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December 20, 2016

VIA ELECTRONIC FILING

Heather Halsey, Esq.
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Re: Alameda and San Mateo County Claimants' Additional Briefing
California Regional Water Quality Control Board,
San Francisco Bay Region, Order No. R2-2009-0074
Consolidated 10-TC-01, 10-TC-02, 10-TC-03 and 10-TC-05

Dear Ms. Halsey:

This letter provides additional briefing on behalf of the Alameda[1] and San Mateo[2] County Claimants regarding the application of the California Supreme Court's opinion in *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749 ("*Dep't of Finance*") to the above-captioned consolidated test claims (collectively, "Test Claims"), as requested by the Commission in its September 21, 2016, and September 27, 2016, letters.

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[1] The "Alameda County Claimants" are the following entities, which submitted Test Claim No. 10-TC-02: the City of Alameda and the County of Alameda, the Cities of Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Pleasanton, San Leandro and Union City, the Alameda County Flood Control and Water Conservation District, and the Alameda County Flood Control and Water Conservation District, Zone 7.

[2] The "San Mateo County Claimants" are the following entities, which submitted Test Claim No. 10-TC-01: the City of Brisbane and the County of San Mateo, the San Mateo County Flood Control District, the Cities of Belmont, Burlingame, Daly City, East Palo Alto, Foster City, Half Moon Bay, Menlo Park, Millbrae, Pacifica, Redwood City, San Bruno, San Carlos, San Mateo and South San Francisco, and the Towns of Atherton, Colma, Hillsborough, Portola Valley and Woodside.

I. INTRODUCTION

In *Dep't of Finance*, the Supreme Court considered and decided the core disputed issue in these Test Claims: whether California Regional Water Quality Control Boards may avoid constitutional subvention obligations for storm water permit requirements based on the federal mandates exception. The Supreme Court ultimately rejected application of the federal mandates exception to the challenged conditions in the storm water permit issued by the Los Angeles regional board:

> We reverse [the Court of Appeal decision], concluding that no federal law or regulation imposed the [permit] conditions nor did the federal regulatory system require the state to impose them. Instead, the permit conditions were imposed as a result of the state's discretionary action.

(1 Cal.5th at 754.) Because the same can be said of the permit conditions at issue in the Alameda and San Mateo County Claimants' Test Claims, the same conclusion must be reached. The Commission should reject the California Regional Water Quality Control Board, San Francisco Bay Region's ("Regional Water Board"), contention that the federal mandates exception applies to the Alameda and San Mateo County Claimants' Test Claims. As the federal mandates exception is the primary basis for the Regional Water Board's opposition to these Test Claims, application of the Supreme Court's decision should result in the Commission approving the claims.

The following holdings from the Supreme Court are particularly relevant here. First, the Supreme Court determined that the Regional Water Board bears the burden of proving the applicability of any exception to the "general rule requiring reimbursement of all state-mandated costs," including the federal mandates exception. (1 Cal.5th at 370-71.) Second, the federal mandates exception does not apply to these Test Claims because the state exercised its discretion by virtue of a "true choice" to issue permit requirements that were not mandated by federal law. Third, the Commission owes no deference to the Regional Water Board in these Test Claim proceedings given the lack of specific findings required by the Supreme Court.

The above holdings derive from the Court's statutory analysis of the Clean Water Act and the Porter-Cologne Act – the same legal framework applicable here. The Test Claims in this proceeding arise from permit conditions that come from the same exercise of state discretion analyzed by the Supreme Court. As a result, the *Dep't of Finance* decision provides controlling authority for the Commission to determine that the storm water permit conditions at issue are not federal mandates. As the federal mandates exception is the primary basis

for the Regional Water Board's opposition to these Test Claims, application of the Supreme Court's decision should result in the Commission approving the Alameda and San Mateo County Claimants' Test Claims.

II. THE REGIONAL WATER BOARD BEARS THE BURDEN OF PROVING EXCEPTIONS TO THE GENERAL CONSTITUTIONAL SUBVENTION REQUIREMENT

Under *Dep't of Finance*, once claimants demonstrate new programs or increased levels of service are being imposed,[3] the burden of proof shifts to the Regional Water Board (or any other test claim opponent, such as the Department of Finance) to prove that such requirements are federal mandates excepted from the general subvention requirement:

> Section 6 establishes a general rule requiring reimbursement of all state-mandated costs. Government Code section 17556, subdivision (c), codifies an exception to that rule. Typically, the party claiming the applicability of an exception bears the burden of demonstrating that it applies. [Citations.] Here, the State must explain why federal law mandated these requirements, rather than forcing the Operators to prove the opposite.

