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VIA DROP BOX
Ms. Heather Halsey
Executive Director
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Re: Supplemental Brief Filed on Behalf of Joint Test Claimants Regarding
Department of Finance, et al v. Commission on State Mandates, (2016) 1 Cal. 5th 749,
and Test Claim 09-TC-03 Santa Ana Regional Water Permit – Orange County

Dear Ms. Halsey:

Attached please find a Supplemental Brief discussing the opinion of the California Supreme Court in *Department of Finance, et al. v. Commission on State Mandates*, (2016) 1 Cal. 5th 749. This brief is submitted in response to your letter dated September 21, 2016, requesting supplemental briefing concerning how this case applies to Test Claim 09-TC-03 Santa Ana Regional Water Permit – Orange County.

This Supplemental Brief is being submitted by the County of Orange and the Orange County Flood Control District and on behalf of the Cities of Anaheim, Brea, Buena Park, Costa Mesa, Cypress, Fountain Valley, Fullerton, Huntington Beach, Irvine, Lake Forest, Newport Beach, Placentia, Seal Beach and Villa Park (collectively, "Joint Test Claimants").

The Joint Test Claimants respectfully request the opportunity to further discuss the impact of the Supreme Court's decision in future briefing before the Commission. If you or your staff have any questions concerning the Supplemental Brief, please do not hesitate to contact me.

Very truly yours,

LEON J. PAGE
COUNTY COUNSEL

By 
Julia Woo, Deputy

JCW:po
cc: Service List (via Drop Box)

SUPPLEMENTAL BRIEF DISCUSSING

DEPARTMENT OF FINANCE v. COMMISSION ON STATE MANDATES,
California Supreme Court, Case No. 214855 (Aug. 29, 2016)

TEST CLAIM 09-TC-03: SANTA ANA REGIONAL WATER PERMIT – ORANGE COUNTY

This brief is filed on behalf of joint test claimants County of Orange, the Orange County Flood Control District and the Cities of Anaheim, Brea, Buena Park, Costa Mesa, Cypress, Fountain Valley, Fullerton, Huntington Beach, Irvine, Lake Forest, Newport Beach, Placentia, Seal Beach and Villa Park in Test Claim 09-TC-03 (“Joint Test Claimants”) in response to the request of the Commission on State Mandates in a letter dated September 21, 2016 for additional briefing concerning the impact of a recent opinion of the California Supreme Court in *Department of Finance v. Commission on State Mandates*, Case No. S214855 (slip op. Aug. 29, 2016).

The Joint Test Claimants first discuss the key holdings made by the Supreme Court in *Department of Finance* and then apply those holdings to the issues raised in Test Claim 09-TC-03 regarding the requirements of Santa Ana Water Board Order No. R8-2009-0030, which is the municipal separate storm sewer system (“MS4”) permit for the Joint Test Claimants (the “Permit”).

I. *Department of Finance* Has Established a Clear Test for Considering Test Claims Involving Municipal Storm Water Permits with Federal and State Requirements

In *Department of Finance*, the California Supreme Court addressed a question considered by several courts and this Commission:¹ Are requirements imposed by state water boards on local agencies in MS4 permits exclusively “federal” mandates, exempt from the requirement for the State to provide for a subvention of state funds under Article XIII B, section 6 of the California Constitution?

The Supreme Court set forth the test of what constitutes a federal versus a state mandate in the context of MS4 permits, as well as who gets to make that determination under the California Constitution. That test is:

If federal law compels the state to impose, or itself imposes, a requirement, that requirement is a federal mandate. On the other hand, 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,” that requirement is not federally mandated.

Slip op. at 18.

¹ This issue has been pending since 2007, when former Govt. Code, § 17516, subd. (c), which prohibited test claims involving orders of the regional or state water boards, was declared unconstitutional in *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal. App.4th 898, 904, 920.

Department of Finance involved a challenge to the decision of the Commission in Test Claims 03-TC-04, -19, -20 and -21, which found that certain provisions in the 2001 Los Angeles County MS4 permit in fact constituted state mandates and, concerning a provision requiring the installation and maintenance of trash receptacles at transit stops, required a subvention of state funds. The Commission similarly found, in Test Claim 07-TC-09, that a number of provisions in the 2007 San Diego County MS4 permit constituted state mandates. That test claim is presently on appeal with the Court of Appeal.

