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October 21, 2016

RECEIVED
October 21, 2016
Commission on State Mandates

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

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 10-TC-11, California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002

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 9, 2016, requesting supplemental briefing concerning how this case applies to the above-referenced test claim. (We note that the Order number in the test claim caption is incorrect, and should be labelled "R9" not "R2." We have applied this change.)

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 Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo and San Juan Capistrano (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 10-TC-11: CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, ORDER NO. R9-2009-0002

This brief is filed on behalf of joint test claimants County of Orange, the Orange County Flood Control District and the Cities of Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo and San Juan Capistrano in Test Claim 10-TC-11 ("Joint Test Claimants") in response to the request of the Commission on State Mandates in a letter dated September 9, 2016 for additional briefing concerning the impact of a recent opinion of the California Supreme Court, *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 10-TC-11 regarding state mandates contained in California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, the municipal separate storm sewer system ("MS4") permit for Orange County local agencies in the South Orange County watersheds, including 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.

The Department of Finance filed a response to the Test Claim on October 10, 2016. However, that response stated that the Department would defer 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." The Department's response focused on fee authority issues, and will be addressed in the Joint Test Claimants' rebuttal comments.

A. Provisions at Issue in Test Claim

The Test Claim asserts that the following provisions in the Permit constitute reimbursable state mandates:

1. The removal in Section B.2 of the Permit of three categories of non-storm water discharges, landscape irrigation, irrigation water and lawn watering, from the categories of non-storm water discharges that are not prohibited from discharged into the MS4.

2. The requirements in Section I of the Permit requiring the meeting of numeric effluent limitations in a Total Maximum Daily Load ("TMDL") for discharges to Baby Beach, as well as the requirement to conduct monitoring.

3. The requirements in Sections C and F of the Permit mandating monitoring, investigation and compliance programs in the event of an exceedance of a Non-Stormwater Dry Weather Action Level ("NAL").

4. The requirements in Section D of the Permit mandating various program requirements triggered by an exceedance of a Stormwater Action Level ("SAL").

5. The requirement in Section F.1.d of the Permit mandating the imposition of Low Impact Development ("LID") requirements on public priority development projects and the requirement in Section F.1.h of the Permit to develop and implement a Hydromodification Management Plan ("HMP").

6. The requirements in Sections J.1.b, J.2, J.3 and J.4 of the Permit to prepare annual reports regarding the effectiveness of Jurisdictional Urban Runoff Management Programs ("JRMP") and to develop a methodology for measuring the effectiveness of the JRMP in meeting certain objectives and reviewing activities conducted to comply with Permit requirements and review and evaluate the effectiveness of BMPs. Permittees must also annually evaluate the methodology itself. Additionally, the Permit adds additional new reporting elements to its annual report. Additionally, the Permit requires the permittees to develop a "Work Plan" intended to address the high priority water quality problems in an iterative manner over the life of the permit.

7. The requirement in Sections G.6 and K.1.b of the Permit to conduct an annual noticed public meeting to review Watershed Work Plans required under the Permit.

8. The requirements in Sections F.1, F.3, K.3 and Attachment D of the Permit mandating additional required elements of the JRMP annual report, reporting on the waiver program required as part of LID requirements, inventorying all permittee flood control devices, and a reporting checklist requirement.

9. The requirement in Section F.4 of the Permit mandating the use of a Geographical Information System ("GIS") for a map of each permittee's MS4 and corresponding drainage area.

10. The requirements in Section F.3.d of the Permit mandating programs aimed at retrofitting areas of existing development.

11. The requirement in Section F.1.f of the Permit mandating permittees to inventory and track maintenance of BMPs constructed since July 2001.

The impact of the Supreme Court's decision in *Department of Finance* on each of these elements of the Test Claim is discussed below.

1. Removal of Categories of Permissible Non-Stormwater Discharges

As set forth in detail in the Joint Test Claimants' Section 5 Narrative Statement in Support of the Test Claim ("Narrative Statement") at pages 9-12, the issue of which non-stormwater streams are exempted from the prohibition against discharge into the MS4 in Section B.2 of the Permit is not a federal requirement. Federal regulations only require that non-stormwater streams, including landscape irrigation, irrigation water and lawn watering, be "addressed" if the "municipality" finds that they are source of pollutants. Narrative Statement at 10.

Here, the San Diego Water Board ("SDWB") mandated the removal of these streams from the list of exempt discharges without reference to the findings of the permittees, an act which required the permittees to take steps to prohibit such discharges from entering the MS4.

The mandate represented by the SDWB's action can be analogized to the trash receptacle requirements in *Department of Finance*, which were imposed on the Los Angeles County MS4 permittees without federal authority, beyond a very vague requirement to address "practices for operating and maintaining public streets, roads and highways . . . ." Slip op. at 26, quoting 40 C.F.R. § 122.26(d)(2)(iv)(A)(3). There, the Court found that the Commission was correct in not finding a federal mandate to implement the specific requirement to install and maintain trash receptacles. Here, the specific requirements imposed by the SDWB also represent a reimbursable state mandate.