(*Dep't of Finance*, 1 Cal.5th at 769 citing *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 23 and *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 67.) Consequently, the Supreme Court squarely rejected the contention the Regional Water Board previously advanced in this matter that "[t]he Claimants must also prove that the costs are mandated on them by the state, rather than by federal law and must prove that any additional costs beyond the federal mandate are substantial and not de minimis." (Regional Water Board Comment Letter (May 17, 2011), p. 1.)

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[3] As discussed in Alameda and San Mateo County Claimants' rebuttal comments, the Regional Water Board effectively conceded that the challenged permit conditions impose new programs and/or higher levels of service. (See Alameda and San Mateo County Claimants' Written Rebuttal Comments, dated September 16, 2011, p. 10.) While the Regional Water Board argues about whether particular requirements are new programs or increased levels of service, it failed to address or rebut any of the supporting evidence submitted by Claimants to demonstrate the substantial additional costs imposed by the challenged conditions. (See *id.*, pp. 10-11.) These significantly increased costs in and of themselves demonstrate the imposition of state mandates, irrespective of whether they are categorized as new programs or increased levels of service.

The Supreme Court has made clear that the Regional Water Board must bear the burden of proof on any exception to the general rule requiring reimbursement. (1 Cal.5th at 769 ["the State must explain why federal law mandated these requirements, rather than forcing the Operators to prove the opposite"].) If the Regional Water Board fails to carry its burden, the general rule requiring subvention applies. As discussed herein, the Regional Water Board has not met – and cannot meet – its burden of proof as required by the Supreme Court.

III. THE FEDERAL MANDATES EXCEPTION DOES NOT APPLY TO THE CHALLENGED REQUIREMENTS BECAUSE THE REGIONAL WATER BOARD EXERCISED ITS DISCRETION BY VIRTUE OF A "TRUE CHOICE"

The Supreme Court also confirmed the rule that application of the federal mandates exception turns on whether a state requirement was imposed because it was compelled by federal law, or whether it was "imposed as a result of the state's discretionary action." (*Dep't of Finance*, 1 Cal.5th at 754). If it is compelled by federal law, the State must implement a federal mandate and no reimbursement is required. On the other hand, if the requirement is imposed as a result of the State's discretionary action, reimbursement is required.

The Supreme Court summarized applicable case law on the matter, and opined that, "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" and reimbursement is required. (*Dep't of Finance*, 1 Cal.5th at 765.) In applying this rule to the County of Los Angeles claims, the Court analyzed the Clean Water Act, the Porter-Cologne Act, and related regulations. The Court found that the regional board was given discretionary power to fashion requirements which it determined would meet the Clean Water Act's maximum extent practicable ("MEP") standard. (*Id.* at 767-68.) Federal law did not compel these requirements, because the State's NPDES program is undertaken on a voluntary basis. (*Id.* at 767.) As the Court noted, the State was not compelled to operate its own permitting system. (*Id.*) The Supreme Court further found that the federal regulations gave the regional board discretion to develop and issue municipal storm water permits and determine which specific controls would be required. (*Id.* at 767-68.) Accordingly, the regional board's exercise of a "true choice" constitutes a state mandate of costs associated with the contested permit provisions. (*Id.* at 769, 770-72 [analyzing whether inspection and trash receptacle conditions were mandated by Clean Water Act].)

A. The Regional Water Board Cannot Carry its Burden to Prove that the Challenged Requirements are Federally Mandated.

The Supreme Court's decision also provides specific support for the Commission to reject the Regional Water Board's federal mandate arguments on these Test Claims. As in *Dep't of Finance*, subvention is required for the discretionarily-imposed permit requirements challenged by the Alameda and San Mateo County Claimants. The Court concluded that the state was not compelled but rather "chose to administer its own [NPDES] program." (1 Cal.5th at 767.) The same state NPDES program, and same true choice, is at issue in the Alameda and San Mateo County Claimants' Test Claims. The State's NPDES program cannot be a product of a discretionary true choice in one case and a product of federal compulsion in another.