Significantly, the process that the Commission used to evaluate these two test claims, which examined federal statutory or regulatory authority for the MS4 permit provisions at issue, at the text of previous permits, at evidence of other permits issued by the federal government and at evidence from the permit development process, was validated by the Supreme Court in *Department of Finance*. In affirming the Commission's decision in regards to the Los Angeles County test claims, the Court explicitly rejected the argument which has been repeatedly raised by the State in both Test Claim rebuttals and in court filings, i.e., that the provisions were simply expressions of the "maximum extent practicable" ("MEP") standard required of stormwater permittees in the CWA,² and thus represented purely federal mandated requirements, exempt from consideration as state mandates pursuant to Govt. Code, § 17756, subd. (c).

A. The Supreme Court Applied Mandates Case Law in Reaching Its Decision

Key to the Supreme Court's decision is its careful application of existing mandate jurisprudence in determining whether an MS4 permit provision was a federal, as opposed to state, mandate. The Commission must also apply those key cases in its determination of this Test Claim.

The question posed by the Court was this:

How to apply [the federal mandate] exception when federal law requires a local agency to obtain a permit, authorizes the state to issue the permit, and provides the state discretion in determining which conditions are necessary to achieve a general standard established by federal law, and when state law allows the imposition of conditions that exceed the federal standard.

Slip op. at 15.

The Court considered three key cases, starting with *City of Sacramento v. State of California* (1990) 50 Cal.3d 51. In *City of Sacramento*, the Court found that a state law requiring local governments to participate in the State's unemployment insurance program was in fact compelled by federal law, since the failure to do so would result in the loss of federal subsidies and federal tax credits for California corporations. The Court found that because of the "certain and severe federal penalties" that would accrue, the State was left "*without discretion*" (italics in slip op.) and thus the State "acted in response to a federal "mandate."'" *Department of Finance*, slip op. at 16, quoting *City of Sacramento*, 50 Cal.3d at 74.

The Court next reviewed *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, in which the county alleged that a state requirement to provide indigent criminal defendants with funding for experts was a state mandate. The court disagreed, finding that because this requirement reflected a binding Supreme Court precedent interpreting the federal

² 33 U.S.C. §1342(p)(3)(B)(iii).

Constitution (*Gideon v. Wainwright* (1963) 372 U.S. 335), even absent the state law, the county still would have been bound to fund defense experts. Thus, the legislation simply “codified an existing federal mandate.” Slip op. at 16.

The Court finally considered *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, where a state plan adopted under a federal special education law required local school districts to provide disabled children with certain educational opportunities. While the state argued that the plan was federally mandated, the *Hayes* court found that this was merely the “starting point” of its analysis, which was whether the “manner of implementation of the federal program was left to the *true discretion* of the state.” Slip op. at 17, quoting *Hayes* at 1593 (emphasis in slip op.). *Hayes* concluded that 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.” Slip op. at 17, quoting *Hayes* at 1594.

From these cases, the Supreme Court distilled the “federally compelled” test set forth above, holding 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,” that requirement is not federally mandated. Slip op. at 18. The Court also held that it is the State, not the test claimants, which has the burden to show that a challenged permit condition was mandated by federal law. Slip op. at 23.

Thus, the Commission must employ this test, and allocate to the State the burden of proof, when determining whether a requirement in an MS4 permit is a state or federal mandate.

B. The Court Examined the Nature of Clean Water Act MS4 Permitting and Determined That the Water Boards Have Great Discretion in Establishing Permit Requirements

In *Department of Finance*, the Supreme Court reviewed the interplay between the federal CWA and California law set forth in the Water Code (slip op. at 20-21) and determined that with respect to the adoption of MS4 permits, the State had chosen to administer its own permitting program to implement CWA requirements (Water Code §13370(d)). Thus, this case was different from a situation where the State was compelled to administer its own permitting system.

The Court found that the State’s permitting authority under the CWA was similar to that in *Division of Occupational Safety & Health v. State Bd. Of Control* (1987) 189 Cal.App.3d 794. There, the State had the choice of being covered by federal occupational safety and health (“OSHA”) requirements or adopting its own OSHA program, which had to meet federal minimums and had to extend its standards to State and local employees. In that case, state OSHA requirements called for three-person firefighting teams instead of the two-person teams that would have been allowed under the federal program. The court found that because the State had freely exercised its option to adopt a state OSHA program, and was not compelled to do so by federal law, the three-person team requirement was a state mandate.

