CALIFORNIA
Water Boards

EDMUND G. BROWN JR.
GOVERNOR

MATTHEW RODRIQUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

Santa Ana Regional Water Quality Control Board

October 21, 2016

VIA DROP BOX

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

Dear Ms. Halsey:

SANTA ANA REGIONAL WATER QUALITY CONTROL BOARD RESPONSE TO COMMISSION ON STATE MANDATE'S REQUEST FOR ADDITIONAL BRIEFING - TEST CLAIM 09-TC-03

I. Introduction

On May 22, 2009, the Santa Ana Regional Water Quality Control Board ("Santa Ana Water Board" or "Board") adopted Order No. R8-2009-0030, NPDES No. CAS618030, Waste Discharge Requirements for the County of Orange, Orange County Flood Control District and the Incorporated Cities of Orange County within the Santa Ana Region Areawide Urban Storm Water Runoff, Orange County ("2009 Permit" or "Permit"). The County of Orange and Orange County Flood Control District, and the 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 ("Test Claimants") filed a test claim with the Commission on State Mandates ("Commission") on June 30, 2010 ("Test Claim"), alleging that certain provisions of the 2009 Permit constituted unfunded State mandates. The Santa Ana Water Board and Department of Finance filed comments responding to the Test Claim on March 9, 2011 ("March 9, 2011 Response") and March 10, 2011, respectively. Test Claimants filed rebuttal comments on June 17, 2011.

On June 8, 2016, the Commission requested that the Santa Ana Water Board and the State Water Resources Control Board ("State Water Board") file the full administrative record for the 2009 Permit. The administrative record was submitted on August 5, 2016. On September 21, 2016, the Commission requested additional briefing from Parties, Interested Parties, and Interested Persons regarding how the California Supreme Court's recent decision in *Department of Finance v. Commission on State Mandates* (Decision No. S214855) ("*LA MS4 Decision*"), issued August 29, 2016, should apply to the Test Claim. These comments respond to that request.

II. Comments

A. The LA MS4 Decision is not yet final; the Santa Ana Water Board respectfully requests an opportunity to supplement these comments should the Supreme Court modify its decision.

The California Supreme Court issued the *LA MS4 Decision* on August 29, 2016. The Los Angeles Regional Water Quality Control Board ("Los Angeles Water Board"), State Water Board, and Division of Finance filed a Petition for Rehearing of the Supreme Court's decision on September 13, 2016.[1] The Supreme Court extended its time through November 27, 2016, to consider granting rehearing or modification of the *LA MS4 Decision*.[2] Accordingly, the *LA MS4 Decision* is not yet final.

The Petition for Rehearing requests that the Supreme Court clarify certain portions of its decision to better guide its application to other test claims, including this Test Claim.[3] These clarifications would be instrumental to the Commission in ruling on the challenged provisions in the 2009 Permit. Any modification to the *LA MS4 Decision* could materially impact the Santa Ana Water Board's position and analysis with respect to how the decision applies to this Test Claim. Therefore, should the Supreme Court modify its decision in any manner, the Board respectfully requests an opportunity to supplement these comments in light of the modified decision.

B. The LA MS4 Decision has limited applicability because, unlike the 2001 Los Angeles Permit, the 2009 Permit includes a finding that the requirements implement only federal law.

An essential element underpinning the *LA MS4 Decision* is the Supreme Court's determination that the Los Angeles Water Board's 2001 MS4 Permit[4] (2001 Los Angeles Permit) was issued based on both federal and State law.[5] In contrast, when issuing the 2009 Permit, the Santa Ana Water Board implemented only federal law. Findings 1-5 of the Permit and Section II of the Fact Sheet set forth the Board's regulatory basis for issuing the Permit. In particular, Finding 3 provides, in part, "In accordance with Section 402(p)(2)(B)(iii) of the CWA and its implementing regulations, this order requires permittees to develop and implement programs and policies

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[1] The Petition for Rehearing is attached hereto.

[2] http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2062486&doc_no=S214855 (Last visited on October 21, 2016).

[3] In particular, the Petition for Rehearing asks the Supreme Court to: (1) confirm that in a mandates challenge to an MS4 permit, the determination of what federal law requires continues to be case specific, and necessitates an examination of evidence and issues unique to each MS4 permit and the applicable geographic location; (2) confirm that the court should give appropriate deference to a regional board's determination of what the Clean Water Act requires, so long as its determination is both express and supported by substantial evidence; (3) to delete the word "fatally" from page 27 of the slip opinion to clarify that terms appearing in permits issued by the United State Environmental Protection Agency in a small number of out-of-state jurisdictions do not constitute an exclusive list of the controls required to meet the federal standard. (Decision No. S214855, Petn. for Rehg., filed Sept. 13, 2016, p. 2.)

[4] California Regional Water Quality Control Board, Los Angeles Region, Order No. 01-182, NPDES Permit No. CAS004001, Waste Discharge Requirements for Municipal Storm Water and Urban Runoff Discharges within the County of Los Angeles, and the Incorporated Cities Therein, Except the City of Long Beach (December 13, 2001).

[5] Decision No. S214855, Slip. Op., pp. 21-22 ("In issuing the Permit, the Regional Board was implementing both state and federal law and was authorized to include conditions more exacting than federal law required.").

necessary to reduce the discharge of pollutants in urban storm water runoff to waters of the US to the maximum extent practicable (MEP)."[6] Additionally, the Fact Sheet states that the 2009 Permit is "being considered for renewal in accordance with Section 402(p) of the CWA and all requirements applicable to an NPDES permit..."[7] The 2009 Permit contains no express or implied statement that any of the provisions are authorized by State law.[8] Collectively, these findings make it clear that the Board intended to and did rely solely on federal law in issuing the Permit.

C. *Because the Santa Ana Water Board determined that the challenged permit provisions are necessary to meet the federal maximum extent practicable standard (MEP), the Commission should afford the Board an appropriate level of deference.*

In its decision, the Supreme Court held that a regional water quality control board ("regional board") may receive deference if a MS4 permit imposes permit conditions based solely on federal law. The opinion states that a regional board should receive deference as to what federal law requires when it has concluded that the disputed terms it chooses are the "only means by which the maximum extent practicable standard could be implemented."[9] The opinion further provides that, in that case, the "board's legal authority to administer the [Clean Water Act] and its technical expertise in water quality control would call on sister agencies as well as courts to defer to that finding."[10] The Santa Ana Water Board reads the reference to "sister agencies" to include agencies such as the Commission.

