



March 9, 2011

Mr. Drew Bohan
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Test Claim 09-TC-03 “Santa Ana Region Water Permit – Orange County.”

Dear Mr. Bohan:

The Department of Finance (Finance) has reviewed the test claim on the Santa Ana Region Water Permit (test claim permit) submitted by the County of Orange and the incorporated cities within Orange County (claimants). The claimants allege the test claim permit is a reimbursable state mandate because the test claim permit requirements exceed federal law, were not included in the prior 2002 Santa Ana National Pollutant Discharge Elimination System (NPDES) permit; and therefore, impose a new program or higher level of service on local agency dischargers.

As noted in comments on prior claims based on other regional water boards' NPDES permits, Finance believes that the test claim permit does not impose a reimbursable state mandate on local agencies within the meaning of Section 6, Article XIII B of the California Constitution. The test claim permit and its requirements are required by the federal Clean Water Act (CWA). The claim should be denied pursuant to the federal mandate exception in subdivision (c) of Section 17556 of the Government Code for the following reasons:

- Finance believes the test claim permit and its provisions are federal mandates because they are required by federal law. Federal law already requires the United States Environmental Protection Agency to issue NPDES permits to regulate municipal separate storm sewer systems (MS4s) which are operated by local agencies (Section 1342(p) of Title 33 of the United States Code). The state's role as a permitting authority acting on behalf of the federal government negates the existence of a state mandate because the test claim permit is issued in compliance with federal law. As determined in the *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App. 4th 805, no state mandate exists if the state requirements, in the absence of state statute, would still be imposed upon local agencies by federal law.
- Finance believes the detailed provisions of the permit do not exceed federal law even though they are not explicitly stated in the federal CWA. According to the test claim narrative, more activities are required in the test claim permit than in the prior 2002 NPDES permit. As noted in our prior comments, the alleged increased level of service is based on the evolving local agency documents submitted in support of the provisions of a

permit. The federal government requires a public discharger to submit a plan that is descriptive and provides specific activities showing how pollutants will be reduced to the maximum extent practicable (MEP) in its jurisdiction. In support, the State Water Resources Control Board notes, in their January 27, 2010 comments on the Commission's draft staff analysis recommending partially reimbursable mandates for the San Diego Region test claim (07-TC-09), that stormwater permits follow an iterative process whereby each successive permit becomes more refined and expanded as needed. The iterative process is based on experiences under the previous permit and proposed best management practices the claimant recommended to reduce pollutant discharges from the MS4s to the MEP. The reduction in pollutant discharges is required by federal law to meet effluent limitations guidelines. Finance asserts that the additional permit activities were necessary for the claimants to continue to comply with the federal CWA. Pursuant to subdivision (c) of Government Code Section 17556, an executive order that imposes requirements mandated by federal law and results in costs is not a reimbursable state mandate unless the executive order mandates costs that exceed the federal mandate. The current permit does not exceed federal requirements.

- Finance also contends that the Santa Ana Regional Water Quality Control Board (Board), as an administrator of federal law, has not imposed a reimbursable state mandate exceeding federal law because the federally-delegated responsibilities and duties of the Board are consistent with the CWA. The federal law requires NPDES permits to include detailed activities or requirements, e.g., best management practices, to reduce discharge of pollutants to the MEP. The Board, a federally-approved permitting authority, also is required to set forth permitting requirements as long as the requirements are not less stringent than the requirements of the federal law pursuant to the CWA. As noted in the test claim narrative on page 5, the federal law does not prescribe or restrict the factors that a state may consider when exercising its permitting authority. Finance, therefore, believes that the specific provisions of the permit were necessary and consistent with the Board's federally-delegated authority to address how the local discharging agencies shall manage the discharge of pollutants unique to its waters. As a result, the Board has not imposed a state reimbursable mandate on local dischargers within the meaning of Section 6, Article XIII B of the California Constitution.
- Finance notes that the claimants cite an appellate court case that does not support the conclusion that the permit activities exceed federal law. In *Long Beach Unified School District v. State of California (Long Beach)* (1990) 225 Cal.App.3d 155, it was found that the state executive order requirements exceeded federal law by mandating school districts to undertake defined steps and approaches that might help alleviate racial segregation. The court noted that the general guidelines under prior governing law were merely advisory requirements or suggestions, but the detailed or specific activities set forth by the state were additional requirements beyond the general guidelines. Accordingly, the court found the state requirements exceeded the federal law. Unlike the situation in *Long Beach*, federal law requires NPDES permits to include specific requirements. Because federal law requires specific provisions in a NPDES permit, and the permit was issued consistent with that federal requirement, the permit is a federal mandate and not a state reimbursable mandate. As a result, Finance believes the state-issued permit does not exceed federal requirements.
- Finance believes that implementing permit activities is not a governmental function unique to local agency dischargers. Even though the test claim permit was issued to local agency dischargers (MS4s), only, the requirements within the test claim permit

apply generally to public and private dischargers. While private dischargers may apply for separate permits, they have similar requirements as the public dischargers, such as submitting stormwater pollution prevention plans to apply for a NPDES permit. The federal law requires industrial dischargers to comply with all of the requirements, e.g., best practicable control technology, that any NPDES permit must contain (Section 1311(b)(1)(A) of Title 33 of United State Code). As a result, the test claim permit is not a reimbursable state mandate. In *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, the court found that, while a law may affect only local government, the law does not compel the conclusion that it imposes a unique requirement on local government. If the law puts local government on the same footing as other employers previously subject to the requirements newly imposed on local government, there is no reimbursable state mandate.

As required by the Commission's regulations, a "Proof of Service" has been enclosed indicating that the parties included on the mailing list which accompanied your letter dated July 9, 2010 have been provided with copies of this letter via either United States Mail or email. Pursuant to section 1181.2, subdivision (c)(1)(E) of the California Code of Regulations, "documents e-filed with the Commission need not be otherwise served on persons that have provided an e-mail address for the mailing list."

If you have any questions regarding this letter, please contact Carla Shelton, Associate Finance Budget Analyst at (916) 445-8913.

Sincerely,



NONA MARTINEZ
Assistant Program Budget Manager

Enclosure

Enclosure A

DECLARATION OF JEFF CAROSONE
DEPARTMENT OF FINANCE
CLAIM NO. CSM-09-TC-03

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

3-7-11

at Sacramento, CA



Jeff Carosone

Commission on State Mandates

Original List Date: 7/9/2010
Last Updated: 1/31/2011
List Print Date: 03/10/2011
Claim Number: 09-TC-03
Issue: Santa Ana Region Water Permit - Orange County

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.2.)

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**DECLARATION OF SERVICE BY EMAIL**

I, the undersigned, declare as follows:

I am a resident of the County of Solano and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On March 10, 2011, I served the:

Department of Finance Comments on Test Claim; and
State Water Resources Control Board Comments on Test Claim
Santa Ana Region Water Permit, 09-TC-03
California Regional Water Quality Control Board, Santa Ana Region,
Order No. R8-2009-0030
County of Orange, Orange County Flood Control District, Cities of Anaheim, Brea, Buena Park, Costa Mesa, Cypress, Fountain Valley, Fullerton, Huntington Beach, Irvine, Lake Forest, Newport Beach, Placentia, Seal Beach and Villa Park, Claimants

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 10, 2011 at Sacramento, California.


Heidi J. Palchik