of a city the expenses shall be paid from the treasury of the city."

[223] Statutes 2012, chapter 497.

[224] Elections Code section 2170(a) (Stats. 2012, ch. 497.)

[225] Statutes 2012, chapter 497; Exhibit A, Test Claim, filed December 23, 2020, page 75.

period prior to election day and on election day.[226] Conditional voter registrants use the same affidavit of registration to register to vote as other voters – either a paper form or online through the Secretary of State's website.[227] The elections official was required to advise conditional voter registrants that a conditional voter registration is effective only if the registrant is determined to be eligible to register to vote and the information on the registration affidavit is verified.[228]

In addition, preexisting law requires county elections officials to provide a CVR voter with a provisional ballot. Under Elections Code section 2170(d)(3):

> The elections official shall conduct the receipt and handling of each conditional voter registration *and offer and receive a corresponding provisional ballot* in a manner that protects the secrecy of the ballot and allows the elections official to process the registration, to determine the registrant's eligibility to register, and to validate the registrant's information before counting or rejecting the corresponding provisional ballot.[229]

Furthermore, processing conditional voter registrations and CVR provisional ballots pursuant to Elections Code section 2170(d)(4) and (d)(5) are not newly required by the test claim statute. Elections Code section 2170(d)(4) and (d)(5), which were enacted by Statutes 2012, chapter 497, provide that, in offering CVR and CVR provisional voting, county elections officials must:

- process the CVR registration, determine the CVR registrant's eligibility to register, and validate the registrant's information before counting or rejecting the CVR voter's ballot (Elections Code section 2170(d)(4)); and
- if the CVR is deemed effective, include the CVR voter's ballot in the official canvass. (Elections Code section 2170(d)(5).

Under these provisions, the claimant alleges that as a result of the test claim statute, the county elections official was required to hire additional staff to process CVR registration forms and CVR provisional ballots and to purchase automated vote processing equipment to sort CVR provisional ballot envelopes.[230] The claimant argues that while purchasing the automated equipment to process the additional CVR provisional ballots was not expressly required by the test claim statute, doing so was necessary to avoid the higher labor costs that would have accrued otherwise.[231] However, even though the claimant may have incurred increased costs because more CVRs and CVR provisional ballots were provided and returned, the requirements in

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[226] Elections Code section 2170(d)(1) (Stats. 2012, ch. 497, § 2).

[227] California Code of Regulations, title 2, section 20022; see Elections Code sections 2102 (as last amended by Stats. 2015, ch. 736), 2150, 2170(a).

[228] Elections Code section 2170(d)(2) (Stats. 2012, ch. 497, § 2).

[229] Elections Code section 2170(d)(3) (Stats. 2012, ch. 497, § 2).

[230] Exhibit A, Test Claim, filed December 23, 2020, pages 17 19.

[231] Exhibit C, Claimant's Rebuttal Comments, filed May 5, 2021, page 6.

Elections Code section 2170(d)(4) and (d)(5) were added by Statutes 2012, chapter 497, are not new, and were not amended by the test claim statute.[232]

In addition, counties have long had the duty to process conditional voter registrations and include CVR provisional ballots in the official canvass. Preexisting law requires a conditional voter registration to be processed in the same manner as a general voter registration.[233] Processing ballots is governed by other code sections that became effective before the enactment of the test claim statute. A provisional ballot cast by a conditional voter registrant is subject to the same requirements as apply to provisional voting generally.[234] Additionally, section 20025 of the Secretary of State's regulations specifies the procedures to be followed when processing a CVR provisional ballot, none of which were changed as a result of the test claim statute.[235] Because county elections officials have a preexisting duty to process CVRs and CVR provisional ballots, these activities are not newly required by the test claim statute.

Prior law did not specify the procedures now stated in Elections Code section 2170(e) when providing a CVR provisional ballot. As discussed above, section 2170(e)(1) through (e)(3) address different situations that may arise at CVR locations, including polling places, depending on whether the CVR voter's precinct can be determined and a precinct-specific ballot is available. However, county elections officials have been required to have the means to determine a CVR voter's precinct and access to a precinct-specific ballot at their permanent offices since before the enactment of the test claim statute.[236] Therefore, the requirement under (e)(1) to provide the CVR voter with a ballot for the voter's precinct is not newly required.

