



State Water Resources Control Board

January 11, 2024

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**Commission on
State Mandates**

VIA COMMISSION DROP BOX

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COMMENTS OF THE STATE WATER RESOURCES CONTROL BOARD AND CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SANTA ANA REGION

Draft Proposed Decision on *California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0033, 10-TC-07*

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0033, Sections IV; VI.D.1.a.vii; VI.D.1.c.i(8); VI.C.2.c; VI.D.2.d.ii(d); VI.D.2.i; VII.B; VII.D.2; VII.D.3; VIII.A; VIII.C; VIII.H; IX.C; IX.D; IX.E; IX.H; X.D; XI.D.1; XI.D.6; XI.D.7; XI.E.6; XII.A.1; XII.A.5; XIII.B; XII.C.1; XII.D.1; XII.E.1; XII.E.2; XII.E.3; XII.E.4; XII.E.6; XII.E.7; XII.E.8; XII.E.9; XII.F; XII.G.1; XII.K.4; XII.K.5; XII.H; XIV.D; XV.A; XV.C; XV.F.1; XV.F.5; XVII.A.3; and Appendix 3, Section III.E.3, adopted January 29, 2010

County of Riverside, Riverside County Flood Control & Water Conservation District, the Cities of Beaumont, Corona, Hemet, Lake Elsinore, Moreno Valley, Perris, and San Jacinto, Claimants

Dear Ms. Halsey:

The State Water Resources Control Board (State Water Board) and California Regional Water Quality Control Board, Santa Ana Region (Santa Ana Water Board) (collectively, Water Boards) have reviewed the Draft Proposed Decision dated November 17, 2023, for the above-referenced Test Claim. The Water Boards appreciate the careful and thoughtful work of the Commission on State Mandates (Commission) staff and concur with conclusions reached in the Draft Proposed Decision (DPD) to deny challenges to numerous provisions in Order No. R8-2010-0033 (Test Claim Permit). The Water Boards specifically disagree, however, with some aspects of the DPD. The Water Boards address these points below.

E. JOAQUIN ESQUIVEL, CHAIR | ERIC OPPENHEIMER, EXECUTIVE DIRECTOR

1. *The requirements to develop and revise jurisdiction-specific individual Local Implementation Plans, like the requirements to implement them, are not state mandates.*

Sections VI.B and VI.C of the Test Claim Permit require permittees to develop and revise jurisdiction-specific individual Local Implementation Plans (LIPs) based on the template required by Section VI.A. Sections VI.D.1.a.vii, VI.D.1.c.i(8), VI.D.2.c, VI.D.2.d.ii(d), VI.D.2.i, V.II.B, VII.D.2, VIII.A, VIII.H, IX.C, IX.D, XII.A.1, XII.H, XIV.D, XV.A. require the permittees to include specific information in their individual LIPs once developed.

While the Water Boards acknowledge that Claimants were not previously required to develop a template for LIPs, the Water Boards disagree that the requirements to develop and revise individual jurisdiction-specific LIPs are state-mandated new programs or higher levels of service. The DPD recognizes that the prior permit already required permittees to “implement management programs, monitoring programs, all BMPs listed in the [Drainage Area Management Plan], and related plans’ and to ‘take such other actions as may be necessary to meet the MEP standard.’[fn omitted]” (DPD, pp. 96-97.) The DPD also recognizes that the LIP categories “largely reflect the major components of the test claim permit that the permittees are required to implement through their urban runoff management programs, with ordinances, agreements, plans, policies, procedures, and tools referenced where relevant.” (DPD, p. 86.) The requirements to develop and revise individual jurisdictional LIPs merely require permittees to document the ongoing implementation of existing Test Claim Permit programs. For these reasons, the above requirements do not impose a new program or higher level of service. To the extent the Commission disagrees, it should find that the costs to comply with the requirements to develop and revise individual LIPs are *de minimis*.

2. *Claimants have fee authority for the entire test claim period*

The DPD contains extensive discussion of local agency constitutional and statutory authorities to raise fees, including discussion of what has been found to constitute sufficient fee authority as a legal matter within the meaning of Government Code section 17556, subdivision (d). The Water Boards agree with the DPD’s conclusion that to the extent the Commission finds state mandated requirements, there are no costs mandated by the state for costs incurred beginning January 1, 2018.

As explained below, the Water Boards disagree with the DPD’s conclusion that claimants lack fee authority for costs incurred *prior* to 2018 due to Proposition 218’s voter approval provisions. California courts have consistently held that fee authority is purely a question of legal authorization. (*Connell v. Superior Court* (1997) 59, Cal.App.4th 382, 401 [holding that the focus under Government Code section 17556 is whether a local agency has “authority, i.e., the right or power, to levy fees sufficient to cover the costs:]; *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 812.) “[F]actual considerations of practicality” do not defeat a local agency’s fee authority. (*Paradise Irrigation Dist. v. Commission on State Mandates* (2019) 33

Cal.App.5th 174, 195.) The Draft Proposed Decision correctly finds that claimants have authority under their police powers to impose fees in connection with challenged permit provisions. Even where Proposition 218 super-imposes a voter approval provision on fees to pay for specific state mandates, the Commission should find claimants' authority nonetheless exists and expenditures for mandates are not reimbursable.