The Supreme Court also distinguished the broad discretion provided to the State under the federal CWA stormwater permitting regulations with the facts in *City of Sacramento, supra*, where the State risked the loss of subsidies and tax credits if it failed to comply with federal law:

Here, the State was not compelled by federal law to impose any particular requirement. Instead, as in *Hayes, supra* . . . the Regional Board has discretion to fashion requirements which it determined would meet the CWA's maximum extent practicable standard.

Slip op. at 21 (citation omitted). The Court held that the EPA regulations "gave the Board discretion to determine which specific controls were necessary to meet the [MEP] standard" *Id.*

C. The Court Rejected the State's Argument That the Commission Must Defer to the Water Board's Determination of What Constitutes a Federal Mandate

The Supreme Court rejected one of the State's key arguments, where it argued that the Commission should defer to a regional board's determination of what in a stormwater permit constitutes a federal, versus state, mandate. Slip op. at 21-24.

The Court first addressed whether the Commission ignored "the flexibility in the CWA's regulatory scheme, which conferred discretion on the State and regional boards in deciding what conditions were necessary to comply with the CWA" and whether the Los Angeles County MS4 permit "itself is the best indication of what requirements *would have been imposed* by the EPA if the Regional Board had not done so," such that the Commission "should have deferred to the board's determination of what conditions federal law required." Slip op. at 21 (emphasis in original).

The Court flatly rejected these arguments, finding that in issuing the permit, "the Regional Board was implementing both state and federal law and was authorized to include conditions more exacting than federal law required. [citation omitted]. It is simply not the case that, because a condition was in the Permit, it was, ipso facto, required by federal law." *Id.* at 21-22. The Court cited as authority *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, where it held (over water board objections) that a federal National Pollutant Discharge Elimination System ("NPDES") permit issued by a water board (such as the Permit in this Test Claim) may contain State-imposed conditions that are more stringent than federal law requirements. *Id.* at 627-28.

The Court next addressed the Water Boards' argument that the Commission should have deferred to the regional board's conclusion that the challenged requirements in the Los Angeles County MS4 permit were federally mandated. Finding that this determination "is largely a question of law," the Court distinguished situations where the question involved the regional board's authority to impose specific permit conditions from those involving the question of who would pay for such conditions. In the former situation, "the board's findings regarding what conditions satisfied the federal [MEP] standard would be entitled to deference." Slip op. at 22. But, the Court held,

Reimbursement proceedings before the Commission are different. The question here was not whether the Regional Board had authority to impose the challenged requirements. It did. The narrow question here was who will pay for them. In answering that legal question, the Commission applied California's constitutional, statutory, and common law to the single issue of reimbursement. In the context of these proceedings, the State has the burden to show the challenged conditions were mandated by federal law.

Id. at 22-23.

The Court explained that “the State must explain why federal law mandated these requirements, rather than forcing the Operators to prove the opposite.” In establishing that burden on the State, the Court held that because article XIII B, section 6 of the Constitution established a “general rule requiring reimbursement of all state-mandated costs,” a party claiming an exception to that general rule, such as the federal mandate exception in Govt. Code section 17556, subdivision (c), “bears the burden of demonstrating that it applies.” Slip op. at 23.

The Supreme Court concluded that the State’s proposed rule of “requiring the Commission to defer to the Regional Board” 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.” Slip op. at 22. In doing so, the Court looked to the policies underlying Article XIII B section 6, and concluded that the Constitution “would be undermined if the Commission were required to defer to the Regional Board on the federal mandate question.” *Id.*

The Court noted that the “central purpose” of article XIII B is to rein in local government spending (citing *City of Sacramento, supra*, 50 Cal.3d at 58-9) and that the purpose of section 6 “is to protect local governments from state attempts to impose or shift the costs of new programs or increased levels of service by entitling local governments to reimbursement” (citing *County of San Diego v. State of California* (1997) 15 Cal. 4th 68, 81), slip op. at 23, emphasis supplied). Requiring the State to establish that a permit requirement is federally mandated, the Court found, “serves these purposes.” *Id.*

D. Applying Its Test, the Court Upheld the Commission’s Determination that Inspection and Trash Receptacle Requirements In The Los Angeles County MS4 Permit Were State Mandates

Applying the “federally compelled” test, the Supreme Court reviewed and upheld the Commission’s determination that the inspection and trash receptacle requirements in the Los Angeles County MS4 Permit were, in fact, state mandates.