The Santa Ana Water Board understands the Supreme Court to mean that, to be entitled to deference, regional boards must make an express finding that the particular set of permit conditions finally embodied in a given permit is required to meet that federal standard, and must support that finding with evidence. And the Board understands the opinion to be consistent with the Board's reading of the Clean Water Act, where a regional board has devised a set of conditions to ensure local governments' compliance with federal law, the regional board does not have a choice to impose some other, overall less rigorous, set of conditions.[11]

As explained above, the 2009 Permit implements only federal law. Moreover, and critically, when issuing the Permit, the Santa Ana Water Board found that the requirements contained therein were necessary to meet the requirements of federal law, including the federal MEP standard.[12] Finding 3 of the 2009 Permit provides, in part:

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[6] 2009 Permit, p. 2.

[7] 2009 Permit Fact Sheet, p. 5.

[8] While Finding 2 of the 2009 Permit contains the Santa Ana Water Board's generic finding indicating that the Permit is also based on State law (for matters such as adoption and review process, reliance on approved water quality control plans, etc.), the specific permit requirements are controlled by the more specific findings and statements related to reliance on federal law. (2009 Permit, Finding 3, 5(a).)

[9] Decision No. S214855, Slip. Op., p. 22.

[10] *Ibid.*

[11] See, *ibid.*; see also Slip Op. 18 ("if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of 'true choice,' the requirement is not federally mandated.").

[12] In comparison, the Los Angeles Water Board made no finding that the permit requirements were necessary to implement the MEP standard. (Decision No. S214855, Slip. Op., p. 22.) Instead, the Los Angeles Water Board found only that the permit was consistent with or within the federal standard.

> *In accordance with Section 402(p)(2)(B)(iii) of the CWA and its implementing regulations, this order requires permittees to develop and implement programs and policies necessary to reduce the discharge of pollutants in urban storm water runoff to waters of the US to the maximum extent practicable (MEP).* (Emphasis added.)

Finding 5, subsection a) further states:

> *This order implements federally mandated requirements under Clean Water Act Section 402(p)(3)(B).*

Thus, when issuing the 2009 Permit, the Board expressly found that all permit terms, including the challenged provisions, were necessary to meet the federal standard. Accordingly, the Board is entitled to an appropriate level of deference in reaching this conclusion.

D. *The Supreme Court's decision was limited to interpreting the MEP standard and did not address other federal laws or regulations which mandate Permit provisions challenged in the Test Claim.*

The *LA MS4 Decision* addressed the narrow question of whether the federal MEP standard and certain implementing regulations[13] mandated both the trash can and inspection requirements contained in the 2001 Los Angeles Permit. In reaching its decision, the Supreme Court's analysis necessarily turned on whether, and to what extent, the MEP standard and the specific implementing regulations compelled the Los Angeles Regional Board to impose the challenged permit conditions.[14] Consequently, the Supreme Court decision has limited application when the federal standard compelling a challenged permit provision is wholly separate from the MEP standard and those specific implementing regulations.

A significant number of the challenged provisions in the 2009 Permit relate to the implementation of total maximum daily load ("TMDL") requirements.[15] As discussed in greater detail in the Santa Ana Water Board's March 9, 2011 Response, a TMDL is prepared for waters that remain impaired despite technology-based efforts to limit pollution.[16] The purpose of a TMDL is to determine how much of a specific pollutant a waterbody can tolerate and still meet water quality standards and protect beneficial uses, and then to allocate portions of the pollutant load to various point and nonpoint source dischargers. Point source dischargers, who have

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[13] The Supreme Court considered the 40 Code of Federal Regulations parts 122.26(d)(2)(iv)(A)(3), (B)(1), (C)(1), and (D)(3) in reaching its decision. (Decision No. S214855, Slip. Op., pp. 9 -10).

[14] *Id.* at p. 21 ("The federal CWA broadly directed the board to issue permits...designed to reduce the pollutant discharges to the maximum extent practicable").

[15] Narrative Statement In Support of Joint Test Claims In Re Santa Ana RWQCB, Order No. R8-2009-0030 (NPDES No. CAS618030), pp. 9-26.

[16] March 9, 2011 Response, pp. 19-21.

been issued NPDES permits, such as the Test Claimants, receive a wasteload allocation ("WLA"). Nonpoint dischargers receive a load allocation ("LA"). In California, TMDLs are developed by either the regional boards or USEPA.

Federal law specifically compelled the Santa Ana Water Board to include the TMDL-related provisions in the 2009 Permit. 40 Code of Federal Regulations part 122(d)(1)(vii)(B) mandates that NPDES permits contain effluent limits that are "consistent with the assumptions and requirements of any available wasteload allocation." Thus, federal law provides an independent basis, separate from the federal MEP standard, for including the challenged TMDL-related provisions.

Moreover, the nature of the discretion exercised by the Santa Ana Regional Board in complying with part 122(d)(1)(vii)(B) was different and more limited than under the MEP standard. Developing provisions to meet the MEP standard necessarily requires consideration and balancing of numerous factors, including the particular control's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness in light of evolving technology and scientific understandings of pollutant control.[17] In contrast, part 122(d)(1)(vii)(B) specifically directs the Board to include effluent limits which are consistent with the assumptions of any applicable WLAs. In other words, the Board had no "true choice" but to include the TMDL-related provisions in the 2009 Permit.[18]

The only discretion the Board employed when complying with 122(d)(1)(vii)(B) was crafting provisions which were consistent with the assumptions and requirements of the applicable WLAs. In exercising this limited discretion, the Board simply translated the WLAs directly into effluent limits--so the effluent limitations were exactly the same as the WLAs. This involved a significantly lesser amount of discretion than did the provisions at issue in the *LA MS4 Decision*.

Additionally, federal regulations not addressed in the *LA MS4 Decision* specifically directed the Board to include other provisions challenged by the Test Claimants. Sections XII.B through XII.E include low impact development and hydromodifcation requirements which implement 40 Code of Federal Regulations part 122.26(d)(2)iv)(A)(2).[19] Section XIII includes requirements for public education and outreach which implement 40 Code of Federal Regulations part 122.26(d)(2)(iv)(B)(6).[20] Section XI includes requirements for reducing pollutants from residential facilities which implement 40 Code of Federal Regulations parts 122.26(d)(2)(iv)(A)(6) and 122.26(d)(2)(iv)(A).[21] Because federal law compelled the Board to include these requirements, and the Board determined that these provisions were necessary to

[17] March 9, 2011 Response, pp. 7-9.

[18] Decision No. S214855, Slip. Op., p. 18 ("On the other hand, if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a "true choice," the requirement is not federally mandated.")

[19] March 9, 2011 Response, pp. 34-36.

[20] March 9, 2011 Response, pp. 37-38.

[21] March 9, 2011 Response, p. 38.

meet these federal requirements in conformity with the federal MEP standard, the Board is entitled to appropriate level of deference in making this determination.

