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October 28, 2024

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October 28, 2024

Commission on
State Mandates

Re: California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074, 10-TC-02, 10-TC-03, and 10-TC-05
California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074, Sections C.2.b, C.2.c, C.2.e, C.2.f, C.8.b., C.8.c., C.8.d.i, C.8.d.ii., C.8.d.iii., C.8.e.ii., C.8.e.ii., C.8.e.iii., C.8.e.iv., C.8.e.v., C.8.e.v., C.8.e.v., C.8.e.v., C.8.g.vi., C.8.g.vi., C.8.g.vi., C.8.g.vii., C.8.h, C.10.a.i., C.10.a.ii., C.10.a.iii., C.10.b.ii., C.10.b.iii., C.10.c., C.10.d.ii., C.10.d.ii., C.11.f., and C.12.f., Adopted October 14, 2009 and Effective December 1, 2009;
Cities of Dublin and San José, and County of Santa Clara, Claimants

City of San Jose's comments on the Draft Proposed Decision

Dear Ms. Halsey:

The City of San José submits the following comments to the Commission's Draft Proposed Decision ("Draft Decision") on the above consolidated test claims. Most of the issues in San Jose's Test Claim are also part of the County of Santa Clara's and City of Dublin's Test Claims. Therefore, the San Jose's comments focus on issues related to Provision C.2, unique to San José's claim. ¹ Regarding the remaining challenged provisions, the City of San José joins in the Comments provided by the County of Santa Clara, City of Dublin, and Alameda Countywide Clean Water Program.

San José urges this Commission to adopt the Draft Decision on the findings that several conditions impose unfunded mandates on local jurisdictions. San Jose also requests the Commission to revise the Draft Decision as to sections C.2.b., C.2.c., C.2.e., and C.2.f., to find that they are unfunded mandates because public entities are legally and practically compelled to construct and maintain their public property and because these provisions create new or higher levels of service.

¹ San José incorporates here and reiterates the arguments it made throughout this Test Claim process. Although this comment focuses on section C.2, San José reserves all of its arguments.

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Introduction

Stormwater Permits implement the Federal Clean Water Act; the Regional Boards, however, continue to add requirements and detail not found in federal law and for which local agencies cannot recover from other sources, leading to significant litigation. ²

In these comments, San José focuses on the Draft Decision's analysis of sections C.2.b., C.2.c., C.2.e., and C.2.f.. These sections "impose certain requirements and BMPs for sidewalk and plaza maintenance and pavement washing; bridge and structural maintenance and graffiti removal; rural road public works construction and maintenance; and corporation yard maintenance." ³ According to the Draft Decision, these requirements do not present a reimbursable mandate because they are triggered by a voluntary decision to develop and maintain facilities and infrastructure and because they are not new. ⁴ The Draft Decision is incorrect on both points.

1. Public entities do not "voluntarily participate in a program" when they construct, expand or maintain public property.

The Draft Decision's reasoning renders the exercise of any local entity power participation in a "voluntary program" and any additional requirements imposed by the State not reimbursable. The Draft Decision erroneously concludes that public entities voluntarily develop and maintain public facilities and therefore do not trigger the state mandate requirements of article XII B, section 6. Its reasoning ignores the practical and legal compulsions imposed on public entities, therefore, its conclusion should be revised.

The Draft Decision correctly states that if a local government is legally or practically compelled to participate in an action then reimbursement is necessary. It correctly outlines the two theories for determining whether a program is compelled or mandated. ⁶ A public entity is practically compelled to participate if a "statutory scheme does not command a public entity to act, but instead induces compliance through the imposition of severe consequences that leave the local entity no reasonable alternative but to comply." ⁷ Legal compulsion occurs when the local entity has a "mandatory, legally enforceable duty to obey." ⁸

For stormwater infrastructure, courts rejected the State's argument that by owning and maintaining a storm drainage system the entities voluntarily participated in the permit system and that, therefore, the State could impose any terms and conditions in the permit:

² See, e.g., Dept. of Finance v. Commn. on State Mandates (County of San Diego) (2022) 85 Cal.App.5th 535; Dept. of Finance v. Commn. on State Mandates (County of Los Angeles) (2021) 59 Cal.App.5th 546; & Dept. of Finance v. Commn. on State Mandates (County of Los Angeles) (2017) 18 Cal.App.5th 661.

³ Draft Decision at p. 100.

⁴ *Id*.

⁵ See Draft Decision at pp. 103-107.

⁶ See Draft Decision at p. 103.