1. The Inspection Requirements

The test claimants had argued in *Department of Finance* that a requirement in the Los Angeles County MS4 Permit that the MS4 operators inspect certain industrial facilities and construction sites was a state mandate. The Commission agreed and the Supreme Court upheld that determination, citing the grounds employed by the Commission.

First, the Court noted that there was no requirement in the CWA, including the MEP provision, which “expressly required the Operators to inspect these particular facilities or construction sites.” Slip op. at 24. While the Act made no mention of inspections, the implementing federal regulations required inspections of certain industrial facilities and construction sites (not at issue at the test claim) but did not mention commercial facility inspections “at all.” *Id.* Second, the Court agreed with the Appellants that state law gave the regional board itself “an overarching mandate” inspect the facilities and sites. *Id.*

The Court further found that with respect to the requirement of the operators to inspect facilities covered by general industrial and general construction stormwater permits, “the State Board had placed responsibility for inspecting facilities and sites on the *Regional Board*” and that

in fact the State Board was authorized to charge a fee for permittees, part of which “was earmarked to pay the Regional Board for ‘inspection and regulatory compliance issues.’” Slip op. at 25 (emphasis in original), citing Water Code, § 13260(d) and §13260, subd. (d)(2)(B)(iii). The Court further cited evidence before the Commission that the regional board had offered to pay the County to inspect industrial facilities, an offer that made no sense “if federal law required the County to inspect those facilities.” *Id.*

The Court, citing *Hayes, supra*, found that the regional board had primary responsibility for inspecting the facilities and sites and “shifted that responsibility to the Operators by imposing these Permit conditions.” *Id.* The Court further rejected the State’s argument that the inspections were federally mandated “because the CWA required the Regional Board to impose permit controls, and the EPA regulations contemplated that some kind of operator inspections would be required.” Slip op. at 26. The Court held that the mere fact that federal 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.* (emphasis supplied).

2. The Trash Receptacle Requirement

The Supreme Court also upheld the Commission’s determination that a requirement for certain Los Angeles County MS4 permittees to place trash receptacles at transit stops represented a state mandate.

The Court first found, as did the Commission, that while MS4 operators were required to “include a description of practices and procedures in their permit application,” the permitting agency had “discretion whether to make those practices conditions of the permit.” Slip op. at 27. As the Commission found, there was no CWA regulation cited by the State which required trash receptacles at transit stops, and there was evidence that EPA-issued permits in other cities did not require trash receptacles at transit stops. *Id.* This latter fact, that “the EPA itself had issued permits in other cities, but did not include the trash receptacle condition,” in the Court’s view, “undermines the argument that the requirement was federally mandated.” *Id.*

II. Application of the Supreme Court’s Test in *Department of Finance* Must Lead to the Conclusion that the Permit Conditions at Issue in this Test Claim are State Mandates

The Supreme Court has provided the Commission with a clear test that it can apply in evaluating whether an MS4 permit provision in fact represents a federal or state mandate, and where the burden of persuasion lies. In this section, the Joint Test Claimants set forth how *Department of Finance*, when applied in evaluating the Permit provisions at issue in this Test Claim, must lead this Commission to conclude that the provisions represent state mandates.³

Before turning to the elements of the Test Claim and how the Supreme Court’s decision in *Department of Finance* impacts those elements, we wish to address how the opinion addresses

³ The Supreme Court did not address the issue of whether the state mandates in the Los Angeles County MS4 permit were unfunded, and that issue is therefore not addressed in this Supplemental Brief.

some of the State's general rebuttal arguments made in letters to the Commission in response to the Test Claim.⁴

A. The Supreme Court's Decision Rejects the Reasoning Employed by the State to Support Its Position that the Challenged Provisions Represented Federal Mandates

The Santa Ana Water Board ("SAWB") argued in a letter dated March 9, 2011 ("SAWB Letter") that the NPDES permitting program constituted a federal mandate which applies directly to local governments, that the State has not shifted any burden to local governments and that the mandates did not exceed federal law. SAWB Letter at 12-17. Those arguments, however, no longer have validity in light of *Department of Finance*.