E. The Supreme Court's decision applies only to the Santa Ana Water Board's arguments that the challenged provisions are mandated by federal law.

Article XIIIB, Section 6 of the California Constitution requires subvention of funds to reimburse local governments for state-mandated programs in specified situations. There are several exceptions and limitations to the subvention requirements that provide bases for the Commission to determine that the Test Claim is not subject to subvention. Article XIIIB, Section 6 provides, "[w]henever 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 that local government for the costs of the program or increased level of service." Implementing statutes clarify that no subvention of funds is required if: (1) the mandate imposes a requirement that is mandated by a federal law or regulation and results in costs mandated by the federal government, unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation;[22] or (2) the local agency proposed the mandate;[23] or (3) the local agency has the authority to levy service charges, fees, or assessments sufficient to pay.[24]

As discussed above, the *LA MS4 Decision* reached only the question of whether certain provisions in the 2001 Los Angeles Permit constituted federal mandates and, thus, would be exempt from subvention requirements. In addition to arguing that the challenged provisions in the 2009 Permit were federal mandates, in its March 9, 2011 Response, the Santa Ana Water Board argued that these provisions fell under other exemptions and limitations.[25] The Board also argued that because the Test Claimants had not exhausted their administrative remedies, they could not collaterally attack the validity of the 2009 Permit in this forum.[26] Therefore, in reviewing the Test Claim, the Commission is required to evaluate each and every challenged provision to determine whether it is mandated by federal law or is nonreimbursable subject to some other exemption or threshold determination.

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[22] Govt. Code, § 17556, subd. c.

[23] *Id.*, § subd. (a).

[24] *Id.*, § subd. (d).

[25] The Santa Ana Water Board argued that the challenged provisions were not subject to subvention because: (a) the challenged provisions did not impose new programs of higher levels of existing service; (b) the challenged provisions did not impose requirements unique to local agencies and not mandates particular to government; and (c) Test Claimants have the authority to levy service charges, fees, or other assessments to pay for the programs. (March 9, 2011 Response, pp. 10-19.)

[26] March 9, 2011 Response, p. 18.

III. Conclusion

The Santa Ana Water Board appreciates the Commission's consideration of these comments.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my personal knowledge.

David Rice
Attorney III
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, Floor 22
Sacramento, CA 95814
Telephone: (916) 341-5182
Email: David.Rice@waterboards.ca.gov

Attachment

cc: Service List via Commission Drop Box

In the Supreme Court of the State of California

STATE DEPARTMENT OF FINANCE, et al.,

Plaintiffs and Respondents,

v.

COMMISSION ON STATE MANDATES,

Defendant and Respondent,

COUNTY OF LOS ANGELES, et al.,
Real Parties in Interest and Appellants.

Case No. S214855

Second Appellate District, Division One, Case No. B237153
Los Angeles County Superior Court, Case No. BS130730
Hon. Ann I. Jones, Judge

PETITION FOR REHEARING

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
KATHLEEN A. KENEALY
Chief Assistant Attorney General

DOUGLAS J. WOODS
Senior Assistant Attorney General
TAMAR PACHTER
Supervising Deputy Attorney General
*NELSON R. RICHARDS
Deputy Attorney General
State Bar No. 246996
2550 Mariposa Mall
Room 5090
Fresno, CA 93721
Telephone: (559) 477-1688
Fax: (559) 445-5106
Email: Nelson.Richards@doj.ca.gov
Attorneys for Plaintiffs and Respondents California Department of Finance, State Water Resources Control Board, and California Regional Water Quality Control Board, Los Angeles Region

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INTRODUCTION

Respondents have reviewed the Court's opinion in this case and are committed to using its guidance to shape their future decisions and conduct. Respondents understand that federal municipal separate storm sewer system (MS4) permits issued by the State's Water Boards to local governments now must expressly state which controls are required by federal law, and that the Water Boards bear the burden of establishing that such terms are necessary to control pollutant discharges to the meet the federal standard.[1]

Respondents are concerned, however, that certain broad language could be misread by those implementing the opinion, including the Commission on State Mandates (Commission) and lower courts, to mean that it is effectively impossible for the State to issue MS4 permits without imposing state mandates. The Clean Water Act and United States Environmental Protection Agency (US EPA) regulations provide the required standard: control of discharges to the "maximum extent practicable." That federal standard is met, in turn, by a set of specific permit conditions tailored to local conditions. Under a misreading of the Court's opinion, the State could never show that the contents of an MS4 permit are mandated by federal law because the permit will always reflect decisions made by the regional boards, exercising their expert judgment, about the mix of terms necessary to meet this federal standard in light of local conditions.

If the Commission or lower courts were to adopt that misreading, the resulting uncertainties raise significant questions about California's ability to continue administration of the MS4 permitting program. These uncertainties have already prompted US EPA to ask how California's

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[1] "Water Boards" means the State Water Resources Control Board and nine Regional Water Quality Control Boards.

Water Boards can continue administering the MS4 permit program consistent with federal law. And there is at least a possibility that US EPA could take back the program if it believes there is substantial regulatory uncertainty. In addition, if a misreading of the opinion resulted in a common understanding that the State is compelled to fund typical permit terms that constitute ordinary municipal functions—such as street sweeping and maintaining storm sewer systems—the State might find that cost prohibitive and relinquish the program to US EPA.

To avoid unnecessary uncertainty and future litigation about the Court's intent, and to help preserve this important example of cooperative federalism, Respondents respectfully request that the Court clarify its opinion in three respects. First, the Court should confirm that in a mandates challenge to an MS4 permit, the determination of what federal law requires continues to be case-specific, and necessitates an examination of the evidence and issues unique to each MS4 permit and geographic location. Second, the Court should clarify its statement that in reviewing future cases, the Commission must give weight to the regional boards' determination of what the Clean Water Act requires, so long as its determination is both express and supported by substantial evidence. Finally, the Court should delete the word "fatally" from page 27 to clarify that the terms appearing in permits issued by US EPA in a small number of out-of-state jurisdictions do not constitute an exclusive list of the controls required to meet the federal standard.

ARGUMENT

I. AN OVERBROAD READING OF THE OPINION RAISES SERIOUS QUESTIONS ABOUT CALIFORNIA'S CONTINUED PARTICIPATION IN MS4 PERMITTING.

California was the first State in the nation to obtain US EPA approval to administer its own permitting program under the National Pollutant

Discharge Elimination System. (*Environmental Protection Agency v. California ex rel. State Water Resources Control Board* (1976) 426 U.S. 200, 209 (*Environmental Protection Agency*).) Since 1973, the Legislature has authorized the State to assume responsibility for issuing permits to dischargers to implement that federal program.

