



October 10, 2016

RECEIVED
October 10, 2016
**Commission on
State Mandates**

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

Test Claim 10-TC-11 "San Diego Region Water Permit – County of Orange"

Dear Ms. Halsey:

The Department of Finance (Finance) has reviewed the test claim on the San Diego Region Water Permit submitted by the County of Orange and the incorporated cities within Orange County. The claimants allege the test claim permit is a reimbursable state mandate because the test claim permit requirements exceed federal law, were not included in the prior 2002 permit and, therefore, impose a new program or higher level of service on local agency dischargers. Finance has also reviewed the decision in *Department of Finance, et al. v. Commission on State Mandates, et al.*, California Supreme Court, Case No. S214855, issued August 29, 2016.

Finance defers to the State Water Resources Control Board and the San Diego Regional Water Quality Control Board on the substance of the permit terms, on whether the 2009 permit included requirements not in the prior permit and on the impact of the Supreme Court decision on the federal law component of the state mandate determination. Finance comments primarily on fee authority issues raised by the claimants.

Claimants argue that they have severely diminished ability to impose fees to cover permit compliance costs in light of Propositions 218 and 26. Notably, Proposition 26 specifically excludes assessments and property-related fees imposed in accordance with Proposition 218 from the definition of taxes (Art. XIII C, § 1, subd. (e)(7)). Further, claimants have authority to impose property-related fees under their police power for alleged mandated permit activities whether or not it is politically feasible to impose such fees via voter approval as may be required by Proposition 218. Local governments can choose not to submit a fee to the voters and voters can indeed reject a proposed fee, but not with the effect of turning permit costs into state reimbursable mandates.

In *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal. App.4th 794, college districts challenged the State Controller's mandate claiming instructions that automatically reduced reimbursement claims by the amount the districts are statutorily authorized to charge students for health fees, regardless of whether the districts chose to charge the fees or not. The court held that "[to] the extent a local agency or school district 'has the authority' to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost. (*Clovis* at p. 812). The court reasoned that "this basic principle flows from common sense as well. As the Controller succinctly puts it, 'Claimants can choose not to require these fees, but not at the state's expense.'" (*Ibid.*)

The same reasoning applies to claimants here. They can choose not to put a fee to the voters, or the voters can reject a fee, but not at the state's expense. The application of Proposition 218 does not result in alleged mandate costs recoverable solely from tax proceeds. Sufficient fee authority exists, regardless of political feasibility. Under Government Code section 17556, subdivision (d), claimants have authority to impose fees sufficient to pay for permit activities and they are not eligible for mandate reimbursement.

Finance further asserts that claimants continue to have regulatory fee authority that does not require voter approval under Propositions 218 and 26 pursuant to their police power in article XI, section 7, of the California Constitution sufficient to pay for alleged mandated activities of the hydromodification plan and low-impact development. As previously articulated by the Commission in their 2010 decision on the test claim Discharge of Stormwater Runoff, 07-TC-09, water pollution prevention has been found to be a valid exercise of government's police power. (*Freeman v. Contra Costa County Water Dist.* (1971) 18 Cal.App.3d 404, 408). Further, charges imposed as a condition of property development are not subject to Proposition 218 (art. XIID, § 1, subd. (b)) and are not taxes under Proposition 26 because they are explicitly exempted from the definition of taxes (art. XIIC, § 1, subd. (e)(6)). Local governments' ability to charge fees as a condition of property development was not eliminated by Proposition 26 and the Commission's previous 2010 confirmation of this fee authority for these development activities remains accurate.

Claimants also have sufficient fee authority under the Mitigation Fee Act (Gov. Code, §§ 66000-66025) to pay for the hydromodification and low-impact development permit activities. The fee would be imposed for permit approval of priority development projects and used to implement the hydromodification plan and low-impact development requirements. This constitutes the reasonable relationship between the fee's use and the type of development project on which the fee is imposed. Accordingly, Finance believes claimants have sufficient fee authority to cover the costs of permit activities related to development. (Gov. Code, § 17556, subd. (d)).

Further, costs related to low-impact development and hydromodification on municipal projects are discretionary. No evidence of legal or practical compulsion to undertake these municipal projects has been presented despite assertions that failure to undertake the projects can expose claimants to liability. The discretionary nature of municipal development projects is consistent with prior Commission analysis on this issue in the Discharge of Stormwater Runoff test claim decision.

If you have any questions regarding this letter, please contact Mary Halterman, Principal Program Budget Analyst, at (916) 445-3274.

Sincerely,



Justyn Howard
Program Budget Manager

Attachments

Attachment A

DECLARATION OF DANIELLE BRANDON
DEPARTMENT OF FINANCE
CLAIM NO. 10-TC-11

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.

2. 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.

October 10, 2016
At Sacramento, CA

Danielle M. Brandon
Danielle Brandon

Attachment B

DECLARATION OF MARY HALTERMAN
DEPARTMENT OF FINANCE
CLAIM NO. 10-TC-11

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.

2. 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.

10/10/16
At Sacramento, CA

Mary Halterman
Mary Halterman

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 11, 2016, I served the:

Department of Finance Comments

San Diego Region Water Permit – County of Orange, 10-TC-11

California Regional Water Quality Control Board, San Diego Region,

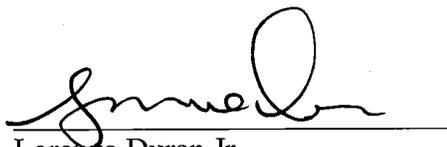
Order No. R9-2009-0002, effective December 16, 2009

County of Orange, Orange County Flood Control District, Cities of Dana Point,

Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, and San Juan Capistrano,

Co-Claimants By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 11, 2016 at Sacramento, California.



Lorenzo Duran Jr.
Commission on State Mandates
980 Ninth Street, Suite 300
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 10/11/16

Claim Number: 10-TC-11

Matter: San Diego Region Water Permit - Orange County

Claimants: City of Dana Point
City of Laguna Hills
City of Laguna Niguel
City of Lake Forest
City of Mission Viejo
City of San Juan Capistrano
County of Orange
Orange County Flood Control District

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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, § 1181.3.)

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