The SAWB first states (Letter at 2) that "Federal law, not state law, mandates the issuance of the Permit as a whole, including the challenged provisions." The Board further argued that it was mandated by federal law to "prescribe the BMPs [best management practices] that the MS4 must implement." *Id.* at 13. This argument was considered and rejected by the Supreme Court, when it held that the permit requirements are not federal mandates simply because they are contained in an NPDES permit. Slip op. at 21. Instead, "in issuing the Permit, the Regional Board was implementing both state and federal law." *Id.* In the case of the Los Angeles County MS4 permit requirements, "[i]t is clear federal law did not compel the Regional Board to impose these particular requirements." Slip op. at 20. The Court held further that the regional board there "was not required by federal law to impose any specific permit conditions."

The SAWB also criticized the approach of the Commission in relying on *Hayes, supra* and *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, in determining the existence of state mandates. SAWB Letter at 13. In particular, the Board criticized the Commission's approach in assessing state mandates in the 2007 San Diego County permit, where the Commission examined whether federal law or regulation required a municipality to adopt or implement a hydromodification plan. It is this particularized approach, however, not simple deference to the MEP standard that the Supreme Court upheld in *Department of Finance*. See slip op. at 24 (the CWA "makes no mention of inspections""The regulations do not mention commercial facility inspections at all.")

The SAWB also criticized the Commission for what it considered a misapplication of the holding in *Hayes*, arguing that the Board did not have "the choice to avoid imposing pollution controls in MS4 permits" and claiming that the Permit "did not shift any federal mandate from the

⁴ These are a letter dated March 9, 2011 from David Rice, Esq., Staff Counsel in the Office of Chief Counsel, State Water Resources Control Board, on behalf of the Santa Ana Water Board and a letter dated March 9, 2011 from Nona Martinez, Assistant Program Budget Manager for the Department of Finance. The Joint Test Claimants do not address arguments in these letters that were not germane to the Supreme Court's decision, such as whether the permit requirements were new programs or higher levels of service or whether funding was available, though these other arguments were addressed in the Joint Test Claimants' Joint Narrative Statement in Rebuttal filed with the Commission on June 17, 2011 ("Rebuttal"). The Department of Finance letter essentially makes the legal arguments made by the Water Board in its letter, and thus will not be addressed in this Supplemental Brief.

state to the Claimants.” Letter at 16-17. The issue, however, is not whether the regional board had a choice as to whether to impose pollution controls. The issue was whether the regional board freely chose the particular pollution controls at issue. As discussed above, the Supreme Court cited *Hayes* to show that where a state agency “freely chose” to impose costs on the local agency as a means of implementing a federal program, those costs were a reimbursable state mandate. As the Court held, “as in *Hayes, supra*, [citation omitted], the Regional Board had discretion to fashion requirements which it determined would meet the CWA’s maximum extent practicable standard.”

B. The Supreme Court Made Clear That Test Claimants Need Not Challenge The Federal Nature of MS4 Permit Requirements Before the Water Boards

The SAWB argued that “the question of whether permit provisions exceed the MEP standard is more properly brought before the State Water Board” and that the Joint Test Claimants should have exhausted that administrative remedy before the State Water Board. Failing to do so, argued the Board, would allow “the Commission to adjudicate a matter properly within the expertise and jurisdiction of the State Water Board.” SAWB Letter at 18-19.

As noted in Section I.C above, the Supreme Court flatly rejected arguments made by the State that the Commission should defer to the findings of the water boards as to the federal/state nature of mandates in stormwater permits. Slip op. at 21-24. The Court held that the Commission is the sole and exclusive venue for determination of this question and that no deference is owed to the Water Boards. Moreover the Court held that it is the Water Boards which bear the burden of establishing this exception to the requirement to reimburse unfunded state mandates. Slip op. at 22-23. *Department of Finance* makes clear that issues of whether a permit requirement constitutes a state mandate must be heard by the Commission, which has exclusive jurisdiction over such matters.

C. Application of the Supreme Court’s Decision to the Issues Raised in the Joint Test Claim Supports A Finding That They Constitute Unfunded State Mandates

Test Claim 09-TC-03 concerns the following provisions of Santa Ana Water Board Order No. R8-2009-0030:

1. Section XVIII of the Permit incorporated several existing and proposed Total Maximum Daily Load (“TMDL”) programs in a fashion that constitute state mandates. Specifically, the Joint Test Claimants allege that the following requirements constitute such state mandates:

- The requirement in Permit provisions XVIII.B.1 through B.4 to strictly achieve numeric effluent limits in waste load allocations established for toxic pollutants in San Diego Creek and Newport Bay;
- The requirement in Permit provision XVIII.B.5 to strictly achieve numeric effluent limits in waste load allocations established for a TMDL for Organo-Chlorine