The State's role as a federally authorized NPDES permitting agency serves a number of important state objectives. Among other things, it avoids duplication of effort by federal and state regulators; avoids the logistical difficulties of two regulators coordinating their conduct; allows for regional boards drawn from the communities they serve to draft permits, rather than federal officials located elsewhere (see Wat. Code, § 13201); allows for a single avenue of judicial review in state court for water quality permits (40 C.F.R. § 123.30; Wat. Code, § 13330); and allows the State to receive federal grants (see 33 U.S.C. § 1256). Local governments avoid having to obtain two different permits from different regulators (one to comply with federal law, one to comply with state law), and they negotiate permit terms with agency officials who have local ties to, and knowledge of, the relevant community and conditions. (See Wat. Code, § 13201, subd. (a) [providing that members of regional boards must "reside or have a principal place of business within the region"].) And California's citizens who use the State's waters for drinking, fishing, swimming, municipal, agricultural, recreational, and other purposes affected by water pollution can more meaningfully participate in localized decisions affecting their water quality.

These sound reasons have motivated the State to administer federal NPDES permitting for over 40 years. (See Wat. Code, § 13370.) Similar reasoning led Congress to encourage States across the country to do the same. (See 33 U.S.C. § 1251(b).) It is not surprising, then, that 46 States have obtained NPDES program approval in order to realize the benefits of

cooperative federalism. (See https://www.epa.gov/npdes/npdes-state-program-information [as of Sep. 9, 2016].)

Congress amended the Clean Water Act in 1987 to require NPDES permits for MS4s. MS4 permits are expressly required of and issued to local governments, not States; they are direct federal regulation of local governments. (See 33 U.S.C. §§ 1311, 1319, 1342(i), (p)(3)(B), 1365.) This means that local governments in California would incur compliance costs associated with these requirements even if the State never administered the MS4 permitting program. Those requirements are enforceable by the US EPA (33 U.S.C. § 1342(d)(2)-(4); 40 C.F.R. § 123.44) and by third party judicial challenges. (40 C.F.R. § 123.30; Wat. Code, § 13330.)[2]

Permits set out the specific requirements that allow MS4 operators to comply with the Clean Water Act. (See 33 U.S.C. § 1342(k); *Environmental Protection Agency*, *supra*, 426 U.S. at p. 205 [NPDES permits define "a preponderance of a discharger's obligations" under the act]; cf. *City of Burbank v. State Water Resources Control Bd.* (2005) 35

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[2] Cases where federal law applies to local governments only because of state action; where the state has imposed conditions that exceed what federal law requires; and where federal requirements imposed on the State are passed down to local government are distinguishable. For example, in *Division of Occupational Safety & Health v. State Bd. of Control* (1987) 189 Cal.App.3d 794, 798-800, 803, to avoid federal preemption, the State adopted OSHA regulations requiring local fire departments to use three-person firefighting teams instead of the two-person teams. Absent state action, no one could have used federal law to compel those departments to use three-person teams. In contrast, the Clean Water Act's requirements apply to MS4 operators regardless of whether the State administers the permitting program, and US EPA, or a third party, could force operators to obtain permits or compel the inclusion of specific, more stringent MS4 permit requirements to reflect the federal standard in 33 U.S.C. § 1342(p)(3)(B)(iii).

Cal.4th 613, 626-627 [noting that principles of federal supremacy prohibit Water Boards from relaxing federal permitting standards].) Terms may include, for example, street sweeping and maintaining storm sewer systems, which the municipality would perform in any event. Standing alone, these types of terms would not satisfy the federal standard, but are included to provide a complete picture of all the actions the municipality will take that contribute to meeting the federal standard.

As a practical matter, the State could not participate in the MS4 permitting program if those permit conditions were treated, for the purposes of state mandates law, as state rather than federal mandates. While this case involves trash receptacles and inspections of certain facilities, the opinion will be applied to a host of other core municipal functions commonly included as MS4 permit terms. The collective cost of every California MS4 operator's compliance with its permit, or large portions of its permit, would reach into the billions of dollars within a few years' time. One county, for instance, estimates that the cost of compliance will "be in the hundreds of millions of dollars" for the governments covered by its permit. (County of Orange Amicus Br. 3.)

Faced with a risk of unanticipated state outlays on that order of magnitude, the State could either revise the law to require the State Board to return MS4 permitting to US EPA, or simply choose to not fund the mandates. (See Cal. Const., art. XIII B, § 6, subd. (b); Gov. Code, § 17581; *California School Boards Association v. Brown* (2011) 192 Cal.App.4th 1507, 1513-1514 ["with respect to a reimbursable mandate, for each fiscal year, the Legislature is required to choose to either fully fund the annual payment toward the arrearage or suspend the operation of the mandate"].) As Justice Cuéllar notes in his concurring and dissenting opinion, "if the state knows ex ante that it will be unable to pass along the expenses to the local areas that experience the most costs and benefits from the mandate at

issue" it "would be unduly discouraged from participating" in the program, even where such participation would "otherwise be in California's interest[.]" (Conc. & Dis. Slip Op. 6-7.)

The Regional Administrator for US EPA Region 9, which has jurisdiction over California, has informed the State Board that US EPA has concerns about California's ability to continue implementing the MS4 permitting program. (Request for Judicial Notice in Support of Respondents' Petition for Rehearing (RJN), Ex. A.) And US EPA's concern is of significant concern to the State. If the opinion as written creates regulatory uncertainty, even for a period of time, US EPA could preemptively take back the MS4 permitting program, or it could be petitioned by members of the public to withdraw its approval. (33 U.S.C. § 1342(c)(3); 40 C.F.R. § 123.64(b)(1); see generally 40 C.F.R. § 123.64.) Federal law requires that the State administering an NPDES permitting program have authority to enforce the terms of the permits it issues. (See 33 U.S.C. § 1342(b)(7); 40 C.F.R. § 123.37 [requiring that agencies have "immediate[] and effective[]" authority to prevent violations of permits]; see also 40 C.F.R. § 123.23(c) [requiring that, as a condition of administering the federal program, the state attorney general must confirm that the State has "adequate authority to carry out the program," including enforcement authority].) Similarly, federal law narrowly limits the circumstances under which permits can be modified once final. (See 40 C.F.R. § 122.62; see also Wat. Code, § 13330, subd. (d) [noting that if a permit is not challenged by an aggrieved party, the permit "shall not be subject to review by any court"].) US EPA is concerned that an MS4 permit or many of its terms may become unenforceable by the Water Boards, if deemed to be state mandates and the State fails to guarantee funds. If so, the Water Boards may no longer be able to enforce MS4

permit terms as required by federal law, which could amount to impermissible permit modifications. (See RJN, Ex. A, at p. 3.)