Furthermore, providing a CVR voter with a ballot for the voter's precinct does not require the county elections official to perform any new activities. If the polling place has the capability to determine and produce a ballot for the CVR voter's precinct, it must do so. If not, then under the language of (e)(2), providing the CVR voter with whatever ballot is available at that polling place is sufficient. Under either scenario, the county elections official is performing the same activity it was already required to perform: providing a provisional ballot.

The activities under (e)(2) are limited to providing the CVR voter with a ballot that is available at that polling place and informing the voter that only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted pursuant to Elections Code section 14310(c)(3). Neither of these require a county elections official to perform new activities. As discussed above, providing the CVR voter with "a ballot"

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[232] Elections Code section 2170(d)(4), (d)(5) (as added by Stats. 2012, ch. 497).

[233] Elections Code section 2171(b).

[234] Elections Code sections 2171(c), 14310, 15350, and 15100-15112; see also Exhibit F(4), California Secretary of State, Provisional Voting, https://www.sos.ca.gov/elections/voting-resources/provisional-voting (accessed on June 2, 2021), page 3.

[235] California Code of Regulations, title 2, section 20025.

[236] California Code of Regulations, title 2, section 20023(d), (Register 2018, No. 10).

does not require the county elections official to perform any new activities.[237] In addition, Elections Code section 14310(c)(3) has long provided the following:

> (c)(3) The provisional ballot of a voter who is otherwise entitled to vote shall not be rejected because the voter did not cast his or her ballot in the precinct to which he or she was assigned by the elections official.
>
> > (A) If the ballot cast by the voter contains the same candidates and measures on which the voter would have been entitled to vote in his or her assigned precinct, the elections official shall count the votes for the entire ballot.
> >
> > (B) If the ballot cast by the voter contains candidates or measures on which the voter would not have been entitled to vote in his or her assigned precinct, the elections official shall count only the votes for the candidates and measures on which the voter was entitled to vote in his or her assigned precinct.[238]

Furthermore, preexisting law requires that county elections officials provide any voter casting a provisional ballot with written instructions regarding the process and procedures for casting a provisional ballot, which must include, amongst other things, the information set forth in Elections Code section 14310(c)(3).[239] Elections Code section 14310(a)(2) provides as follows:

> (a) At all elections, a voter claiming to be properly registered, but whose qualification or entitlement to vote cannot be immediately established upon examination of the roster for the precinct or upon examination of the records on file with the county elections official, shall be entitled to vote a provisional ballot as follows:
>
> > [¶]
> >
> > (2) The voter shall be provided a provisional ballot, written instructions regarding the process and procedures for casting the ballot, and a written affirmation regarding the voter's registration and eligibility to vote. The written instructions shall include the information set forth in subdivisions (c) and (d).[240]

Therefore, the requirement under Elections Code section 2170(e)(2), to "inform the [CVR] voter that only the votes for the candidates and measures on which the voter would be entitled to vote in the voter's assigned precinct may be counted pursuant to paragraph (3) of subdivision (c) of Section 14310" is not new.

Elections Code section 2170(e)(3) provides that if the elections official is able to determine the CVR voter's precinct, but a ballot for the voter's precinct is unavailable, then the elections

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[237] Elections Code section 2170(d)(3) (as amended by Stats. 2015, ch. 734).

[238] Elections Code section 14310(c)(3) (as last amended by Stats. 2017, Ch. 806).

[239] Elections Code section 14310(a)(2) (as last amended by Stats. 2017, Ch. 806).

[240] Elections Code section 14310(a)(2), (as last amended by Stats. 2017, Ch. 806).

official may inform the voter where the voter's polling place is located. Because county elections offices are required to have the means to determine a CVR voter's precinct and provide a ballot for the voter's precinct, the scenario contemplated under section 2170(e)(3) is limited to polling places, which may or may not have the equipment necessary to determine a CVR voter's assigned precinct.[241] However, under preexisting law, county elections officials have a general duty to ensure that voters are able to locate their assigned polling place.[242] The Secretary of State's Poll Worker Training Standards, which are intended to provide elections officials with the necessary information for training poll workers, state as follows:

> If voters are in the wrong polling place, poll workers should tell them they can either go to their assigned polling place to vote a polling place ballot or they can stay and cast a provisional ballot. The poll workers should also explain the advantages and disadvantages of each option. For example, the polling place ballot may not contain all of the same candidates and measures as the ballot in a voter's home precinct. If this type of situation occurs late in the day, the poll worker should let the voter know that if the voter arrives at their assigned polling place after 8:00 p.m., the voter will not be allowed to cast a ballot.[243]

The Poll Worker Training Standards further state, consistent with the language of Elections Code section 2170(e)(3), that "[i]f the ballot for the voter's precinct is not available, the poll worker may inform the voter of the location of their polling place."[244]

Because county elections officials already have a general duty to assist voters in determining their polling place, and polling places are already required to make available to voters a means to obtain information about the voter's polling place, requiring county elections officials to inform CVR voters where their polling place is located, when they have the means to do so, does not require the county elections official to perform any new activities.

