Hearing: March 25, 2004
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ITEM 2

APPEAL OF EXECUTIVE DIRECTOR'S DECISION
RETURN OF "TESTCLAIM" FILING

California Regional Water Quality Control Board Executive Order Number 01-182
December 13, 2001
Permit Number CAS004001, Part 4, Section F.5.c.3

Transit Trash Receptacles (03-TC-04)

County of Los Angeles, Appellant

EXECUTIVE SUMMARY

Background

On September 5, 2003, the County of Los Angeles (County) filed a "test claim" alleging that the Los Angeles County's *Transit Trash Receptacles Program*, now required under California Regional Water Quality Control Board Executive Order Number 01-182 (December 13, 2001, Permit Number CAS004001, Part 4, Section F5[1].c.3, Transit Trash Receptacles), constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.[2]

On October 15, 2003, the Executive Director returned this filing to the County because the document issued by the California Regional Water Quality Control Board does not constitute an executive order pursuant to Government Code section 17516.[3]

On November 17, 2003, the County appealed the Executive Director's action pursuant to section 1181, subdivision (c) of the Commission's regulations.[4]

On February 5, 2004, a staff analysis on this appeal was issued to the parties. Comments on the analysis were received from the County, the State Water Resources Control Board, and the Department of Finance.

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[1] Part 4, Section F5 addresses Storm Drain Operation and Management. (See, Exhibit B, Bates page 17.)

[2] Exhibit B.

[3] See Exhibit A.

[4] See Exhibit C.

Comments from the County

The County contends that its test claim is properly before the Commission. The County argues that Government Code section 17516 cannot limit the reach of article XIII B, section 6 of the California Constitution. The County asserts that nothing in article XIII B, section 6 excludes regional board orders from the new programs or higher levels of service for which a subvention of funds is required.[5]

Comments from the State Water Resources Control Board

The State Water Resources Control Board contends that the Cities' appeal should be denied. The Board argues that Government Code section 17516 exempts any order, plan, requirement, rule or regulation issued by any regional water quality control board from the definition of executive order subject to article XIII B, section 6. Consistent with article III, section 3.5 of the California Constitution, the Commission must follow Government Code section 17516 and deny this appeal.[6]

Comments from the Department of Finance

The Department of Finance argues that the test claims were properly returned, and that the Commission should deny this appeal.[7]

Revised Analysis

The Legislature implemented article XIII B, section 6 of the California Constitution by enacting Government Code section 17500 et seq. Government Code section 17500 et seq. provides the sole and exclusive procedure by which to claim reimbursement under article XIII B, section 6.[8]

"Costs mandated by the state", as defined in Government Code section 17514, means

> [A]ny increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any *executive order* implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of section 6 of Article XIII B of the California Constitution. (Emphasis added.)

Government Code section 17516 defines an "executive order" subject to article XIII B, section 6, and specifically excludes from the definition of an executive order any order, plan, requirement, rule, or regulation issued by any regional water quality control board. Section 17516 states the following:

> "Executive order" does not include any order, plan, requirement, rule, or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code. It is the intent of the Legislature that the State Water Resources Control Board and regional water quality control boards will not adopt enforcement orders against publicly

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[5] Exhibit F.

[6] Exhibit G.

[7] Exhibit H.

[8] Government Code section 17552.

> owned dischargers which mandate major waste water treatment facility construction costs unless federal financial assistance and state financial assistance pursuant to the Clean Water Bond Act of 1970 and 1974, is simultaneously made available. "Major" means either a new treatment facility or an addition to an existing facility, the cost of which is in excess of 20 percent of the cost of replacing the facility.

The County's September 5, 2003 filing is based on a document issued by the California Regional Water Quality Control Board, Los Angeles Region, pursuant to Division 7 of the Water Code. Based on the plain language of Government Code section 17516, the document is not an "executive order" subject to article XIII B, section 6 of the California Constitution.

The County argues that the Commission cannot rely on Government Code section 17516. The County urges the Commission to look only at the provisions of article XIII B, section 6, which does not include an exemption from reimbursement for rules or requirements issued by regional water quality control boards.

Staff disagrees with the County. Article III, section 3.5 of the California Constitution places limitations on the powers of administrative agencies, such as the Commission on State Mandates, and prohibits administrative agencies from refusing to enforce a statute or from declaring a statute unconstitutional. Section 3.5 states, as follows:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

In 1988, the California Supreme Court, in *Reese v. Kizer*, described the purpose of article III, section 3.5.[9] Article III, section 3.5 was added to the Constitution in 1978 through Proposition 5. The purpose of the amendment was to prevent administrative agencies from using their own interpretation of the Constitution to thwart the mandates of the Legislature.[10] According to the ballot materials in support of Proposition 5, the proponents argued that the amendment would "insure that appointed officials do not refuse to carry out their duties by usurping the authority of the Legislature and the Courts."[11]

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[9] *Reese v Kizer* (1988) 46 Cal.3d 996. (Exhibit I.)

[10] *Id.* at page 1002.

[11] *Id*. at page 1002, footnote 7.

Staff finds that based on Article III, section 3.5 of the California Constitution, the Commission has no power to declare Government Code section 17516 unconstitutional or to refuse to enforce this statute because no appellate court has determined that it is unconstitutional.

Conclusion

Therefore, staff concludes that the Executive Director correctly exercised her authority to return this filing to the County of Los Angeles.

Recommendation

If the Commission agrees that the Executive Director's action to return the County of Los Angeles "test claim" filing was correct, then the Commission should deny this appeal.

If the Commission agrees with the Appellant, then it should grant the appeal and direct the Executive Director to accept the "test claim" filing and initiate a "completeness review" pursuant to California Code of Regulations, title 2, section 1183.