Respondents believe that it is in Californians' best interests for the Water Boards to continue administering the MS4 permitting program—as the Legislature and Congress decided long ago. (See Wat. Code, § 13370; 33 U.S.C. § 1251(b).) They respectfully request that the Court modify its opinion in the limited ways described below to avoid any unintended interference with that goal. These modifications would clarify, without requiring further litigation about the Court's intent and a potentially extended period of uncertainty, that the opinion in this case does not hold that all future MS4 permit terms are state mandates. That clarification would do much to ensure the continued vitality of a program that for more than 40 years has allowed Californians to have a prominent role in deciding exactly how best to implement the broad requirements of the Clean Water Act in California communities.

II. RESPONDENTS ASK THE COURT TO CLARIFY THAT THE COMMISSION MUST EVALUATE EACH MS4 PERMIT TEST CLAIM ON A CASE-BY-CASE BASIS, CONSIDERING MULTIPLE SOURCES OF EVIDENCE OF WHAT FEDERAL LAW REQUIRES.

Respondents ask the Court to clearly state that the opinion in this case is not dispositive of all the future MS4 permit test claims, and that the Commission must evaluate future test claims and permit terms in light of the facts and evidence in each case to determine whether they are state or federal mandates. In particular, Respondents request three modifications: first, to confirm that in future mandates proceedings, the determination of what federal law requires in particular circumstances remains a case-by-case inquiry; second, and relatedly, to confirm that the Commission and lower courts should accord some deference (Slip Op. 22) to adequately supported and express determinations by the regional boards on whether permit terms are required to meet the federal standard; and finally, to

remove the word "fatally" from the final sentence of section II.B.2.b. (Slip Op. 27.) These clarifications would be consistent with, and follow from, pages 24 through 27 of the opinion, in which the Court reviewed the evidence before the Commission in this case.

These clarifications would prevent the Court's opinion from being misconstrued to make the result of every future MS4 mandates proceeding a foregone conclusion simply because regional boards exercise expertise in selecting the suite of controls necessary to meet the federally mandated maximum-extent-practicable standard in a particular MS4, and would eliminate the substantial uncertainties and harm resulting from that misreading.

A. The combination of permit terms required to control the discharge of pollutants to the maximum extent practicable is a case-by-case inquiry.

MS4 permitting poses unique regulatory challenges. Municipal stormwater pollution is "one of the most significant sources of water pollution in the nation." (*Environmental Defense Center, Inc. v. United States Environmental Protection Agency* (9th Cir. 2003) 344 F.3d 832, 840.) Over the years, effectively regulating the stormwater system source has posed a vexing regulatory problem because it allows pollutants to enter the waterways from "possibly millions of diverse point sources." (See *Building Industry Association of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 874 (*Building Industry*).) It took well over two decades—and Congress's enactment of the Water Quality Act of 1987—to develop a workable approach. (*Id.*, at pp. 872-875 [recounting history of stormwater regulation]; see also *Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency* (9th Cir. 1992) 966 F.2d 1292, 1296 [explaining that the Water Quality Act was a response to "both the environmental threat posed by

storm water runoff and EPA's problems in implementing regulations"].) This long struggle yielded the flexible maximum-extent-practicable standard. (See 33 U.S.C. § 1342(p)(3)(B); 40 C.F.R. § 122.26(d).)

Successful implementation of that standard requires permits to be "developed in a flexible manner to allow site-specific permit conditions to reflect the wide range of impacts that can be associated with [stormwater] discharges." (55 Fed.Reg. 48037-48038 (Nov. 16, 1990).) When developing controls to meet that standard, permit-writers must "balanc[e] numerous factors, including [a] particular control's technical feasibility, cost, public acceptance, regulatory compliance, and effectiveness." (*Building Industry*, *supra*, 124 Cal.App.4th at p. 889.) The standard was also designed to evolve over time to account for advances in technology and regulators' understanding of pollution controls. (See 55 Fed.Reg. 48052 (Nov. 16, 1990) ["The Permits for discharges from municipal separate storm sewer systems will be written to reflect changing conditions that result from program development and implementation and corresponding improvements in water quality"]; 3 AR 3797 ["The EPA . . . expects stormwater permits to follow an iterative process whereby each successive permit becomes more refined, detailed, and expanded as needed, based on experience under the previous permit"].) This means that although federal law mandates the standard municipalities must meet, it does not specify the particularized set of terms that must appear in a permit; indeed, the US EPA has cautioned against using its guidance documents as scripts, checklists, or enforcement "how to's." (3 AR 3393.)

At the same time, when regional boards draft permits to implement the federal maximum-extent-practicable standard, several interrelated factors constrain what they may do. Regional boards rely on the permit applications submitted by MS4 operators to formulate permit terms. (Wat. Code, §§ 13260, 13374.) An MS4 operator that believes the regional board

has abused its discretion may seek relief before the State Board and in state court. (*Id.*, §§ 13320, 13330.) US EPA also reviews all permits, and may block a permit's issuance if it does not comply with federal law. (33 U.S.C. § 1342(d)(2)-(4); 40 C.F.R. § 123.44.) If the state agency does not fix the objection and following a federally specified process, US EPA may issue the MS4 permit. (33 U.S.C. § 1342(d)(4); 40 C.F.R. § 123.44(h)(2).) The public plays a role, too, and may participate in the permitting process and challenge a permit in state court. (See 40 C.F.R. § 124.11 [requiring that public be allowed to comment on permit applications]; *id.*, § 124.12 [requiring that public be allowed to participate in permit hearings]; *id.*, § 123.30 [requiring an opportunity for judicial review in state court]; Cal. Code Regs., tit. 23, § 2235.2 [incorporating federal rules into California permitting process]; see also Wat. Code, § 13330 [allowing "any aggrieved party" to file a petition in superior court].)

So while federal law does not prescribe the precise terms that must appear in an MS4 permit, there is a body of evidence—permit applications, US EPA guidance documents, US EPA-issued permits, US EPA suggestions or input during the permitting process, and permits issued in other States, among other things—that can be evaluated to determine whether a term is federally required.

B. The Court should clarify that if substantial evidence supports the regional board's findings about the need for specific controls to meet the federal standards, some deference is appropriate.