This claim is similar to *Fifteen Day Close of Voter Registration*, 01-TC-15. In *Fifteen Day Close of Voter Registration*, 01-TC-15, prior law allowed voters to newly register to vote, reregister, or change their address with county elections officials until the twenty-ninth day before an election. After that date, voter registration closed for that election.[245] The test claim statute allowed new

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[241] California Code of Regulations, title 2, section 20023(d).

[242] Elections Code section 12105(a) ("The elections official shall, not less than one week before the election, publish the list of the polling places designated for each election precinct."); Elections Code section 14105(h) (the elections official shall provide a "sufficient number of cards to each polling place containing the telephone number of the office to which a voter may call to obtain information about his or her polling place. The card shall state that the voter may call collect during polling hours").

[243] Exhibit F(3), Excerpt from California Secretary of State, 2021 Poll Worker Training Standards (Rev. August 2021), pages 5-6.

[244] Exhibit F(3), Excerpt from California Secretary of State, 2021 Poll Worker Training Standards (Rev. August 2021), page 3.

[245] Exhibit F(6), Excerpt from Commission on State Mandates, Statement of Decision for *Fifteen Day Close of Voter Registration*, 01-TC-15, adopted October 31, 2006, page 2.

registrations or changes to voter registrations through the fifteenth day before an election. [246] The Commission concluded that the majority of the statutory provisions at issue did not constitute a new program or higher level of service because the activities required of the county – processing and accepting voter registration affidavits and changes of address – were not newly required. County elections officials had been required to perform those activities long before the enactment of the test claim statute.[247]

Similarly, here, expanding the locations where county elections officials are required to provide CVR and CVR provisional voting does not impose any new or additional activities on county elections officials. Even without the test claim statute, counties are required to provide conditional voter registrations and provisional ballots *to all voters* requesting them regardless of the cost, and that has not changed. Nor does the test claim statute change *when* CVR and CVR provisional voting must be made available to voters, or require counties to create new polling places, vote centers, or satellite offices to provide these existing services. Under the test claim statute, county elections officials are simply performing the same activities during the same time period as was required under preexisting law, except at additional, existing locations.

Accordingly, the test claim statute does not require counties to perform any new or additional activities or shift financial responsibility for conducting elections from the state to the counties and, thus, does not impose a new program or higher level of service.

b. <u>The cases relied on by the claimant do not support the finding that the test claim statute imposes a new program or higher level of service.</u>

In comments on the Draft Proposed Decision, the claimant argues that because the test claim statute newly requires counties to provide CVR and CVR provisional voting at "expanded times and locations," it constitutes a new program or higher level of service.[248]

> Here, SB 72 increased the "actual level or quality" of county election officials' preexisting CVR duties by expanding the dates and locations on which these services must be offered. *San Diego Unified Sch. Dist., supra*, 33 Cal. 4th at 877. This increased service constitutes a "new program" because the requirements to offer CVR in polling places and at satellite locations during the 14-day period prior to the election and on election day were new and provided a uniquely governmental service.[249]

As explained above, the test claim statute did not expand the dates for which the county must provide CVR and CVR provisional voting. The statute only requires counties to perform those

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[246] Exhibit F(6), Excerpt from Commission on State Mandates, Statement of Decision for *Fifteen Day Close of Voter Registration*, 01-TC-15, adopted October 31, 2006, page 2.

[247] Exhibit F(6), Excerpt from Commission on State Mandates, Statement of Decision for *Fifteen Day Close of Voter Registration*, 01-TC-15, adopted October 31, 2006, page 2.

[248] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 6.

[249] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 5.

same services at existing satellite offices and polling places (defined to include vote centers), in addition to permanent county elections offices.

