



DEPARTMENT OF  
**FINANCE**

EDMUND G. BROWN JR. ■ GOVERNOR

915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

May 17, 2011

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

**Test Claim 10-TC-05 "Municipal Regional Stormwater Permit—Municipal Operations (C.2)."**

Dear Mr. Bohan:

The Department of Finance (Finance) has reviewed the test claim on the Municipal Regional Stormwater Permit (test claim permit) submitted by the City of San Jose (claimant). The claimant alleges the test claim permit is a reimbursable state mandate because the test claim permit requirements exceed federal law, were not included in the prior 2001 permit that was amended in 2001 and 2005 and, therefore, impose a new program or higher level of service on local agency dischargers.

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

- Finance believes the test claim permit and its provisions are federal mandates because they are required by federal law. Federal law already requires the United States Environmental Protection Agency to issue permits to regulate municipal separate storm sewer systems (MS4s) which are operated by local agencies (section 1342(p) of Title 33 of the United States Code). The state's role as a permitting authority acting on behalf of the federal government negates the existence of a state mandate because the test claim permit is issued in compliance with federal law. As determined in the *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App. 4<sup>th</sup> 805, no state mandate exists if the state requirements, in the absence of state statute, would still be imposed upon local agencies by federal law.
- Finance believes the detailed provisions of the permit do not exceed federal law even though they are not explicitly stated in the federal CWA. According to the test claim narrative, more activities are required in the test claim permit than in the prior 2001 permit. As noted in our prior comments, the alleged increased level of service is based on the evolving local agency documents submitted in support of the provisions of a

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

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

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

As required by the Commission's regulations, a "Proof of Service" has been enclosed indicating that the parties included on the mailing list dated February 3, 2011, have been provided with copies of this letter via either United States Mail or email. Pursuant to section 1181.2, subdivision (c)(1)(E) of the California Code of Regulations, "documents e-filed with the Commission need not be otherwise served on persons that have provided an e-mail address for the mailing list."

If you have any questions regarding this letter, please contact Jeff Carosone, Principal Program Budget Analyst at (916) 445-8913.

Sincerely,



NONA MARTINEZ  
Assistant Program Budget Manager

Enclosure

Enclosure A

DECLARATION OF JEFF CAROSONE  
DEPARTMENT OF FINANCE  
CLAIM NO. CSM-10-TC-05

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

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

5-17-11

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at Sacramento, CA



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Jeff Carosone

## Commission on State Mandates

Original List Date: 12/10/2010  
Last Updated: 5/18/2011  
List Print Date: 05/18/2011  
Claim Number: 10-TC-05  
Issue: Municipal Regional Stormwater Permit - Municipal Operations (C.2)

### Mailing List

#### TO ALL PARTIES AND INTERESTED PARTIES:

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

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Ms. Angie Teng State Controller's Office (B-08) Division of Accounting and Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916)323-0706 Email ateng@sco.ca.gov Fax:
Mr. Michael Lauffer State Water Resources Control Board 1001 I Street, 22nd Floor Sacramento, CA 95814-2828	Tel: (916)341-5183 Email mlauffer@waterboards.ca.gov Fax: (916)641-5199
Ms. Harmeet Barkschat Mandate Resource Services, LLC 5325 Elkhorn Blvd. #307 Sacramento, CA 95842	Tel: (916)727-1350 Email harmeet@calsdrc.com Fax: (916)727-1734
Ms. Juliana F. Gmur MAXIMUS 2380 Houston Ave Clovis, CA 93611	Tel: (916)471-5513 Email julianagmur@msn.com Fax: (916)366-4838
Mr. J. Bradley Burgess MGT of America 895 La Sierra Drive Sacramento, CA 95864	Tel: (916)595-2646 Email Bburgess@mgtamer.com Fax:
Ms. Jill Kanemasu State Controller's Office (B-08) Division of Accounting and Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916)322-9891 Email jkanemasu@sco.ca.gov Fax:
Ms. Jolene Tollenaar MGT of America 2001 P Street, Suite 200 Sacramento, CA 95811	Tel: (916)443-9136 Email jolene_tollenaar@mgtamer.com Fax: (916)443-1766