The opinion states that a regional board should receive deference as to what federal law requires when it has concluded that the disputed terms it chooses are the "only means by which the maximum extent practicable standard could be implemented." (Slip Op. 22.) Respondents understand this to mean that, to be entitled to deference, regional boards must make an express finding that the particular set of permit conditions finally embodied

in a given permit is required to meet that federal standard, and must support that finding with evidence. And Respondents understand the opinion to be consistent with the State's reading of the Clean Water Act that, where a regional board has devised a set of conditions to ensure local governments' compliance with federal law, the board does not have a choice to impose some other, overall less rigorous, set of conditions. (See *ibid.*; see also Slip Op. 18 ["if federal law gives the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement by virtue of a 'true choice,' the requirement is not federally mandated"].) Respondents are concerned, however, that this language might be misunderstood and used to support an argument that the regional boards must make an impossible finding to receive deference—because there is no single term, or set of terms, that will ever be the *only* way to comply with the inherently flexible federal standard.

Affording some deference or weight to an agency's determination is appropriate where there is no one right answer to a question, and legislators in Congress or the Legislature have either expressly or implicitly authorized an expert agency to work out the specifics. (See, e.g., *American Coatings Association, Inc. v. South Coast Air Quality District* (2012) 54 Cal.4th 446, 475 [deferring to expert agency because there was no "objectively correct categorization" under a pollution-control statute]; see also *Larkin v. Workers' Comp. Appeals Bd.* (2015) 62 Cal.4th 152, 163 [where statute was susceptible to more than one interpretation, Court gave "great weight to the Board's interpretation because of its expert knowledge of complex workers' compensation statutes, and its role as the agency accountable for implementing the statutory scheme"].) Federal administrative law principles that would control construction of the Clean Water Act are similar. (See *United States v. Mead* (2001) 533 U.S. 218, 229 [discussing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984) 467

U.S. 837 and noting that deference applies when an expert agency interprets an ambiguous statute].) These general principles apply with special force when what is at issue is the application of a purposefully flexible standard to a particular set of local circumstances. And an expert agency's properly articulated and supported interpretation of what federal law requires, reached after a permitting process involving dozens of hearings and tens-of-thousands of pages of administrative record (see 3 CT 415; 1 CT 25), should receive appropriate deference. By enacting the Water Quality Act of 1987 and adding the maximum-extent-practicable standard to the law, Congress left it to the permit-issuing agency's expert judgment to choose a set of terms that meet the Clean Water Act requirements for a particular MS4—a quintessential example of when deference is appropriate.

Respondents ask the Court to clarify that traditional deference principles apply when a regional board determines what federal law requires of local governments operating MS4s and its determination is supported by substantial evidence. Applied in this context, deference, which is "fundamentally situational" (*Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 12), would recognize the practical challenges of Clean Water Act permitting, and allow regional boards to bring their expertise to bear in this notoriously difficult area of regulation (see *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 812 ["considerable weight should be given to the findings of experienced administrative bodies made after a full and formal hearing, especially in cases involving technical and scientific evidence"]).

C. Removing the word "fatally" would ensure that the Commission considers all the evidence bearing on what the Clean Water Act requires.

Finally, Respondents ask the Court to strike out one word in its opinion that Respondents fear could be misread to suggest that if the EPA

has not included a term in a permit that it has issued in the past, that fact is "fatal" to Respondents' ability to show that a term is a federal mandate in a different context. (Slip Op. 27.) Because the specific terms in a permit emerge from a collaborative process that involves the MS4 operators, the regional board, the public, and US EPA, terms that are appropriate for a particular California MS4 permit may not find counterparts in existing, US EPA-issued permits addressing conditions in other States. If the regional boards were forced to limit permit conditions to those already found in existing US EPA-issued permits, the resulting California permits would be unduly constrained in implementing—and, indeed, might be unable to satisfy—the federal maximum-extent-practicable standard. Proper application of that standard depends on a host of factors unique to a particular location—including, but not limited to, the region's topography, population and population density, annual rainfall, frequency of rainfall, and land uses. It also depends on constructing a particular permit with a number of locally tailored, individual terms working together to achieve compliance with the federal standard. Limiting new permits to terms that have already been used in the four States and handful of federal jurisdictions where US EPA issues permits would also preclude California and its localities from taking advantage of emerging best practices or innovative approaches and technologies. A rule that treats any term not among the terms in past US EPA-issued permits as a state mandate, even where such terms are necessary to meet the maximum-extent-practicable standard in the future, would jeopardize California's continued administration of the MS4 permitting program for the reasons discussed in Section I.

Certainly, a US EPA-issued permit from another jurisdiction may provide some evidence of what federal law requires. Treating US EPA-issued permits as one piece of evidence among many—such as US EPA

guidance documents, site-specific reports, etc.—will allow the regional boards appropriate flexibility to select a set of controls that will reliably and efficiently meet the federal standard, while enabling the Commission to determine in an informed way whether the permit contains terms that are in fact state mandates. Respondents believe this approach is fully consistent with the intent of this Court's opinion. Removing the adverb "fatally" from the opinion would achieve that goal.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court grant rehearing and make minor changes to its opinion clarifying that the federal mandates question in MS4 permit test claims remains a case-by-case inquiry.

Dated: September 13, 2016

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
KATHLEEN A. KENEALY
Chief Assistant Attorney General
DOUGLAS J. WOODS
Senior Assistant Attorney General
TAMAR PACHTER
Supervising Deputy Attorney General

Nelson Richards / PPL

NELSON R. RICHARDS
Deputy Attorney General
Attorneys for Plaintiffs and Respondents California Department of Finance, State Water Resources Control Board, and California Regional Water Quality Control Board, Los Angeles Region

CERTIFICATE OF COMPLIANCE

I certify that the attached Petition for Rehearing uses a 13 point Times New Roman font and contains 4,114 words.

Dated: September 13, 2016

KAMALA D. HARRIS
Attorney General of California

Nelson Richards / PPL

NELSON R. RICHARDS
Deputy Attorney General
Attorneys for Plaintiffs and Respondents California Department of Finance, State Water Resources Control Board, and California Regional Water Quality Control Board, Los Angeles Region

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *Department of Finance v. Commission on State Mandates (County of Los Angeles)*

No.: **S214855**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 13, 2016, I served the attached

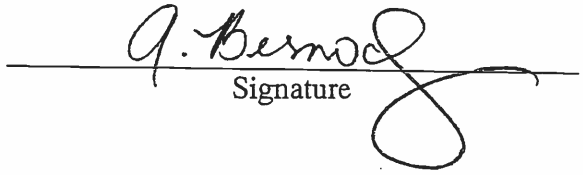
PETITION FOR REHEARING

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

(See attached service list.)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 13, 2016, at San Francisco, California.

