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Commission on
State Mandates



1100 K Street
Suite 101
Sacramento
California
95814

Telephone
916.327-7500

Facsimile
916.441.5507

May 30, 2017

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 9th Street, Suite 300
Sacramento, CA 95814

Re: *Santa Ana Region Water Permit – County of Riverside*, 10-TC-07
California State Association of Counties Written Comments
Regarding *Department of Finance v. Commission on State Mandates*

Dear Ms. Halsey:

The California State Association of Counties (CSAC) respectfully submits these comments in response to your “Request for Briefing” issued in this matter on April 7, 2017. That Request seeks input on how the California Supreme Court’s decision in *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, should be applied to the activities that are the subject of this claim.

In *Department of Finance*, the California Supreme Court held: “If federal law compels the State to impose, or itself imposes, a requirement, the requirement is a federal mandate. On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement for virtue of a ‘true choice,’ the requirement is not a federal mandate.” (*Id.* at p. 765.) In so holding, the Court affirmed this Commission’s partial approval of the test claims in that case.

Several aspects of that holding are important in understanding the pending test claim. First, the Court noted that the State of California has voluntarily elected to implement the Clean Water Act, and is at no risk of penalty if it elects not to do so. (*Dept. of Finance, supra*, 1 Cal.5th at p. 767.) The Regional Board thus has, in many cases, discretion in how to achieve its goals, and that discretion by definition means that such permit conditions are not required by federal law. (*Id.* at p.767.) Indeed, in order for permit conditions to be required by federal law, they must be “the only means by which the maximum extent practicable standard could be implemented.” (*Id.* at p. 768.) The Court instructs that in making that determination, it will review the record, including references to federal and state statute. (*Id.* at p. 762.)

Second, the Court made clear that the burden for establishing an exception to requiring subventions under article XIII B, section 6 of the California Constitution is on the

party asserting the exception. Thus, as to the stormwater permit conditions, the “State must explain why federal law mandated these requirements, rather than forcing the Operators to prove the opposite.” (*Dept. of Finance, supra*, 1 Cal.5th at p. 769.) The rule serves the purpose of article XIII B, section 6, which is “to protect local governments from State attempts to impose or shift the costs of new programs or increased levels of service by entitling local governments to reimbursement.” (*Ibid.*, citing *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.)

Finally, the Court’s opinion addresses the respective roles of this Commission and the State Water Resources Control Board and Regional Boards in determining whether a permit condition constitutes a mandate. The Court makes clear that the Boards should be afforded deference in technical expertise in water control. Further, if a Regional Board makes a finding at the time it imposes a particular condition that such condition is the only means of implementing the federal maximum extent practicable standard, that finding would also be entitled to deference. (*Dept. of Finance, supra*, 1 Cal.5th at p. 768.) But it is the role of the Commission to determine whether a particular permit condition is required by federal or state law, and the Regional Board’s determination on that issue is not entitled to deference. (*Id.* at p. 769.)

Taken together, this guidance creates a roadmap for the Commission in evaluating the present test claim:

- A permit condition can only be considered to be required by federal law if the Board had no discretion in imposing the condition.
- Any assertion that a permit condition is required by federal law must be accompanied by a specific citation to the applicable federal statute or regulation showing the specific requirement.
- The burden of proving that a specific federal statute or regulation requires the permit condition rests with the Board. The claimant does not have to prove that the condition was required by State law or was a discretionary act of the Board.
- Deference to the Board on the issue of permit conditions is limited to technical expertise in water control. The Board is not entitled to deference with regard to its conclusions on whether a permit condition is required by federal law.

In recognition of these points, claimants have provided detailed information to the Commission on each of the mandated activities in the permit, including the applicable federal law and an explanation of how the permit conditions are not required by federal law or exceed the minimum federal standard. (Narrative Statement in Support of Joint Test Claim of Riverside County Local Agencies Concerning Santa Ana RWQCB Order No. R8-2010-0033, pp. 7-35.) The burden now rests with the Regional Board to show with specific citations how each conditions is required by federal law. If the Regional Board is unable to do so, the test claim should be approved.

CSAC greatly appreciates the opportunity to provide comments on this important issue. If you have any questions, please do not hesitate to contact me at jhenning@counties.org or 916-327-7535.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Jennifer B. Henning". The signature is fluid and cursive, with the first name being the most prominent.

