



December 20, 2016

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

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

Municipal Regional Stormwater Permit Order No. R2-2009-0074 (10-TC-01, 10-TC-02, 10-TC-03, 10-TC-05)

Dear Ms. Halsey:

The Department of Finance (Finance) has again reviewed the test claim on the California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074. The claimants allege the test claim permit is a reimbursable state mandate because the permit requirements exceed federal law, were not included in the prior 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 v. Commission on State Mandates* (2016) 1 Cal.5th 749.

Finance defers to the State Water Resources Control Board and the California Regional Water Quality Control Board, San Francisco Bay Region, on the impact of the Supreme Court decision on the federal law component of the state mandate determination. Following our 2011 comments on the test claim, Finance now also comments primarily on the fee authority issue raised by the claimants.

Claimants argue they have no or inadequate fee authority to cover the alleged mandated costs incurred for monitoring, trash load reduction and stormwater diversion studies. Finance believes claimants do have fee authority undiminished by Propositions 218 or 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.

If the Commission were to conclude the permit imposed reimbursable mandated costs, claimants also identified potentially offsetting revenue that should reduce those costs and be identified by the Commission.

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 NOS. 10-TC-01, 10-TC-02, 10-TC-03, 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.

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.

December 20, 2016
At Sacramento, CA

Danielle M. Brandon
Danielle Brandon

Attachment B

DECLARATION OF MARY HALTERMAN
DEPARTMENT OF FINANCE
CLAIM NOS. 10-TC-01, 10-TC-02, 10-TC-03, 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.
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.

12/20/16
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 December 21, 2016, I served the:

Finance Response to the Request for Additional Briefing

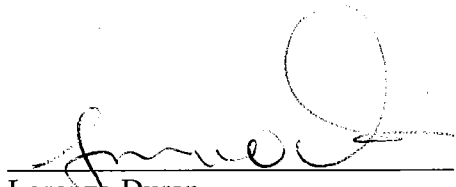
*California Regional Water Quality Control Board, San Francisco Bay Region,
Order No. R2-2009-0074, Provisions C.2.b, C.2.c, C.2.e, C.2.f, C.8.b, C.8.c, C.8.d,
C.8.e.i, ii and iv, C.8.f, C.8.g, C.10.a.i, ii, and iii, C.10.b, C.10.c, C.10.d, C.11.f, and
C.12.f,*

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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Mailing List

Last Updated: 12/2/16

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

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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