A. Bermudez
Declarant



Signature

SERVICE LIST

Department of Finance v. Commission on State Mandates (County of Los Angeles)

Case No.: S214855

Representing Real Parties in Interest County of Los Angeles, Cities of Bellfolower, Carson, Commerce, Covina, Downey, and Signal Hill: Howard Gest David W. Burhenn Burhenn & Gest, LLP 624 South Grand Avenue, Suite 2200 Los Angeles, CA 90017	***Representing Real Party in Interest City of Monterey Park:*** Christi Hogin Jenkins & Hogin LLP Manhattan Towers 1230 Rosecrans Avenue, Suite 110 Manhattan Beach, CA 90266
Representing Real Parties in Interest County of Los Angeles: John F. Krattli County Counsel Judith A. Fries Office of the Los Angeles County Counsel 500 West Temple Street, Room 653 Lost Angeles, CA 90012	***Representing Respondent Commission on State Mandates:*** Camille Shelton Chief Legal Counsel Commission on State Mandates 980 Ninth Street, Suite 300 Sacramento, CA 95814
Representing City of Vernon: Nicholas George Rodriguez City Attorney Zaynah Moussa City of Vernon 4305 Santa Fe Avenue Vernon, CA 90058	***Representing Real Parties in Interest Cities of Artesia, Beverly Hills, Norwalk, Rancho Palos Verdes, and Westlake Village:*** Ginetta L. Giovinco Richards, Watson & Gershon 355 South Grand Avenue, 40th Floor Los Angeles, CA 90071-3101
Amicus curiae Alameda Countywide Clean Water Program, City/County Association of Governments of San Mateo County, Santa Clara Valley Urban Runoff Pollution Prevention Program Gregory Joe Newmark Meyers, Nave, Riback, Silver & Wilson 633 West Fifth Street, Suite 1700 Los Angeles, CA 90071	***Amicus curiae Cities of Aliso Viejo, Lake Forest, Santa Ana*** Jonathan Gerard Monette Best Best & Krieger LLP 2000 Pennsylvania Avenue, Northwest Washington, DC 20006

Amicus curiae *Alameda Countywide Clean Water Program, City/County Association of Governments of San Mateo County, Santa Clara Valley Urban Runoff Pollution Prevention Program* Robert L. Falk Morrison & Foerster LLP 425 Market Street San Francisco, CA 94105	*Amicus curiae* *Cities of Costa Mesa, Westminster:* Baron Jacob Bettenhausen Jones & Mayer 3777 North Harbor Boulevard Fullerton, CA 92835
Amicus curiae *City of Huntington Beach* Jennifer Michelle McGrath Office of the City Attorney 2000 Main Street P.O. Box 190 Huntington Beach, CA 92648	*Amicus curiae* *California Stormwater Quality Association, Riverside County Flood Control and Water Cons. District, County of Riverside* Theresa A. Dunham Somach, Simmons & Dunn 500 Capitol Mall, Suite 1000 Sacramento, CA 95814
Amicus curiae *California State Association of Counties, League of California Cities* Timothy Martin Barry County of San Diego 1600 Pacific Highway, Suite 355 San Diego, CA 92101	*Amicus curiae* *City of Orange* Wayne William Winthers Office of the City Attorney 300 East Chapman Avenue Orange, CA 92866
Amicus curiae *City of Cypress* Anthony Robert Taylor Aleshire & Wynder LLP 18881 Von Karman Avenue, Suite 400 Irvine, CA 92612	*Amicus curiae* *County of Orange* Ryan Michael Baron Office of the County Counsel Hall of Administration P.O. Box 1379 Santa Ana, CA 92702
Amicus curiae *Cities of Yorba Linda, Irvine, San Clemente, Dana Point* Jeremy Nathan Jungreis Richard Montevideo Rutan & Tucker, LLP 611 Anton Boulevard, #1400 Costa Mesa, CA 92626	*Amicus curiae* *Cities of Brea, Buena Park, Seal Beach* Candice Kim Lee Richards Watson & Gershon 355 South Grand Avenue, Floor 40 Los Angeles, CA 90071
Amicus curiae *County of San Diego* Shawn David Hagerty Best Best & Krieger LLP 655 West Broadway, 15th Floor San Diego, CA 92101	*Amicus curiae* *City of Anaheim* Michael Robert Houston City Attorney, City of Anaheim 200 South Anaheim Boulevard, #356 Anaheim, CA 92805

Amicus curiae *City of Mission Viejo* Mark Kitabayashi Bergman & Dacey 10880 Wilshire Boulevard, #900 Los Angeles, CA 90024	*Amicus curiae* *Cities of Tustin, Laguna Hills* M. Lois Bobak Woodruff Spradlin & Smart, APC 555 Anton Boulevard, Suite 1200 Costa Mesa, CA 92626
Amicus curiae *City of Newport Beach* Aaron Cain Harp City of Newport Beach 100 Civic Center Drive P.O. Box 1768 Newport Beach, CA 92660	*Amicus curiae* *City of Laguna Niguel* Terry E Dixon Attorney at Law 30111 Crown Valley Parkway Laguna Niguel, CA 92677
Clerk, Court of Appeal Second Appellate District Ronald Reagan State Building 300 S. Spring Street, 2nd Floor North Tower Los Angeles, CA 90013	Clerk Los Angeles County Superior Court 111 N. Hill Street Department 86 Los Angeles, CA 90012

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

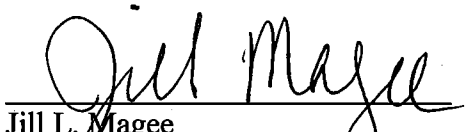
I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On October 21, 2016, I served the:

> **Claimant Response to the Request for Additional Briefing,**
> **SARWQCB Response to the Request for Additional Briefing, and**
> **Finance Response to the Request for Additional Briefing**
> *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 October 21, 2016 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

Last Updated: 10/3/16

Claim Number: 09-TC-03

Matter: Santa Ana Regional Water Permit - Orange County

Claimants: City of Anaheim
City of Brea
City of Buena Park
City of Costa Mesa
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Orange County Flood Control District

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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

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

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@biasc.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@cityofsthelena.org

Lisa Bond, *Richards,Watson & Gershon,LLP*
355 South Grand Avenue, 40th Floor, Los Angeles, CA 90071-3101
Phone: (213) 626-8484
lbond@rwglaw.com

Danielle Brandon, Budget Analyst, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
danielle.brandon@dof.ca.gov

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*
624 S. Grand Ave., 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

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
achinncrs@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

Chris Crompton, Deputy Director of Public Works, *Orange County Public Works*
Orange County Environmental Resources, 2301 North Glassell Street, Orange, CA 92865
Phone: (714) 955-0630
chris.crompton@ocpw.ocgov.com

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

Terri Elliott, Principal Civil Engineer, *City of Huntington Beach*
Public Works Department, 2000 Main Street, PO Box 190, Huntington Beach, CA 92648
Phone: (714) 375-8494
TElliott@surfcity-hb.org