Jennifer B. Henning
Litigation Counsel

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

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

On June 5, 2017, I served the:

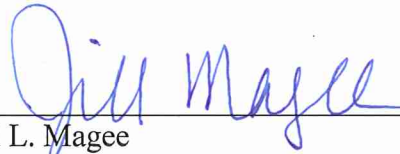
- **California Regional Water Quality Control Board (CRWQCB) Santa Ana Region's Response to the Request for Additional Briefing filed May 31, 2017**
- **California State Association of Counties (CSAC's) Response to the Request for Additional Briefing filed May 31, 2017**
- **Claimants' Response to the Request for Additional Briefing filed May 31, 2017**
- **Finance's Response to the Request for Additional Briefing filed May 31, 2017**

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0033, 10-TC-07

County of Riverside, Riverside County Flood Control and Water Conservation District, Cities of Beaumont, Corona, Hemet, Lake Elsinore, Moreno Valley, Perris, and San Jacinto, Co-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 June 5, 2017 at Sacramento, California.



Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

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Claim Number: 10-TC-07

Matter: California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0033

Claimants: City of Beaumont
City of Corona
City of Hemet
City of Lake Elsinore
City of Moreno Valley
City of Perris
City of San Jacinto
County of Riverside
Riverside County Flood Control and Water Conservation District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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Nino Abad, Principal Engineer, *City of Hemet*
510 E. Florida Avenue, Hemet, CA 92543
Phone: (951) 765-2360
nabad@cityofhemet.org

Paul Angulo, Auditor-Controller, *County of Riverside*
4080 Lemon Street, 11th Floor, Riverside, CA 92502
Phone: (951) 955-3800
pangulo@rivco.org

Ahmad Ansari, Public Works Director/City Engineer, *City of Moreno Valley*
14177 Frederick Street, Moreno Valley, CA 92553
Phone: (951) 413-3105
ahmada@moval.org

Socorro Aquino, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-7522
SAquino@sco.ca.gov

Raul Arevalo, Operations Analyst, *City of Corona*

Department of Water and Power, 755 Public Safety Way, Corona, CA 92880
Phone: (951) 739-4915
Raul.Arevalo@ci.corona.ca.us

Harmeet Barkschat, *Mandate Resource Services, LLC*
5325 Elkhorn Blvd. #307, Sacramento, CA 95842
Phone: (916) 727-1350
harmeet@calsdrc.com

Lacey Baysinger, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
lbaysinger@sco.ca.gov

Richard Belmudez, *City Manager, City of Perris*
101 N. D Street, Perris, CA 92570
Phone: (951) 943-6100
rbelmudez@cityofperris.org

Shanda Beltran, *General Counsel, Building Industry Legal Defense Foundation*
Building Association of Southern California, 17744 Sky Park Circle, Suite 170, Irvine, CA 92614
Phone: (949) 553-9500
sbeltran@biasec.org

Kurt Berchtold, *Executive Officer, Santa Ana Regional Water Quality Control Board*
3737 Main Street, Suite 500, Riverside, CA 92501-3348
Phone: (951) 782-3286
kberchtold@waterboards.ca.gov

Cindy Black, *City Clerk, City of St. Helena*
1480 Main Street, St. Helena, CA 94574
Phone: (707) 968-2742
cityclerk@cityofstheleena.org

Allan Burdick,
7525 Myrtle Vista Avenue, Sacramento, CA 95831
Phone: (916) 203-3608
allanburdick@gmail.com

J. Bradley Burgess, *MGT of America*
895 La Sierra Drive, Sacramento, CA 95864
Phone: (916) 595-2646
Bburgess@mgtamer.com

David Burhenn, *Burhenn & Gest, LLP*
Claimant Representative
624 South Grand Avenue, Suite 2200, Los Angeles, CA 90017
Phone: (213) 629-8788
dburhenn@burhenngest.com

Gwendolyn Carlos, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-0706
gcarlos@sco.ca.gov

Ron Carr, *Assistant City Manager, City of Perris*
101 North D Street, Perris, CA 92570

Phone: (951) 943-6100
rcarr@cityofperris.org

Daniel Carrigg, Deputy Executive Director/Legislative Director, *League of California Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8222
Dcarrigg@cacities.org

Annette Chinn, *Cost Recovery Systems, Inc.*
705-2 East Bidwell Street, #294, Folsom, CA 95630
Phone: (916) 939-7901
achinnrcs@aol.com

Carolyn Chu, Senior Fiscal and Policy Analyst, *Legal Analyst's Office*
925 L Street, Sacramento, CA 95814
Phone: (916) 319-8326
Carolyn.Chu@lao.ca.gov

Michael Coleman, *Coleman Advisory Services*
2217 Isle Royale Lane, Davis, CA 95616
Phone: (530) 758-3952
coleman@muni1.com

Anita Dagan, Manager, Local Reimbursement Section, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740,
Sacramento, CA 95816
Phone: (916) 324-4112
Adagan@sco.ca.gov

Michelle Dawson, City Manager, *City of Moreno Valley*
14177 Frederick Street, Moreno Valley, CA 92552-0805
Phone: (951) 413-3020
michelled@moval.org