As in *Dep't of Finance*, Regional Water Board in this case "was not required by federal law to impose any specific permit conditions." (1 Cal.5th at 767.) Instead, the Regional Water Board "had discretion to fashion requirements which it determined would meet the CWA's maximum extent practicable standard." (See *id.* at 768.) As the record submitted to the Commission reflects, the Regional Water Board exercised that discretion here to impose the conditions challenged in these Test Claims.

Specifically, the Alameda and San Mateo County Claimants challenge three types of requirements from Order No. R2-2009-0074 (the "MRP"): (1) monitoring pursuant to Provision C.8, (2) trash load reduction pursuant to Provision C.10, and (3) Mercury and PCB diversion studies under Provisions C.11.f and C.12.f. As shown in prior submittals, the specific requirements of each of these challenged provisions is not expressly set forth in federal statutes or regulations. (See, *e.g.*, City of Alameda Test Claim, Written Narrative, pp. 25-29.) In its comments, the Regional Water Board failed to identify any specific language setting forth any such specific requirements, but instead cites vaguely to the Clean Water Act and the MEP standard. (See generally Regional Water Board Comment Letter (May 17, 2011), pp. 44-47 [C.8], 53-55 [C.10], 56-59 [C.11.f and C.12.f].) As the Supreme Court has clearly stated, citations to the broad authority of the Clean Water Act do not establish a federal mandate sufficient to avoid subvention. (See *Dep't of Finance*, 1 Cal.5th at 767-68.) In the absence of federal statutory language or regulations specifically imposing the requirements of MRP Provisions C.8, C.10, C.11.f and C.12.f, the Regional Water Board simply cannot meet its burden to avoid reimbursement for these state-mandated programs.

In *Dep't of Finance*, the Supreme Court was unpersuaded by the regional board's argument that the inspection requirements were federally mandated by federal regulations that generally addressed inspections. (See 1 Cal.5th at 771.)

"That the EPA regulations contemplated some form of inspections, however, does not mean that federal law required the scope and detail of inspections required by the Permit conditions." (*Id.*) The same analysis applies to the permit conditions challenged by the Alameda and San Mateo County claimants. For example, the Regional Water Board argued at length in its comment letter that expanded water quality monitoring provisions at issue in this case are federally mandated because federal law generally requires monitoring. (See Regional Water Board Comment Letter (May 17, 2011), pp. 27-29.) However, none of the cases or regulations cited "required the scope and detail" of the challenged monitoring provisions. (See 1 Cal.5th at 771.) The same is true for the trash control and diversion study requirements challenged in these Test Claims. The permit conditions at issue are not federally mandated, based on the Supreme Court's analysis.

IV. THE REGIONAL WATER BOARD'S FINDINGS ON THE FEDERAL MANDATES ISSUE RECEIVE NO DEFERENCE IN THIS COMMISSION'S PROCEEDING

The Supreme Court's recent decision also clearly establishes that the Regional Water Board's findings on the federal mandates issue are **not** entitled to deference in proceedings before this Commission. (See *Dep't of Finance*, 1 Cal.5th at 768-69.) This legal conclusion strongly supports the Alameda and San Mateo County Claimants' position that the Commission has the authority in this test claim proceeding to reject the Regional Water Board's unsupported arguments that the specific and financially burdensome MRP conditions at issue here were somehow mandated by the broad authority of the Clean Water Act. The Regional Water Board's argument here to the contrary – based on the purported flexibility of the MEP standard under the Clean Water Act – was specifically rejected by the Supreme Court. (See Regional Water Board Comment Letter (May 17, 2011), p. 11 [citing *Building Industry Association of San Diego County v. State Water Board* (2004) 124 Cal.App.4th 866, 889].)

In *Dep't of Finance*, the State argued that "the Commission should have deferred to the board's determination of what conditions federal law required." (*Id.* at 768.) The State asserted that this deference is owed because the Clean Water Act's flexible regulatory scheme provides the water boards with discretion in deciding what conditions to impose to achieve Clean Water Act compliance. (*Id.*) The Supreme Court resoundingly rejected the State's demand for deference, as inconsistent with the regional board's burden to establish the federal mandates exception. (*Dep't of Finance*, 1 Cal.5th at 768 ["We also disagree that the Commission should have deferred to the Regional Board's conclusion that the challenged requirements were federally mandated."]) The Court noted that the issue of whether the challenged permit requirements were federally mandated was "largely a question of law." (*Id.* at 768.) Further, the

State identified no authority holding that the Commission should defer to a state agency's determination of whether requirements were mandated by state or federal law. (*Id.*) The Supreme Court concluded that requiring deference to the regional board in a test claim proceeding would improperly deprive the Commission of its legislatively-established authority to resolve the State's obligations to reimburse. (*Id.* at 769 ["The State's proposed rule ... would leave the Commission with no role to play on the narrow question of who must pay. Such a result would fail to honor the Legislature's intent in creating the Commission."].)