In *Paradise Irrigation, supra*, the court of appeal considered whether the majority protest procedure added by Proposition 218 deprived local agencies of authority to impose fees for water service. (33 Cal.App.5th at p. 182.) California Constitution, Article XIII D, section 6(a), requires a local agency to identify parcels subject to a new fee, calculate the fee amount, and provide notice to affected property owners. (Art. XIII D, § 6, subd. (a)(1).) If a majority of property owners submits written protests against the fee, the fee may not be imposed. (*Id.*, subd. (a)(2).)

The *Paradise Irrigation* court held that the “majority protest procedures are properly construed as a power-sharing arrangement between the districts and their customers, rather than a deprivation of fee authority.” (33 Cal.App.5th at p. 182.) It explained that, when considering how voter powers affect the ability of local governments to impose fees, courts “presume local voters will give appropriate consideration and deference to state mandated requirements” (*Id.*, at p. 194, citing *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 220.) “Although this power-sharing arrangement has the potential for conflict, we must presume that both sides will act reasonably and in good faith.” (*Id.*, at p. 192.) Further, the fact that, “as a matter of practical reality, the majority protest procedure allows water customers to defeat the District’s authority to levy fees” was not dispositive; “the inquiry into fee authority constitutes an issue of law rather than a question of fact.” (*Id.*, at p. 195, citing *Connell, supra*, 59 Cal.App.4th at p. 401.)

The *Paradise Irrigation* court did not consider whether a local agency has fee authority as a legal matter where fees or assessments are subject to voter approval requirements. However, the court’s reasoning applies with equal force where Proposition 218 requires pre-approval by a majority vote of the affected property owners (or, alternatively, by a two-thirds vote of the electorate). That the governing body of a municipality (e.g., County Board of Supervisors or City Council) and the affected property owners who elected that body share power to impose fees does not mean claimants are deprived of fee authority under Government Code section 17556. And the fact that property owners in claimants’ local jurisdictions could theoretically withhold approval—just as a majority of the governing body could theoretically withhold approval to impose a fee—does not undermine claimants’ police power; that power exists regardless of what the property owners, or the governing body, might decide about any given fee.

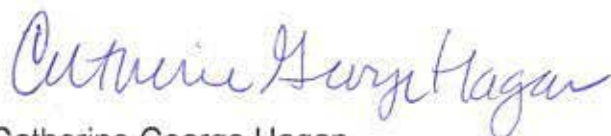
Under Proposition 218, local property owners share the power to impose certain fees with their governing bodies. This more direct governance process does not deprive a local agency of any fee authority, the local agency simply shares that authority with affected property owners or voters. Such property owners or voters are considered part of the legislating body, a body that has legal fee authority required by Government Code

section 17556. Whether a fee is subject to voter approval (which may be withheld) or majority protest (which can defeat a fee), there is the same potential practical result that the local agency will be unable to collect the desired fee. Since the same potential outcome can result from either power-sharing mechanism, there is no compelling reason to find fee authority exists in one mechanism but not the other. While voter approval provisions, like voter protest provisions, may complicate the exercise of fee authority, they do not negate it.

Therefore, while the Water Boards agree with the Draft Proposed Decision's reasoning to deny many of the challenged provisions in the test claim, the Commission should find that to the extent there are any state mandated costs prior to January 1, 2018, claimants have necessary fee authority and are entitled to no reimbursement.

I declare under penalty of perjury that the foregoing is true and correct to the best of my personal knowledge, information, or belief.

Sincerely,



Catherine George Hagan
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Tel. 619.521.3012

cc: Service List 10-TC-07 via Drop Box

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 January 12, 2024, I served the:

- **Current Mailing List dated January 11, 2024**
- **Water Boards' Comments on the Draft Proposed Decision filed January 11, 2024**

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0033, 10-TC-07

California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0033, Sections IV; VI.D.1.a.vii; VI.D.1.c.i(8); VI.D.2.c; VI.D.2.d.ii(d); VI.D.2.i; VII.B; VII.D.2; VII.D.3; VIII.A; VIII.C; VIII.H; IX.C; IX.D; IX.E; IX.H; X.D; XI.D.1; XI.D.6; XI.D.7; XI.E.6; XII.A.1; XII.A.5; XII.B; XII.C.1; XII.D.1; XII.E.1; XII.E.2; XII.E.3; XII.E.4; XII.E.6; XII.E.7; XII.E.8; XII.E.9; XII.F; XII.G.1; XII.K.4; XII.K.5; XII.H; XIV.D; XV.A; XV.C; XV.F.1; XV.F.4; XV.F.5; XVII.A.3; and Appendix 3, Section III.E.3, Adopted January 29, 2010

County of Riverside, Riverside County Flood Control & Water Conservation District, and Cities of Beaumont, Corona; Hemet, Lake Elsinore, Moreno Valley, Perris, and San Jacinto, 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 January 12, 2024, at Sacramento, California.



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COMMISSION ON STATE MANDATES

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Last Updated: 1/11/24

**Claim
Number:** 10-TC-07

Matter: California Regional Water Quality Control Board, Santa Ana
Region, Order No. R8-2010-0033

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City of Hemet
City of Lake Elsinore
City of Moreno Valley
City of Perris
City of San Jacinto
County of Riverside
Riverside County Flood Control and Water Conservation
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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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