Nevertheless, the claimant asserts that unlike the statutes in *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1196, *City of Anaheim v. State* (1987) 189 Cal.App.3d 1478, and *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, which involved incidental requirements that were not unique to government or did not require local government to increase the level of services provided to the public, but simply resulted in increased costs, the test claim statute here requires counties to provide *expanded* services to the public.[250]

> In contrast to merely imposing a "higher costs," [sic] when a statute requires that a local government must provide an "expanded" version of a service it is already providing to the public (as is true here), this is a reimbursable mandate. That is because the increased costs are not merely an incidental effect of a law of general application. Rather, the increased costs are borne by the local government in order to provide expanded services to the public.[251]

The claimant relies on *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, and *Department of Finance. v. Commission State Mandates* (2021) 59 Cal.App.5th 546 to support its position that a statute that requires a local government to provide an expanded version of a service it is already providing to the public constitutes a reimbursable mandate.[252]

> For example, in *Carmel Valley Fire Protec. Dist. v. State of California*, 190 Cal. App. 3d 521, 537–38 (1987), the Court held that a requirement in an executive order to provide "updated equipment" to firefighters was a reimbursable mandate. The Court emphasized that fire protection is an essential and basic function of local government. *Id*. at 537. Thus the updated equipment was necessary for the government to better provide that service. *See San Diego Unified Sch. Dist., supra*, 33 Cal.4th at 877 ("Because this increased safety equipment apparently was designed to result in more effective fire protection, the mandate evidently was intended to produce a higher level of service to the public….")
>
> In *Carmel Valley*, the local governments were already providing firefighting services to the public—and certainly were already using some equipment (hence the mandate to provide "updated" equipment). But the Court held that the requirement to update the equipment was a "new program" under Section 6. [Footnote omitted] Thus this additional mandated cost that the local governments

[250] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, pages 2-3.

[251] Exhibit E, Claimant's comments on the Draft Proposed Decision, filed October 20, 2021, page 4.

[252] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, pages 4-5.

incurred in order to provide basic government services was reimbursable. *Carmel Valley*, 190 Cal.App.3d at 537.

The Supreme Court of California honed in on the distinction between "higher costs" and a "higher level of service" in *San Diego Unified Sch. Dist., supra*, 33 Cal.4th at 878. In that case, the statute at issue required schools to expel students under certain circumstances. 33 Cal.4th at 868-69. The Supreme Court of California held that the schools' new duties to provide mandatory hearings constituted a higher level of service. *Id.* at 878-89. This was because the requirements did not exist prior to the statute, the mandate applied uniquely to public schools, and because enhancing the safety of the students was a service to the public. *Id*. at 879. In its discussion, the Court distinguished other cases in which Courts of Appeal found that statutes did not impose mandates when the statutes imposed universal requirements on private employers and local governments alike. *Id*. (citing *County of Los Angeles, supra*, and *City of Sacramento v. State of California*, 50 Cal. 3d 51 (1990).) The Supreme Court explained that simply because a state law increases the costs borne by local government in providing services, that does not automatically render the law a reimbursable mandate. *Id.* at 876. However, the Supreme Court contrasted such laws with statutes that impose an "increase in the actual level or quality of governmental services provided," which do impose reimbursable mandates. *Id.* at 877.

A recent Court of Appeal decision also highlighted this distinction. *Dep't. of Fin. v. Comm'n. on State Mandates*, 59 Cal. App. 5th 546 (2021) (*Dep't of Fin*.). In *Dep't. of Fin*., the County of Los Angeles historically provided stormwater drainage and flood control services. A new Regional Board stormwater permit mandated the installation and maintenance of trash receptacles at transit stops, and the inspection of facilities to ensure compliance. *Id*. at 558. The court held that even though the County already provided stormwater drainage and flood control services, the new requirements imposed a "higher level of service" because they reduced pollution and increased compliance. *Id*. at 558. The court held that alternatively, the requirements were a new program because they provided a government service that was not mandated prior to the permit. *Id*. at 559.[253]

However, unlike this case, the statutes and executive orders in the above cases required local government to perform *new activities that were not required by prior state law*. As indicated above, the court in *San Diego Unified School Dist.* determined that statutory requirements compelling suspension and mandating a recommendation of expulsion for certain offenses committed by K-12 students "are new in comparison with the preexisting scheme in view of the

[253] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, pages 4-5.

circumstance that they did not exist prior to the enactment of [the test claim statutes at issue]."[254] Only after finding that the duties were new did the court continue its analysis to find that the duties were unique to local government and provided a service to the public.[255]