V. THE REGIONAL WATER BOARD IS NOT ENTITLED TO DEFERENCE AS IT DID NOT FIND THAT THE CHALLENGED CONDITIONS WERE THE ONLY MEANS OF CWA COMPLIANCE.

The Supreme Court also directly addressed and rejected the argument, advanced by the Regional Water Board here, that the regional board is entitled to deference in its determination of what is federally mandated, relative to municipal storm water permit requirements. (*Dep't of Finance*, 1 Cal.5th at 768.) The Court ruled that deferring to the regional board's technical expertise would only be appropriate if the regional board had contemporaneously found, "when imposing the disputed permit conditions, that those conditions were **the only means** by which the maximum extent practicable standard could be implemented." (*Id.* [emphasis added].)

No such finding was made by the regional board in the *Dep't of Finance* case – or by the Regional Water Board here. The Court noted "the Regional Board was not required by federal law to impose any specific permit conditions." (*Id.* at 768.) Indeed, the State argued that the Clean Water Act's flexible regulatory scheme conferred discretion on the regional board to select which conditions to impose. (*Id.*) The discretion asserted by the State is entirely at odds with a finding that specific conditions were "the only means" to achieve Clean Water Act compliance. Likewise, the Regional Water Board in this proceeding did not and could not make a finding that the conditions challenged by the Alameda and San Mateo County Claimants were "the only means" to satisfy federal law. (See MRP, pp. 4-7 [Findings]; MRP Fact Sheet, pp. App I-4 [Goals], App I-5 – I-6 [Implementation], App I-11 – I-12 [Legal Authority].) The Regional Water Board is thus effectively foreclosed from arguing that the challenged requirements were the only means to achieve the Clean Water Act MEP standard.

VI. CONCLUSION

The Supreme Court's recent decision regarding the Los Angeles NPDES permit strongly supports the request in these Test Claims for subvention as to

the challenged conditions in the MRP. The Regional Water Board cannot meet its burden to demonstrate that any of the three types of permit requirements at issue here was mandated by the Clean Water Act or its implementing regulations. Nor has the Regional Water Board provided any meaningful evidence to rebut the Alameda and San Mateo County Claimants' showing that these new requirements impose substantial additional costs on the local agencies. Accordingly, the claimants respectfully request that the Commission require the Regional Water Board to provide reimbursement for all past and future costs associated with the requirements at issue in these Test Claims.

Sincerely,

Gregory J. Newmark
Attorney at Law

GJN:GJN

2747123.4

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Los Angeles and I am over the age of 18 years, and not a party to the within action. My place of employment is 707 Wilshire Boulevard, 24th Floor, Los Angeles, California 90017.

On December 20, 2016, I served the:

1. Alameda and San Mateo County Claimants' letter providing additional briefing

by electronically filing it on the Commission's website, which provides notice of how to locate it to the email addresses provided on the test claim 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 December 20, 2016, at Los Angeles, California.

Patricia Anne McNulty

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

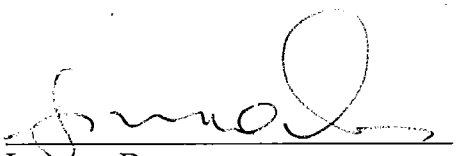
I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On December 21, 2016, I served the:

Claimant (City of Brisbane and City of Alameda) Response to Request for Additional Briefing
California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074, Provisions C.2.b, C.2.c, C.2.e, C.2.f, C.8.b, C.8.c, C.8.d, C.8.e.i, ii and iv, C.8.f, C.8.g, C.10.a.i, ii, and iii, C.10.b, C.10.c, C.10.d, C.11.f, and C.12.f,
10-TC-01, 10-TC-02, 10-TC-03, and 10-TC-05
Cities of Alameda, Brisbane, and San Jose, and County of Santa Clara, 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 December 21, 2016 at Sacramento, California.



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Claimant: Cities of Alameda, Brisbane, and San Jose, and County of Santa Clara

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