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

Adam Fischer, *Santa Ana Regional Water Quality Control Board*
3737 Main Street, Suite 500, Riverside, CA 92501
Phone: (951) 320-6363
afischer@waterboards.ca.gov

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

Howard Gest, *Burhenn & Gest,LLP*
624 South Grand Avenue, Suite 2200, Los Angeles, CA 90402
Phone: (213) 629-8787
hgest@burhenngest.com

Nicholas Ghirelli, *Richards, Watson & Gershon*
355 South Grand Avenue, 40th Floor, Los Angeles, CA 90071-3101
Phone: (213) 626-8484
Nghirelli@rwglaw.com

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

Juliana Gmur,
1865 Hernden Avenue, Suite K-44, Clovis, CA 93611
Phone: (559) 960-4507
julianagmur@msn.com

Catherine George Hagan, Senior Staff Counsel, *State Water Resources Control Board*

c/o San Diego Water Board, 2375 Northside Drive, Suite 100, San Diego, CA 92108
Phone: (619) 521-3012
catherine.hagan@waterboards.ca.gov

Kimberly Hall-Barlow, *Jones and Mayer*
3777 N. Harbor Blvd., Fullerton, CA 92835-1366
Phone: (714) 754-5399
khb@jones-mayer.com

Mary Halterman, Principal Program Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Mary.Halterman@dof.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*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3000
aharp@newportbeachca.gov

Steven Hauerwaas, *City of Fountain Valley*
10200 Siater Avenue, Fountain Valley, CA 92708-4736
Phone: (714) 593-4441
steve.hauerwaas@fountainvalley.org

Jarad Hildenbrand, City Manager, *City of Villa Park*
17855 Santiago Boulevard, Villa Park, CA 92861
Phone: (714) 998-1500
jarad@villapark.org

Michael Ho, *City of Seal Beach*
211 Eight Street, Seal Beach, CA 90740
Phone: (562) 431-2527
mho@ci.seal-beach.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

Travis Hopkins, *City of Huntington Beach*
2000 Main Street, Huntington Beach, CA 92648
Phone: (714) 536-5437
THopkins@surfcity-hb.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

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

David Jacobs, Director of Public Works, *City of Buena Park*
6650 Beach Boulevard, Buena Park, CA 90621
Phone: (714) 562-3670
djacobs@buenapark.com

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

Matt Jones, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
matt.jones@csm.ca.gov

Jeremy Jungreis, Attorney, *Rutan & Tucker, LLP*
611 Anton Boulevard, 14th Floor, Costa Mesa, CA 92626
Phone: (714) 338-1882
jjungreis@rutan.com

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

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

Jay Lal, *State Controller's Office (B-08)*
Division of Accounting & Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0256
JLal@sco.ca.gov

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

Candice Lee, *Richards,Watson & Gershon,LLP*
355 South Grand Avenue, 40th Floor, Los Angeles, CA 90071

Phone: (213) 626-8484
clee@rwglaw.com

Keith Linker, *City of Anaheim*
Public Works, 200 S. Anaheim Boulevard, Anaheim, CA 92805
Phone: (714) 765-5148
KLinker@anaheim.net

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

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

Andre Monette, Partner, *Best Best & Krieger, LLP*
2000 Pennsylvania NW, Suite 5300, Washington, DC 20006
Phone: (202) 785-0600
andre.monette@bbklaw.com

Richard Montevideo, *Rutan & Tucker,LLP*
611 Anton Blvd., Suite 1400, Costa Mesa, CA 92626
Phone: (714) 641-5100
rmontevideo@rutan.com

Peter Naghavi, *City of Costa Mesa*
77 Fair Drive, Costa Mesa, CA 92628
Phone: (714) 754-5343
pnaghavi@ci.costa-mesa.ca.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

Kimberly Nguyen, *MAXIMUS*
3130 Kilgore Road, Suite 400, Rancho Cordova, CA 95670
Phone: (916) 471-5516
kimberleynguyen@maximus.com

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

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

Trung Phan, *City of Fullerton*
303 W. Commonwealth Ave., Fullerton, CA 92832
Phone: (714) 738-5333
trungp@cityoffullerton.com

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

Ivette Rodriguez, *City of Placentia*
401 East Chapman Avenue, Placentia, CA 92870
Phone: (714) 993-8189
irodriguez@placentia.org

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

Wayne Shimabukuro, *County of San Bernardino*
Auditor/Controller-Recorder-Treasurer-Tax Collector, 222 West Hospitality Lane, 4th Floor, San Bernardino, CA 92415-0018
Phone: (909) 386-8850
wayne.shimabukuro@atc.sbcounty.gov

Jennifer Shook, *County of Orange - OC Public Works Department*
OC Watersheds Program - Stormwater External, 2301 N. Glassell Street, Orange, CA 92865
Phone: (714) 955-0671
jennifer.shook@ocpw.ocgov.com

Shane Silsby, Director of Public Works, *County of Orange*
300 North Flower Street, Santa Ana, CA 92703
Phone: (714) 667-9700
shane.silsby@ocpw.ocgov.com

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

Cristina Talley, *City of Anaheim*
Public Works, 200 S. Anaheim Boulevard #356, Anaheim, CA 92805
Phone: (714) 765-5169
CTalley@anaheim.net

Jolene Tollenaar, *MGT of America*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 443-411
jolene_tollenaar@mgtamer.com

Eric Tolles, *City of Irvine*
One Civic Center Plaza, Irvine, CA 92623
Phone: (949) 724-6453
etolles@ci.irvine.ca.us

Evelyn Tseng, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3127
etseng@newportbeachca.gov

Gonzalo Vazquez, *City of Cypress*
Department of Public Works, 5275 Orange Avenue, Cypress, CA 90630
Phone: (714) 229-6752
gvazquez@ci.cypress.ca.us

Charlie View, *City of Brea*
1 Civic Center Circle, Brea, CA 95821
Phone: (714) 990-7698
CharlieV@ci.brea.ca.us

Michael Vigliotta, *City of Huntington Beach*
2000 Main Street, Huntington Beach, CA 92648
Phone: (714) 536-5555
MVigliotta@surfcity-hb.org

David Webb, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3328
dwebb@newportbeachca.gov

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

Julia Woo, Deputy County Counsel, *County of Orange*
Claimant Representative
333 West Santa Ana Blvd, Santa Ana, CA 92702-1379
Phone: (714) 834-3300
Julia.woo@coco.ocgov.com

Robert Woodings, *City of Lake Forest*
25550 Commercenter Dr, Suite 100, Lake Forest, CA 92630
Phone: (949) 461-3480
rwoodings@lakeforestca.gov

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