Similarly, in *Department of Finance. v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, the court found that installing and maintaining trash receptacles at transit stops and performing certain inspections were both *new duties* that local governments were required to perform, before concluding that the activities constituted a program within the meaning of article XIII B, section 6, and thus a new program or higher level of service.[256]

> Turning to the instant case, there are three pertinent governmental functions implicated by the challenged requirements for purposes of section 6: The operation of stormwater drainage and flood control systems; the installation and maintenance of trash receptacles at transit stops; and the inspection of commercial, industrial, and construction facilities and sites to ensure compliance with environmental laws and regulations. The first existed prior to the Regional Board's permit; *the other two are new*. Each is a governmental function that provides services to the public, and the carrying out of such functions are thus programs under the first part of the Supreme Court's definition of that term.
>
> In the case of the provision of stormwater drainage and flood control services, the trash receptacle requirement provides a higher level of service because it, together with other requirements, will reduce pollution entering stormwater drainage systems and receiving waters…
>
> The inspection requirements provide a higher level of service because they promote and enforce third party compliance with environmental regulations limiting the amount of pollutants that enter storm drains and receiving waters.[257]

The claimant also cites to the *Carmel Valley* case, asserting the following: "In *Carmel Valley*, the local governments were already providing firefighting services to the public—*and certainly were already using some equipment (hence the mandate to provide "updated" equipment)*."[258] However, the claimant cites no law to indicate that the regulatory requirements were not newly imposed by the state on fire protection districts. The regulatory requirements to provide protective clothing and safety equipment had to be newly required by state law for the Board of

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[254] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878. See also page 869, footnotes 6 and 7, and page 871, footnote 9, where the court describes in detail the state of the law immediately before the enactment of the test claim statutes at issue.

[255] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 ("the requirements were intended to provide an enhanced service to the public—safer schools for the vast majority of students").

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

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

[258] Exhibit E, Claimant's Comments on the Draft Proposed Decision, filed October 20, 2021, page 4, emphasis added.

Control (the Commission's predecessor) and the court to approve reimbursement under the California Constitution. As recognized by Government Code section 17565, even if a local agency or a school district, at its option, has been incurring costs which are subsequently mandated by the state, the state shall reimburse the local agency or school district for those costs incurred after the operative date of the mandate.[259]

As explained in the *Carmel Valley* decision, the regulations were adopted by the Department of Industrial Relations in 1978 after the Legislature enacted the California Occupational Safety and Health Act (Cal/OSHA) in Statutes 1973, chapter 993. Cal/OSHA is modeled after federal law and is designed to ensure safe working conditions for all California workers.[260] Under the Act, the Occupational Safety and Health Standards Board within the Department of Industrial Relations is responsible for adopting occupational safety and health standards and orders, and the regulations at issue in *Carmel Valley* were adopted in 1978 pursuant to that law.[261]

After the Board of Control approved the Test Claim, the Legislature failed to appropriate funds for mandate reimbursement, claiming in part that the requirements were mandated by federal law. The court, however, determined that the requirements to provide protective clothing and safety equipment were not mandated by existing federal law, but were state mandated requirements imposed by the 1978 regulations.[262] The court also found that reimbursement was required pursuant to article XIII B, section 6 of the California Constitution because the regulations were passed after January 1, 1975.[263] Therefore, even though the court found the regulatory requirements to be "updated," the requirements had to be newly mandated by the state on fire protection districts in order to be reimbursable under article XIII B, section 6 of the California Constitution.

Counties have long been required to provide CVR and CVR provisional voting to all voters that request them, regardless of the cost, during the 14 days before the election and on election day, and the test claim statute does not require counties to perform any new or additional activities. Accordingly, the Commission finds that the test claim statute does not impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

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[259] Government Code section 17565 implements the article XIII B, section 6 of the California Constitution. However, the same provision was contained in the former statutory mandate scheme and was derived from former Revenue and Taxation Code section 2234 (added by Stats. 1975, ch. 486, § 9, amended by Stats. 1977, ch. 1135, § 8.6; Stats. 1980, ch. 1256, § 11).

[260] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 541-542.

[261] Labor Code sections 140, 142.3, and 6305. See also, *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 293-294 (which also addressed the program after the Legislature suspended it pursuant to Government Code section 17581).

[262] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 544.

[263] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 548.

V. Conclusion

Based on the foregoing analysis, the Commission concludes that Elections Code section 2170, as amended by the test claim statute (Stats. 2019, ch. 565), does not impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514.

Accordingly, the Commission denies this Test Claim.