Compounds in San Diego Creek and Newport Bay and a requirement to comply with a State-adopted TMDL prior to its approval by EPA;

- The requirement in Permit provision XVIII.B.7 to develop TMDLs for metals and selenium in the Newport Bay watershed and the requirement in provision XVIII.B.8 for permittees to establish a “Cooperative Watershed Program” to meet the requirements of a selenium TMDL implementation plan and to implement that plan upon Water Board approval;
- The requirement in Permit provision XVIII.B.9 for permittees to develop a Constituent Specific Source Control Plan, including a monitoring program, for the Coyote Creek and San Gabriel River TMDL for metals and selenium;
- The requirement in Permit provision XVIII.C.1 that permittees strictly comply with numeric effluent limits in waste load allocations under a TMDL for fecal coliform/bacteria in Newport Bay; and
- The requirement in Permit provision XVIII.D.1 that permittees strictly comply with numeric effluent limits in waste load allocations for Diazinon and Chlorpyrifos in San Diego Creek and Chlorpyrifos in Newport Bay.

2. The application of low impact development (“LID”) and hydromodification requirements in Sections XII.B through XII.E of the Permit to public projects.

3. The requirement in Section XIII of the Permit to undertake specific public education requirements.

4. The requirement in Section XI of the Permit for permittees to develop a program to reduce discharges of pollutants from residential facilities through specific program elements.

5. The requirement in Sections IX and X of the Permit (relating to municipal inspections of industrial and commercial facilities) that permittees develop a Geographical Information System (“GIS”) for industrial facilities and specified commercial facilities and conduct additional inspections.

The impact of the Supreme Court’s decision on these claims is discussed below.

1. TMDL Provisions

As set forth in the Narrative Statement in Support of the Joint Test Claim (“Narrative Statement”) (pages 9-27) and the Rebuttal (pages 24-39), the TMDL provisions in the Permit constitute reimbursable state mandates. First, the Permit’s incorporation of the TMDL waste load allocations as strict numeric effluent limitations represents a discretionary act of the SAWB that exceeds the approach called for in the CWA, which is to implement such waste load allocations through control measures called “best management practices” (“BMPs”). As set forth more fully in the Rebuttal (*see* pages 24-39), the plain language of the CWA and its implementing regulations,

case law, and the nature of the California Toxics Rule (which forms the basis for many of the numeric effluent limits) demonstrate that the SAWB in fact had, and made, a “true choice” in requiring compliance with such limits.

In *Department of Finance*, the Supreme Court established this test for an MS4 permit requirement: a federal mandate exists if federal law compelled the State to impose the requirement or itself imposed the requirement. On the other hand, “if federal law give the state discretion whether to impose a particular implementing requirement, and the state exercises its discretion to impose the requirement virtue of a ‘true choice,’ the requirement is not federally mandated.” Slip op. at 18. As explained further in the Narrative Statement (11-16) and the Rebuttal (14-22), federal law does not require the imposition of strict numeric effluent limitations.

Here, the SAWB has exercised its discretion to impose a requirement as part of its “true choice.” The Supreme Court held that when a water board exercises its discretion in specifying the manner of implementation of requirements in a stormwater permit, such as implementation of a TMDL, it is creating a state mandate. *See* Slip op. at 20-21. The SAWB chose to incorporate the TMDLs at issue with numeric effluent limitations, instead of requiring the permittees to achieve compliance with the TMDLs’ waste load allocations with BMPs.

The Joint Test Claimants note that the State Board has itself concluded, in a 2015 precedential order binding on all regional water boards, that the decision to implement WLAs through numeric effluent limits in Water Quality Based Effluent Limitations (“WQBELs”) is discretionary, not mandatory: “The permitting authority [has] discretion as to how to express the WQBEL(s), either as numeric effluent limitations or as BMPs[.]” State Board Order No. WQ 2015-0075, at 11. This recognition of discretion extended also to the State Board’s recognition that “requiring strict compliance with water quality standards (e.g., by imposing numeric effluent limitations *is at the discretion of the permitting agency.*” *Id.* at 10 (emphasis supplied). The Joint Test Claimants will provide the Commission with a copy of this Order in future briefing.

