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RECEIVED
December 20, 2016
**Commission on
State Mandates**

Heather Halsey, Executive Director
STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: *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*
City of San Jose's supplemental briefing

Dear Ms. Halsey:

In response to the Commission's request, the City of San Jose respectfully submits its supplemental brief regarding the recent California Supreme Court opinion in *Department of Finance v. Commission on State Mandates (County of Los Angeles)* (2016) 1 Cal.5th 749 ("*County of L.A.*"), as to how that decision should apply to the above consolidated test claims. The Test Claim of the City of San Jose, 10-TC-05, challenges several requirements listed in the 2009 Municipal Regional Permit in the categories of Municipal Operations (C.2.b, C.2.c, C.2.e, C.2.f), Water Quality Monitoring (C.8.b, C.8.c, C.8.d, C.8.e.i, C.8.e.ii, C.8.e.vi, C.8.f, C.8.h), Trash Load Reduction (C.10.a.i, C.10.a.ii, C.10.b.ii, C.10.b.iii, C.10.c, C.10.d), and Mercury and PCB Reduction Studies (C.11.f, & C.12.f).¹

¹ City of San Jose's Test Claim narrative at 12-39.

The recent opinion of the California Supreme Court in *County of L.A.* affirmed this Commission's determinations concerning the Los Angeles County's test claim.² In that decision, the Supreme Court discussed and applied a case on which the City of San Jose relied in support of its Test Claim: *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564 ("*Hayes*"). The *Hayes* test states 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."³ The *County of L.A.* opinion confirms the correctness of San Jose's reasoning and conclusion that the challenged permit requirements are state mandates for which the State must reimburse the City.

Key elements of the *County of L.A.* Supreme Court's opinion

The *County of L.A.* Court noted that under California Constitution article XIII B section 6(a), if a local agency is required to provide a new program or a higher level of service then the agency is entitled to reimbursement from the State for costs of the program or increase in the service level.⁴ The State need not provide reimbursement, however, if federal law mandates the requirement and federal government mandates the resulting costs "unless the statute or executive order mandates costs that exceed the mandate in that federal law or regulation."⁵

In reimbursement proceedings before the Commission, the question whether a certain requirement is federally mandated is one of law and does not require deference to the regional board, unless the board makes a finding that a specific condition is the only means of implementation of the federal "maximum extent practicable" standard.⁶ In reimbursement proceedings the State has the burden to show that the challenged conditions were mandated by federal law.⁷ "[T]he State must explain why federal law mandated those requirements."⁸

² *Id.* at 769.

³ *County of L.A.*, 1 Cal.5th at 765.

⁴ *Dept. of Finance v. Commn. on State Mandates (County of Los Angeles)* (2016) 1 Cal.5th 749, 758.

⁵ *Id.* at 759.

⁶ *Id.* at 768-69.

⁷ *Id.* at 769.

⁸ *Id.*

The *County of L.A.* Court provided the rule that if federal law imposes or compels the state to impose a requirement, it is a federal mandate; if federal law gives the state discretion whether to impose a requirement, it is not a federal mandate.⁹ The Court noted that the regional board implements both state and federal law and may include conditions over and above what federal law requires.¹⁰

“The federal CWA broadly directed the board [i.e. Regional Water Quality Control Board, Los Angeles Region] to issue permits with conditions designed to reduce pollutant discharges to the maximum extent practicable. But the **EPA regulations gave the board discretion** to determine which specific controls were necessary to meet that standard.”¹¹ The Court determined that federal law did not require those specific permit conditions.¹²

The *County of L.A.* Supreme Court determined that the permit conditions at issue there—inspection of certain commercial and industrial facilities and construction sites, and installation and maintenance of trash receptacles at transit stops—were not federal mandates.¹³ The Court noted that neither the CWA nor the EPA regulations expressly mention the challenged requirements.¹⁴

The inspection conditions were not federal mandates because the state board imposed the inspection obligation on regional boards, and under the CWA the inspected facilities and sites could operate under statewide permits alone.¹⁵ The state board charged a fee for regional board’s inspections, and the regional board in turn offered to pay the county for inspections.¹⁶

The requirement for trash receptacles at transit stops was not a federal mandate because “the issuing agency has discretion whether to make those practices conditions of the permit.”¹⁷

⁹ *Id.* at 765.

¹⁰ *Id.*

¹¹ *Id.* at 767-68 (emphasis added).

¹² *Id.* at 767.

¹³ *Id.*

¹⁴ *Id.* at 770-72.

¹⁵ *Id.* at 770.

¹⁶ *Id.*

¹⁷ *Id.* at 772.

Under the *County of L.A.* the challenged permit conditions are state mandates.

The *County of L.A.* Court clarified that the Commission need not defer to the Regional Board's determination as to the state or federal character of mandates.¹⁸ The Court also noted that the burden rests with the State to show that the challenged conditions are federal mandates¹⁹ rather than with the permittees to prove the opposite. The City of San Jose's previously submitted letter briefs and evidence demonstrate that the State is unable to carry that burden.

a. The *County of L.A.* Court adopted the test used in that case by the Commission and here by San Jose.