Marieta Delfin, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-4320
mdelfin@sco.ca.gov

Donna Ferebee, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
donna.ferebee@dof.ca.gov

Susan Geanacou, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
susan.geanacou@dof.ca.gov

Dillon Gibbons, Legislative Representative, *California Special Districts Association*
1112 I Street Bridge, Suite 200, Sacramento, CA 95814
Phone: (916) 442-7887
dillong@csda.net

Catherine George Hagan, Senior Staff Counsel, *State Water Resources Control Board*
c/o San Diego Regional Water Quality Control Board, 2375 Northside Drive, Suite 100, San
Diego, CA 92108

Phone: (619) 521-3012
catherine.hagan@waterboards.ca.gov

Heather Halsey, Executive Director, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
heather.halsey@csm.ca.gov

Sunny Han, Project Manager, *City of Huntington Beach*
2000 Main Street, Huntington Beach, CA 92648
Phone: (714) 536-5907
Sunny.han@surfcity-hb.org

Aaron Harp, *City of Newport Beach*
Office of the City Attorney, 100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3131
aharp@newportbeachca.gov

Chris Hill, Principal Program Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Chris.Hill@dof.ca.gov

Katie Hockett, Operations Manager, *City of Corona*
Department of Water and Power, 755 Public Safety Way, Corona, CA 92880
Phone: (951) 279-3601
Katie.Hockett@ci.corona.ca.us

Dorothy Holzem, Legislative Representative, *California State Association of Counties*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
dholzem@counties.org

Justyn Howard, Program Budget Manager, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-1546
justyn.howard@dof.ca.gov

Thomas Howard, Executive Director, *State Water Resources Control Board*
P.O. Box 2815, Sacramento, CA 95812-2815
Phone: (916) 341-5599
thoward@waterboards.ca.gov

Aftab Hussain, Public Works Utility Manager, *City of Beaumont*
550 E. Sixth Street, Beaumont, CA 92223
Phone: (951) 769-8520
ahussain@ci.beaumont.ca.us

Mark Ibele, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814
Phone: (916) 651-4103
Mark.Ibele@sen.ca.gov

Amer Jakher, Director of Public Works, *City of Beaumont*
550 E. Sixth Street, Beaumont, CA 92223
Phone: (951) 769-8520
Ajakher@ci.beaumont.ca.us

Kris Jensen, Public Works Director, *City of Hemet*

3777 Industrial Ave, Hemet, CA 92545
Phone: (951) 765-3823
kjensen@cityofhemet.org

Edward Jewik, *County of Los Angeles*
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-8564
ejewik@auditor.lacounty.gov

Rob Johnson, City Manager, *City of San Jacinto*
595 S. San Jacinto Ave., Bldg. A, San Jacinto, CA 92583
Phone: (951) 487-7330
rjohnson@sanjacintoca.us

Jill Kanemasu, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 322-9891
jkanemasu@sco.ca.gov

Anne Kato, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-5919
akato@sco.ca.gov

Anita Kerezi, *AK & Company*
3531 Kersey Lane, Sacramento, CA 95864
Phone: (916) 972-1666
akcompany@um.att.com

Michael Lauffer, Chief Counsel, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828
Phone: (916) 341-5183
mlauffer@waterboards.ca.gov

Hortensia Mato, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3000
hmato@newportbeachca.gov

Michelle Mendoza, *MAXIMUS*
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403
Phone: (949) 440-0845
michellemendoza@maximus.com

Alexander Meyerhoff, City Manager, *City of Hemet*
445 E. Florida Avenue, Hemet, CA 92543
Phone: (951) 765-2301
ameyerhoff@cityofhemet.org

Meredith Miller, Director of SB90 Services, *MAXIMUS*
3130 Kilgore Road, Suite 400, Rancho Cordova, CA 95670
Phone: (972) 490-9990
meredithcmiller@maximus.com

Tom Moody, Assistant General Manager, *City of Corona*
Department of Water and Power, 755 Public Safety Way, Corona, CA 92880
Phone: (951) 279-3660
Tom.Moody@ci.corona.ca.us

Dan Mudrovich, Water Superintendent, *City of San Jacinto*
270 Bissell Place, San Jacinto, CA 92582
Phone: (951) 654-4041
dmudrovich@sanjacintoca.us

Geoffrey Neill, Senior Legislative Analyst, Revenue & Taxation, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
gneill@counties.org

Nelson Nelson, Principal Engineer, *City of Corona*
400 S. Vicentia Ave, Corona, CA 92882
Phone: (951) 736-2266
nelson.nelson@ci.corona.ca.us

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Adriana Nunez, Staff Counsel, *State Water Resources Control Board*
P.O. Box 100, Sacramento, CA 95812
Phone: (916) 322-3313
Adriana.nunez@waterboards.ca.gov