⁷ Draft Decision at p. 103 (quoting *Dept. of Finance v. Commn. on State Mandates* (2022) 13 Cal. 5th 800, 816.) ⁸ *Id.*

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[T]he alternative to not obtaining an NPDES permit was for permittees not to provide a stormwater drainage system. If permittees chose to operate an MS4, they were required by the State to obtain a permit. [Citation.] While permittees at some point in the past chose to provide a stormwater drainage system, "[t]he drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised." [Citation.] In urbanized cities and counties such as permittees, deciding not to provide a stormwater drainage system is no alternative at all. It is "so far beyond the realm of practical reality" that it left permittees "without discretion" not to obtain a permit. [Citation.] Permittees were thus compelled as a practical matter to obtain an NPDES permit and fulfill the permit's conditions. Permittees "[did] not voluntarily participate' in applying for a permit to operate their stormwater drainage systems; they were required to do so under state and federal law and the challenged requirements were mandated by the Regional Board." [Citation.] ⁹

Despite this clear holding, the Draft Decision concludes that by constructing and maintaining public infrastructure, the public entities voluntarily participate in a program. However, cities and counties have a Constitutional right to "establish, purchase, and operate public works" to furnish residents with "light, water, power, heat, transportation, or means of communication." ¹⁰ Thus, it is undisputable that construction and maintenance of public works is an essential function of local government and necessary for public health, safety, and welfare. Applying the Draft Decision's logic, San Jose could simply choose not to construct a new road, library, or fire station; for its existing facilities, it could choose to allow them to fall in a state of disrepair. But like a stormwater drainage system, deciding not to provide new public works or maintain existing ones is "so far beyond practical reality" that public entities are compelled to act.

Moreover, failure to comply with this practical reality exposes public entities to legal liability. Government Code section 835 provides:

Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

⁹ Dept. of Finance v. Commn. on State Mandates (2021) 59 Cal.App.5th 546, 560 (emphasis added); see also Draft Decision at p. 89.

¹⁰ Cal. Const. art. XI § 9(a). Section 9 provides:

⁽a) A municipal corporation may establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication. It may furnish those services outside its boundaries, except within another municipal corporation which furnishes the same service and does not consent.

⁽b) Persons or corporations may establish and operate works for supplying those services upon conditions and under regulations that the city may prescribe under its organic law.

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(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition. ¹¹

The Draft Decision relies on clearly distinguishable cases. For example, in *Department of Finance v. Commission on State Mandates (Kern High School District)* 30 Cal.4th 727, the local school district challenged agenda and noticing requirements for participating in **a voluntary grant funded program**. ¹² Here, however, the State does not propose to provide grant funds for the construction and maintenance of the public infrastructure. And in *City of Merced v. State* (1984) 153 Cal.App.3d 777, the court held that the city chose to acquire property through the exercise of eminent domain so compensating the owner for the loss of goodwill was not compelled. But construction of public works can occur without the exercise of the power of eminent domain. Neither case applies here.

Thus, the Draft Decision skips that essential step in the analysis: can a public entity choose not to construct or maintain public property? Because public infrastructure would be unavailable or in disrepair, it is not practical for a public agency to function without using its Constitutional powers to construct and maintain public works. The Draft Decision should be amended to reflect this reality.

2. Section C.2 constitutes a new program or higher level of service.

The Proposed Decision erroneously concludes that section C.2 requirements in San José's permit at issue existed in prior versions of the Permit, the National Pollutant Discharge Elimination System (NPDES) Permit No. CAS029718, Board Order No. 01-024 ("Prior Permit"). ¹³

The Prior Permit identified requirements to be implemented, but only "to the maximum extent practical," an important qualifier not present in the Stormwater Permit at issue here. ¹⁴ Courts recognize the discretion provided by the "maximum extent practical" standard:

[T]he Supreme Court found the "maximum extent practicable" did not preclude the State from making a choice; rather, it gave the State discretion to make a choice. "The federal CWA broadly directed the board to issue permits with conditions designed to reduce pollutant discharges to the maximum extent practicable. But the EPA's regulations gave the board discretion to determine

¹¹ Gov. Code §835.

¹² See Draft Decision at pp. 105-106.

¹³ See Draft Decision at pp. 108-13.

¹⁴ San Jose's Test Claim, Exh. 2; San Jose's Revised Narrative Statement at pp. 12-17; San Jose's Reply at pp. 3-16 & 17-34.

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which specific controls were necessary to meet that standard. [Citations.] As the high court stated, except where a regional board finds the conditions are the only means by which the "maximum extent practicable" standard can be met, the State exercises a true choice by determining what controls are necessary to meet the standard. ¹⁵

If the State "freely chose to impose costs upon the agency as a means of implementing a federal program, then the costs are the result of a reimbursable state mandate regardless of whether the costs were imposed upon the state by the federal government." ¹⁶

Removing the permittees' ability to determine the "maximum extent practical" imposes a new or higher level of service than the prior permit. The difference between Prior Permit and the one at issue here is apparent after comparing the terms of both. ¹⁷ For example, section C.2.a. of the Prior Permit reads:

Urban Runoff Management Plan and Performance Standards

The Dischargers shall implement control measures and best a. management practices to reduce pollutants in stormwater discharges to the maximum extent practicable. The Management Plan shall serve as the framework for identification, assignment, and implementation of such control measures/BMPs. The Management Plan contains Performance Standards that address the following Program elements: Illicit Connection/Illegal Discharge Control; Industrial/Commercial Discharger Control; Public Streets, Roads, and Highways Operation and Maintenance; Storm Drain Operation and Maintenance; Water Utility Operation and Maintenance; and New Development Planning Procedures and Construction Inspection. Performance Standards are defined as the level of implementation necessary to demonstrate the control of pollutants in stormwater to the maximum extent practicable. The Dischargers shall implement the Management Plan, and shall, through its continuous improvement process, subsequently demonstrate its effectiveness and provide for necessary and appropriate revisions, modifications, and improvements to reduce pollutants in stormwater discharges to the maximum extent practicable and as required by Provisions C. 1 through C.10 of this Order. 18

¹⁵ Dept. of Finance v. Commn. on State Mandates (2017) 18 Cal. App.5th 661, 682.

¹⁶ Hayes v. Commn. on State Mandates (1992) 11 Cal.App.4th 1564, 1593-94.

¹⁷ San José's Revised Narrative Statement at pp. 12-17; San José's Reply at pp. 3-16 & 17-34.

¹⁸ San José's Test Claim, Ex. 2. (emphasis added)

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The Stormwater Permit at issue here, however, does not contain the qualifying "to the maximum extent practicable" language: "C.2. Municipal Operations [¶] The purpose of this provision is to ensure development and implementation of appropriate BMPs by all Permittees to control and reduce non-stormwater discharges and polluted stormwater to storm drains and watercourses during operation, inspection, and routine repair and maintenance activities of municipal facilities and infrastructure." ¹⁹

As explained in earlier briefing, the Stormwater Permit expands each area in the Prior Permit in sections C.2.a. through C.2(f). For example, section C.2.b. "Sidewalk/Plaza Maintenance and Pavement Washing" requires Best Management Practices "for pavement washing, mobile cleaning, pressure wash operations in such locations as parking lots and garages, trash areas, gas station fueling areas, and sidewalk and plaza cleaning" not found in the Prior Permit. The Stormwater Permit also requires permittees to "implement BMPs included in BASMAA's Mobile Surface Cleaner Program." ²⁰ This means that section C.2.b contains not only a new scope of responsibilities but also mandates implementation levels and reporting. The Draft Decision erroneously holds otherwise.

Conclusion

The Draft Decision correctly states that reimbursement is necessary when there is a legal or practical compulsion. Construction and maintenance of public property is both, and section C.2 and its subsections C.2.b., C.2.c., C.2.e., and C.2.f. are State mandates requiring reimbursement.

Under California Code of Regulations Title 2, sections 1183.8 and 1183.3, I certify and declare under penalty of perjury under the laws of the State of California that the forgoing is true and correct to the best of my personal knowledge, information, or belief, and that this declaration is executed on this 28th day of October, 2024, at San José, California.

Very truly yours,

NORA FRIMANN, City Attorney

MARGO LASKOWSKA Senior Deputy City Attorney

By: Margo Lashowole

CDW/mkl

¹⁹ San Jose Test Claim, Ex. 1.

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 29, 2024, I served the:

- Current Mailing List dated September 26, 2024
- Claimant's (City of Dublin) and Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision filed October 28, 2024
- Claimant's (City of San Jose) Comments on the Draft Proposed Decision filed October 28, 2024
- Claimant's (County of Santa Clara) Comments on Draft Proposed Decision filed October 28, 2024
- Water Boards' Comments on Draft Proposed Decision filed October 28, 2024

California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074, 10-TC-02, 10-TC-03, and 10-TC-05
California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074, Sections C.2.b, C.2.c, C.2.e, C.2.f, C.8.b., C.8.c., C.8.d.i, C.8.d.ii., C.8.d.iii., C.8.e.ii., C.8.e.ii., C.8.e.iii., C.8.e.iv., C.8.e.v., C.8.e.vi., C.8.f., C.8.g.i. (first sentence only), C.8.g.ii., C.8.g.iii., C.8.g.v., C.8.g.v., C.8.g.vi., C.8.g.vii., C.8.h, C.10.a.i., C.10.a.ii., C.10.a.iii., C.10.b.ii., C.10.b.ii., C.10.b.iii., C.10.c., C.10.d.i., C.10.d.ii., C.11.f., and C.12.f., Adopted October 14, 2009 and Effective December 1, 2009

Cities of Dublin 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 October 29, 2024 at Sacramento, California.

David Chavez

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COMMISSION ON STATE MANDATES

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Last Updated: 9/26/24

Claim

10-TC-02, 10-TC-03, and 10-TC-05

Number:

California Regional Water Quality Control Board, San

Francisco Bay Region, Order No. R2-2009-0074, Provisions

Matter: 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 vi,

C.8.f, C.8.g, C.8.h, C.10.a, C.10.b, C.10.c, C.10.d, C.11.f, and

C.12.f

Claimants: City of Dublin

City of San Jose

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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