In the Test Claim narrative, San Jose notes that this Commission relied on *Hayes* in its decision on the test claim of Los Angeles County,²⁰ ultimately upheld in *County of L.A.* In its Test Claim narrative, San Jose urges the Commission to apply the same reasoning as in the case of Los Angeles County's test claim, including the *Hayes* test.²¹ The San Francisco Bay Regional Water Quality Control Board ("Water Board") responds that the Commission misapplied *Hayes* in its previous decisions.²² On September 15, 2011, replying to the Water Board's arguments, San Jose points out that the Water Board's argument that *Hayes* does not apply is incorrect.²³ San Jose analyzed the challenged permit provisions under the *Hayes* test.²⁴

In reviewing the Commission's decision, the *County of L.A.* Court examined and was guided by the reasoning of *Hayes*, among other cases.²⁵ The Supreme Court stated that "[a]ccording to the *Hayes* court, the essential question is how the costs came to be imposed upon the agency required to bear them. 'If the state **freely chose** to impose the costs upon the local agency as a means of implementing a federal program then the costs are the result of a reimbursable state mandate regardless whether the costs were imposed upon the state by the federal government.'"²⁶ The *County of L.A.* Court adopted the *Hayes* test.²⁷ The Court held that in *County of L.A.*, "as in *Hayes* . . . ,

¹⁸ *Id.* 768.

¹⁹ *Id.* at 769.

²⁰ City of San Jose's Test Claim narrative, filed on November 29, 2010, at 8-9.

²¹ *Id.*; see, e.g., also *id.* at 14-16, 26-27, & 37-38.

²² Water Board's letter of May 17, 2011, at 21-23.

²³ City of San Jose's reply at 9; see also Water Board's opposition at 21-23.

²⁴ See City of San Jose's reply at 10-13.

²⁵ See, e.g., *County of L.A.*, 1 Cal.5th at 764-65, 767-68, & 771.

²⁶ *County of L.A.*, 1 Cal.5th at 765 (quoting *Hayes*, 11 Cal.App.4th at 1594) (emphasis added).

²⁷ *Id.*

the Regional Board had **discretion to fashion requirements** which it determined would meet the CWA's maximum extent practicable standard."²⁸

The *County of L.A.* opinion confirms the correctness of San Jose's arguments. San Jose's legal analysis and undisputed evidence submitted with the Test Claim demonstrate that the challenged permit conditions are state mandates.²⁹ The 2009 permit challenged here creates new programs or higher levels of service in the categories of Municipal Operations, Water Monitoring, Trash Load Reduction, and Stormwater Diversion Studies.³⁰ Those requirements are new obligations.³¹ The Water Board "freely chose" to include in the permit certain obligations that are stricter and more specific than under federal law.³²

b. Distinguishing between requirements in permit applications and imposition of permit conditions, the *County of L.A.* Court asked whether federal law or regulations expressly require the conditions.

The *County of L.A.* discussion of the trash receptacles condition in that permit is relevant to the challenged conditions in San Jose's permit. In both instances the State relies on 40 C.F.R. section 122.26(d)(2)(iv) as authority for permit conditions.

In *County of L.A.* the Supreme Court observed that the State misconstrued the EPA regulation codified as 40 C.F.R. section 122.26(d)(2)(iv).³³ The Court interpreted the regulation to only require a description of certain practices in permit applications, and disagreed that the regulation required installation and maintenance of trash receptacles at transit stops.³⁴ The Supreme Court distinguished permit applications requirements from permit conditions.³⁵ The Court noted that in the absence of an express federal requirement, the State has discretion whether to include as permit conditions the practices that applicants described in their applications: "While the Operators were required to include a description of practices and procedures in their permit application, the issuing agency has **discretion** whether to make those practices conditions of the permit. (40 C.F.R. § 122.26(d)(2)(iv).) No regulation cited by the State required trash receptacles at transit stops."³⁶

²⁸ *Id.* at 768 (emphasis added).

²⁹ City of San Jose's Test Claim narrative at 14-16, 25-29, 33-35, 37-38; City of San Jose's reply at 8-13.

³⁰ *Id.* at 13, 17-25, 30-33, & 37.

³¹ *Id.*

³² *Id.* at 14-16, 25-29, 33-35, & 37-38.

³³ *County of L.A.*, 1 Cal.5th at 771-72.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* (emphasis added)

Here, too, the Water Board relies on section 122.26(d)(2)(iv) as authority for the challenged permit requirements,³⁷ but in light of *County of L.A.* that reliance is unwarranted. The Water Board acknowledges that the CWA does not require any particular permit conditions and that the permitting agency uses discretion to impose them: "The CWA does not provide a specific set of permit requirements that the permitting agency must include in each MS4 permit. Rather, the NPDES permitting program mandates that the permitting agency **exercise discretion and choose** specific controls, generally BMPs, to meet a legal standard."³⁸ And the Finance Department acknowledges that the specific permit requirements are not in the CWA: "Finance believes the detailed provisions of the permit do not exceed federal law even though **they are not explicitly stated** in the federal CWA."³⁹ Thus, the State's claim that the conditions in the City's permit are federal mandates is error.

Conclusion

The *County of L.A.* analysis supports San Jose's reasoning and conclusion that the State's permit conditions are state mandates. The State does not point to any express language in federal law or regulations that would require the conditions it imposed in this permit. Because the State acknowledges that it exercised discretion in imposing the challenged permit conditions,⁴⁰ they are state mandates, and thus subject to reimbursement under article XIII section 6 of the California Constitution.

Very truly yours,

RICHARD DOYLE, City Attorney

By: 
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MKL/mkl

³⁷ Exhibit 1 to City of San Jose's Test Claim narrative, Permit Appendix I at pp. App I-12, App I-19, App I-57, & App I-71.

³⁸ *Id.* at 9 (emphasis added).

³⁹ Department of Finance letter of May 17, 2011 at 1 (emphasis added).

⁴⁰ Water Board's letter of May 17, 2011, at 9.

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 San Jose) Response to the 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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COMMISSION ON STATE MANDATES

Mailing List

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Claim Number: 10-TC-01, 10-TC-02, 10-TC-03, and 10-TC-05

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

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