Second, the Permit’s requirement that permittees were to comply with TMDLs prior to their approval by EPA can in no sense be explained as an act required by the CWA, since it is one made by a state agency to require actions to implement a TMDL that is not yet approved by the federal EPA, and thus is not federally enforceable. Such act is one of pure discretion by the SAWB, without compulsion by the CWA, and thus constitutes a requirement that is not federally compelled under the *Department of Finance* test.

Third, the Permit’s requirement that permittees are to “participate in the development” of TMDLs is a classic example of the shifting of federal responsibility from the State to local government. This shift of federal responsibility was discussed in *Department of Finance* when the Supreme Court determined that the State there had transferred inspection requirements imposed on regional water boards to the permittees: “The Regional Board exercised its discretion under the CWA, and shifted that obligation to the [MS4] Operators.” Slip op. at 25.

Here, the CWA requires states to develop TMDLs for pollutants in waters where beneficial uses are found to be impaired due to the presence of those pollutants. 33 U.S.C. § 1313(d) (“Each *State* shall establish for the waters identified . . . the total maximum daily load, for those pollutants which the Administrator identifies . . . as suitable for such calculation.”) (emphasis supplied). By

shifting in part the responsibility to develop TMDLs to the permittees, the SAWB to that extent created a reimbursable state mandate.

Fourth, the requirement to create and implement a “Cooperative Watershed Program” and a “constituent specific source control plan” and monitoring program associated with the selenium TMDL in San Diego Creek and Newport Bay and the Coyote Creek TMDL similarly are new programs, adopted at the discretion of the SAWB, which represent reimbursable state mandates. Neither the CWA nor its implementing regulations requires such programs, as discussed in the Rebuttal at pages 37-38. In the absence of any such authority, it is clear that the programs were not “federally compelled” within the meaning of *Department of Finance*. See also the Court’s discussion of the trash receptacle requirement in the Los Angeles County MS4 permit at issue in the case, where, similarly, there was no statutory or regulatory requirement for the receptacles. Slip op. at 26-27.

2. Low Impact Development and Hydromodification Requirements

As set forth in the Narrative Statement (pages 27-36) and the Rebuttal (pages 39-43), the application to public development projects of the requirements set forth in Section XII of the Permit to require the Permit’s LID and hydromodification requirements are state mandates. The imposition of these requirements illustrates one of the key points made by the Supreme Court in *Department of Finance*, that general federal regulatory requirements (here a general requirement to address discharges from “areas of new development and significant redevelopment,” 40 CFR §122.26(d)(2)(iv)(A)) do not constitute a federal mandate for the highly specific elements included in the Permit’s LID or hydromodification requirements.

These Permit requirements include, but are not limited to, developing programs to incorporate water quality protections into development projects, including BMPs for various tasks, infiltrating and otherwise treating water from the 85th percentile storm event, maintaining or replicating pre-development hydrologic regimes, taking steps to address changes in hydrology and pollutant loading from projects, and evaluating project downstream erosion impacts and, as required, implement in lieu/mitigation projects.

As the Supreme Court held, citing *Hayes*, where an agency such as the SAWB implemented a general federal requirement, it was exercising its discretion and exercising a “true choice” when it imposed the detailed and prescriptive LID and hydromodification provisions. Slip op. at 25. The LID and hydromodification requirements were not compelled by federal law and, again, represented the exercise of the SAWB’s discretion to include those requirements in the Permit.

3. New Public Education Requirements

Department of Finance supports the position of the Joint Test Claimants that the public education requirements in Section XIII of the Permit are reimbursable state mandates. As set forth in the Narrative Statement (37-41) and Rebuttal (43-46), the Permit imposed significant new and detailed public education requirements over and above the requirements of the 2002 permit, all without any support in the governing federal CWA regulations, which require only “educational

activities” for commercial pesticide/herbicide or fertilizer applicators and distributors, “educational activities” to facilities proper management of used oil and toxic materials and “educational and training measures” for construction site operators. 40 CFR § 122.26(d)(2)(iv)(A)(6), (B)(6) and (D)(4).

The Permit requires the permittees to, among other things, complete a survey, target specific industrial and commercial sectors as well as residential and community activities, conduct workshops, develop BMP guidance and public education materials on illegal and unauthorized dumping and discharges and develop and implement mechanisms for public participation in planning activities.