Lori Okun, Assistant Chief Counsel, *State Water Resources Control Board*
Regional Water Board Legal Services, 1001 I Street, Sacramento, CA 95814
Phone: (916) 341-5165
Lori.Okun@waterboards.ca.gov

Jay Orr, Chief Executive Officer, *County of Riverside*
4080 Lemon Street, 4th Floor, Riverside, CA 92501
Phone: (951) 955-1100
jorr@rivco.org

Arthur Palkowitz, *Artiano Shinoff*
2488 Historic Decatur Road, Suite 200, San Diego, CA 92106
Phone: (619) 232-3122
apalkowitz@as7law.com

Todd Parton, City Manager, *City of Beaumont*
550 E. 6th Street, Beaumont, CA 92223
Phone: (951) 769-8520
TParton@ci.beaumont.ca.us

Steven Pavlov, Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Steven.Pavlov@dof.ca.gov

Jeff Potts, Environmental Compliance Coordinator, *City of Corona*
Department of Water and Power, 755 Public Safety Way, Corona, CA 92880
Phone: (951) 736-2442
Jeff.Potts@ci.corona.ca.us

Jai Prasad, *County of San Bernardino*
Office of Auditor-Controller, 222 West Hospitality Lane, 4th Floor, San Bernardino, CA 92415-

0018

Phone: (909) 386-8854

jai.prasad@atc.sbcounty.gov

Mark Rewolinski, *MAXIMUS*

808 Moorefield Park Drive, Suite 205, Richmond, VA 23236

Phone: (949) 440-0845

markrewolinski@maximus.com

David Rice, *State Water Resources Control Board*

1001 I Street, 22nd Floor, Sacramento, CA 95814

Phone: (916) 341-5161

davidrice@waterboards.ca.gov

Nick Romo, Policy Analyst, *League of California Cities*

1400 K Street, Suite 400, Sacramento, CA 95814

Phone: (916) 658-8254

nromo@cacities.org

Carla Shelton, *Commission on State Mandates*

980 9th Street, Suite 300, Sacramento, CA 95814

Phone: (916) 327-6490

carla.shelton@csm.ca.gov

Camille Shelton, Chief Legal Counsel, *Commission on State Mandates*

980 9th Street, Suite 300, Sacramento, CA 95814

Phone: (916) 323-3562

camille.shelton@csm.ca.gov

Jim Spano, Chief, Mandated Cost Audits Bureau, *State Controller's Office*

Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 323-5849

jspano@sco.ca.gov

Dennis Speciale, *State Controller's Office*

Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 324-0254

DSpeciale@sco.ca.gov

Tracy Sullivan, Legislative Analyst, *California State Association of Counties (CSAC)*

Government Finance and Administration, 1100 K Street, Suite 101, Sacramento, CA 95814

Phone: (916) 650-8124

tsullivan@counties.org

Darrell Talbert, City Manager, *City of Corona*

400 South Vicentia Avenue, Corona, CA 92882

Phone: (951) 279-3670

darrell.talbert@ci.corona.ca.us

Rita Thompson, NPDES Coordinator, *City of Lake Elsinore*

130 South Main Street, Lake Elsinore, CA 92530

Phone: (951) 674-3124

rthompson@lake-elsinore.org

Jolene Tollenaar, *MGT of America*

2251 Harvard Street, Suite 134, Sacramento, CA 95815

Phone: (916) 443-411

jolene_tollenaar@mgtamer.com

Evelyn Tseng, *City of Newport Beach*

100 Civic Center Drive, Newport Beach, CA 92660

Phone: (949) 644-3127

etseng@newportbeachca.gov

Jason Uhley, General Manager - Chief Engineer, *Riverside County Flood Control and Water Conservation District*, 1995 Market Street, Riverside, CA 95201

Phone: (951) 955-1201

juhley@rivco.org

Renee Wellhouse, *David Wellhouse & Associates, Inc.*

3609 Bradshaw Road, H-382, Sacramento, CA 95927

Phone: (916) 797-4883

dwa-renee@surewest.net

Jennifer Whiting, Assistant Legislative Director, *League of California Cities*

1400 K Street, Suite 400, Sacramento, CA 95814

Phone: (916) 658-8249

jwhiting@cacities.org

Patrick Whitnell, General Counsel, *League of California Cities*

1400 K Street, Suite 400, Sacramento, CA 95814

Phone: (916) 658-8281

pwhitnell@cacities.org

Hasmik Yaghobyan, *County of Los Angeles*

Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012

Phone: (213) 974-9653

hyaghobyan@auditor.lacounty.gov

Grant Yates, City Manager, *City of Lake Elsinore*

130 South Main Street, Lake Elsinore, CA 92530

Phone: (951) 674-3124

gyates@lake-elsinore.org