Ms. Elizabeth G. Pianca County of Santa Clara 70 West Hedding Street, 9th Floor, East Wing San Jose, CA 95110-1770	Tel: (408)299-5920 Email elizabeth.pianca@cco.sccgov.org Fax: (408)292-7240
Ms. Colleen Winchester City of San Jose 200 E. Santa Clara Street, 16th Floor San Jose, CA 95113	Tel: (408)535-1946 Email colleen.winchester@sanjoseca.gov Fax: (408)998-3131
Ms. Anita Worlow AK & Company 3531 Kersey Lane Sacramento, CA 95864	Tel: (916)972-1666 Email akcompany@um.att.com Fax:
Mr. Ram Venkatesan County of Santa Clara Controller - Treasurer Department 70 West Hedding Street, East Wing San Jose, CA 95110	Tel: (408)299-5210 Email ram.venkatesan@fin.sccgov.org Fax: (408)299-8629
Mr. Jim Spano State Controller's Office (B-08) Division of Audits 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916)323-5849 Email jspano@sco.ca.gov Fax: (916)327-0832
Ms. Socorro Aquino State Controller's Office Division of Audits 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916)322-7522 Email SAquino@sco.ca.gov Fax:
Ms. Evelyn Tseng City of Newport Beach 3300 Newport Blvd. P. O. Box 1768 Newport Beach, CA 92659-1768	Tel: (949)644-3127 Email etseng@newportbeachca.gov Fax: (949)644-3339
Ms. Donna Ferebee Department of Finance (A-15) 915 L Street, 11th Floor Sacramento, CA 95814	Tel: (916)445-3274 Email donna.ferebee@dof.ca.gov Fax: (916)323-9584
Ms. Lorena Romero Department of Finance 915 L Street, 7th Floor Sacramento, CA 95814	Tel: lorena.romero@dof.ca.gov Email lorena.romero@dof.ca.gov Fax:
Mr. Leonard Kaye Los Angeles County Auditor-Controller's Office 500 W. Temple Street, Room 603	Tel: (213)974-9791 Email lkaye@auditor.lacounty.gov Fax: (213)617-8106

Los Angeles, CA 90012

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Mr. Jeff Carosone Department of Finance (A-15) 915 L Street, 8th Floor Sacramento, CA 95814	Tel: (916)445-8913 Email jeff.carosone@dof.ca.gov Fax:
Ms. Carla Shelton Department of Finance 915 L Street, 7th Floor Sacramento, CA 95814	Tel: carla.shelton@dof.ca.gov Email carla.shelton@dof.ca.gov Fax:
Mr. Andy Nichols Nichols Consulting 1857 44th Street Sacramento, CA 95819	Tel: (916)455-3939 Email andy@nichols-consulting.com Fax: (916)739-8712
Mr. Wayne Shimabukuro County of San Bernardino Auditor/Controller-Recorder-Treasurer-Tax Collector 222 West Hospitality Lane, 4th Floor San Bernardino, California 92415-0018	Tel: (909)386-8850 Email wayne.shimabukuro@atc.sbcounty.gov Fax: (909)386-8830
Mr. David Wellhouse David Wellhouse & Associates, Inc. 9175 Kiefer Blvd, Suite 121 Sacramento, CA 95826	Tel: (916)368-9244 Email dwa-david@surewest.net Fax: (916)368-5723
Ms. Hasmik Yaghobyan County of Los Angeles Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	Tel: (213)893-0792 Email hyaghobyan@auditor.lacounty.gov Fax: (213)617-8106
Mr. Edward Jewik Los Angeles County Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	Tel: (213)974-8564 Email ejewik@auditor.lacounty.gov Fax: (213)617-8106
Mr. Allan Burdick CSAC-SB 90 Service 2001 P Street, Suite 200 Sacramento, CA 95811	Tel: (916)443-9136 Email allan_burdick@mgtamer.com Fax: (916)443-1766
Ms. Dorothy Dickey San Francisco Bay Regional Water Quality Control 1515 Clay Street, Suite 1400 Oakland, CA 94612	Tel: (510)622-2490 Email DDickey@waterboards.ca.gov Fax:
Ms. Susan Geanacou Department of Finance (A-15) 915 L Street, Suite 1280	Tel: (916)445-3274 Email susan.geanacou@dof.ca.gov Fax: (916)449-5252

Sacramento, CA 95814

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Ms. Annette Chinn  
Cost Recovery Systems, Inc.  
705-2 East Bidwell Street, #294  
Folsom, CA 95630

Tel: (916)939-7901  
Email achinnrcrs@aol.com  
Fax: (916)939-7801

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Mr. Bruce Wolfe  
San Francisco Bay Regional Water Quality Control  
1515 Clay Street, Suite 1400  
Oakland, CA 94612

Tel: (510)622-2314  
Email bwolfe@waterboards.ca.gov  
Fax: (510)622-2460

**COMMISSION ON STATE MANDATES**

980 NINTH STREET, SUITE 300  
SACRAMENTO, CA 95814  
PHONE: (916) 323-3562  
FAX: (916) 445-0278  
E-mail: csminfo@csm.ca.gov

**DECLARATION OF SERVICE BY EMAIL**

I, the undersigned, declare as follows:

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

On May 18, 2011, I served the:

**Department of Finance Comments**

*Municipal Regional Stormwater Permit –Municipal Operations (C.2)*

Municipal Regional Stormwater Permit Number CAS612008, issued by the Regional Water Quality Control Board, San Francisco Region as Order No. R2-2009-0074, October 14, 2009  
City of San Jose, Claimant

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 May 18, 2011 at Sacramento, California.

A handwritten signature in cursive script, appearing to read "Heidi J. Palchik", written over a horizontal line.

Heidi J. Palchik