In *Department of Finance*, the Supreme Court reviewed general federal regulatory provisions regarding inspections to see if they justified the inspection provisions in the Los Angeles County permit. Slip op. at 24-26. Having parsed those regulations, the Court determined that they did not establish the federal character of the inspection obligations:

The State argues the inspection requirements were federally mandated because the CWA required the Regional Board to impose permit controls, and the EPA regulations contemplated that some kind of operator inspections would be required. 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.

Slip op. at 26. *See also* the Court’s disposition of the trash receptacle requirement in the Los Angeles County permit, where it found that “[n]o regulation cited by the State required trash receptacles at transit stops.” *Id.* at 27.

The specificity and scope of the public education requirements in the Permit similarly go well beyond federal regulatory authority, and demonstrate that the SAWB was exercising its discretion to impose state mandated requirements on the permittees. As the Rebuttal notes, the SAWB set forth no findings that the additional public education requirements were required “to address any deficiencies of the existing program” or were “necessary to address specific pollutants of concern . . .” Rebuttal at 45. Given the lack of such findings, it cannot be argued the additional public education conditions “were the only means by which the [MEP] standard could be implemented,” where deference to the board’s expertise in reaching that finding would be appropriate. Slip op. at 22.

4. New Residential Facilities Requirements

The Supreme Court’s decision similarly supports the Joint Test Claimants’ position that the specific and detailed residential facilities requirements are state mandates.

As set forth in the Narrative Statement (42-44) and Rebuttal (46-47), Section XI of the Permit establishes specific and detailed requirements to address pollutants generated in residential areas. These requirements include, but are not limited to, developing and implementing a residential program to reduce the discharge of pollutants to the MS4, identifying specified residential areas and activities that are potential sources of pollutants and encouraging pollution

prevention measures, facilitating the collection of oil and hazardous materials, developing a pilot program to control pollutant discharges from common interest areas and areas managed by homeowner associations or management companies and evaluating the residential program in annual reports.

As with the public education requirements, the authorizing federal regulation (40 CFR §122.26(d)(2)(iv)(A)) requires only that unspecified “structural and source control measure to reduce pollutants from runoff from commercial and residential areas” be included in MS4 permits. The Supreme Court, as noted above, rejected similar claims that general federal regulatory requirements gave the Water Board federal authority to impose the kind of specific permit requirements contained in Section XI.

5. GIS and Inspection Requirements for Industrial and Commercial Facilities

As set forth in the Narrative Statement (45-51) and the Rebuttal (47-51), Section IX.1 of the Permit included a new requirement to employ a GIS with certain formatting to inventory industrial facilities and Section X.1 required both a GIS inventory of commercial facilities and the additional requirement for municipalities to inspect 11 additional categories of commercial facilities.

The federal stormwater regulations only require that the permit include an “inventory” of sources associated with industrial activity (40 CFR § 122.26(d)(2)(ii)). This regulation does not, however, require the use of GIS technology. The Joint Test Claimants’ Rebuttal (pages 50-51) further establishes that there were feasible alternatives to the use of GIS. As with the additional inspection and trash receptacle requirements in the Los Angeles County MS4 permit at issue in *Department of Finance*, the SAWB freely chose to impose such additional specific requirements in the Permit, thus rendering them reimbursable state mandates. Slip op. at 24-27.

Similarly, there is no federal requirement for the use of GIS technology or the inspection of commercial facilities, including the additional facility types added in the Permit. Under *Department of Finance*, such requirements are reimbursable state mandates.

* * *

The Joint Test Claimants appreciate this opportunity to provide this Supplemental Brief on the impact of the California Supreme Court’s decision in *Department of Finance*.

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 21, 2016, I served the:

**Claimant Response to the Request for Additional Briefing,
SARWQCB Response to the Request for Additional Briefing, and
Finance Response to the Request for Additional Briefing**

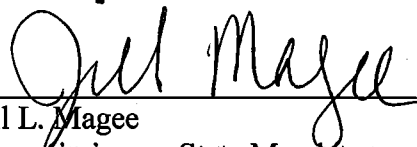
Santa Ana Region Water Permit, 09-TC-03

California Regional Water Quality Control Board, Santa Ana Region,
Order No. R8-2009-0030

County of Orange, Orange County Flood Control District, Cities of Anaheim, Brea,
Buena Park, Costa Mesa, Cypress, Fountain Valley, Fullerton, Huntington Beach, Irvine,
Lake Forest, Newport Beach, Placentia, Seal Beach and Villa Park, 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 21, 2016 at Sacramento, California.



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