2. TMDL Requirements

The Narrative Statement (pages 13-23) discusses in detail the requirements in Section I of the Permit for permittees to meet strict numeric effluent limits in waste load allocations set out in the Baby Beach bacterial indicator TMDL. As discussed in the Narrative Statement, in imposing numeric effluent limitations instead of requiring the permittees to install BMPs to comply with the waste load allocation, the SDWB has demonstrated that it in fact 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. Here, as explained further in the Narrative Statement (16-20), federal law does not require the imposition of strict numeric effluent limitations, but gave discretion to the state water boards to impose more stringent requirements.

Here, the SDWB has exercised its discretion to impose a requirement as part of its "true choice." 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 waste load allocations 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.

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 record before the Commission reflects that the SDWB 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. Those requirements, therefore, represent reimbursable state mandates.

3. Monitoring, Investigation, Reporting and Compliance Programs Triggered by NAL Exceedances

As described on pages 23-28 of the Narrative Statement, Sections C and F.4 of the Permit require the permittees to undertake a series of steps to monitor, investigate, report and address exceedances of NALs. These requirements are very prescriptive, as can be seen from the Permit excerpts set forth on pages 23-27 of the Narrative Statement, and closely direct the permittees along required paths in the event of an NAL exceedance.

The CWA does not require that municipal permittees be subject to numerical effluent standards in discharges from their MS4s. Narrative Statement at 27-28. Moreover, nothing in the CWA or its implementing regulations requires or even addresses NALs or the specific requirements of the Permit in response to their exceedance. While the NALs may not be strict numeric effluent limitations, the violation of which would render the permittees liable for violation of the Permit, this is a distinction without a difference in terms of the mandate – action is required under the Permit in the event of an exceedance.

By adopting these requirements, the SDWB has exercised its discretion to implement programs that are neither federally required nor even suggested by the CWA regulations. These requirements clearly are not federally compelled, *Department of Finance,* slip op. at 18. The SDWB had, and made, a "true choice" in imposing these requirements, and they therefore represent a reimbursable state mandate.

4. Monitoring and Compliance Programs Triggered by SAL Exceedance

As described on pages 29-31 of the Narrative Statement, Section D of the Permit requires permittees to undertake specific actions, including monitoring and various compliance requirements, in the event of an exceedance of a SAL. As with the NAL provision discussed above, nothing in the CWA or its implementing regulations requires such actions to be taken. *See* Narrative Statement at 30. And as with the NAL requirements, the CWA does not require that municipal permittees be subject to numerical effluent standards in discharges from their MS4s. Moreover, nothing in the CWA or its implementing regulations requires or even addresses SALs or the specific requirements of the Permit in response to their exceedance. While the SALs may not be strict numeric effluent limitations, the violation of which would render the permittees liable

for violation of the Permit, this is a distinction without a difference in terms of the mandate – action is required under the Permit.[3]

By adopting these requirements, the SDWB has chosen to implement programs that are neither federally required nor even suggested by the CWA regulations. These requirements clearly are not federally compelled, slip op. at 18. The SDWB had, and made, a "true choice" in imposing these requirements, and they therefore represent a reimbursable state mandate. Under *Hayes* and now *Department of Finance,* Permit requirements resulting from such a choice are reimbursable state mandates.

5. LID and Hydromodification Requirements

As described on pages 32-48 of the Narrative Statement, Sections F.1.d and F.1.h of the Permit require the permittees to update model and local Standard Storm Water Mitigation Plans ("SSMPs") apply LID BMP requirements for each priority development projects ("PDPs"), assess potential on- or off-site collection and reuse of storm water, amend local ordinances to remove barriers to LID implementation, maintain or restore natural storage reservoirs and drainage corridors, drain a portion of impervious areas into pervious areas, construct low-traffic areas with permeable surfaces, as well as collaboratively develop and implement an HMP to manage increases in discharges rates and durations from PDPs.

This Commission has already determined in the test claim involving the 2007 San Diego County MS4 permit, Test Claim 07-TC-09 ("2007 SD County Test Claim") that similar requirements to review and update BMPs in local SSMPs, to submit and implement an updated Model SSMP or to adopt an HMP are not required by federal law or regulation and thus constituted state mandates. 2007 SD County Test Claim at 51. In that test claim, the Commission considered the scope of the MEP standard in the CWA and determined that while the CWA suggested options for attaining this standard, when those suggestions were "required acts, [t]hese requirements constitute a higher level of service." *Id.* at 51.

Department of Finance confirms the correctness of the Commission's analysis in its determination of the 2007 San Diego County Test Claim. In the absence of a federal statutory or regulatory requirement, the detailed requirements in Section F.1 of the Permit represent the exercise of discretion by the SDWB to impose these requirements as a "free choice," not compelled by federal law. As such, the requirements are state mandates.

6. Annual JRMP Assessment Report and Resources Workplan

The Narrative Statement (pages 49-54) sets forth numerous, specific and prescriptive requirements in Permit Section J concerning evaluation of the effectiveness of the permittees' JRMPs, including evaluation of the effectiveness of the JRMP in reducing discharges into certain waterbodies, the effectiveness of individual JRMP elements and the effectiveness of measures conduct to implement the "iterative" approach to storm water pollutants. The methodology

[3] The Permit provides, moreover, that the failure by a permittee "to appropriately consider and react to SAL exceedances in an iterative manner creates a presumption that the Copermittee(s) have not complied with the MEP standard." *See* Narrative Statement at 29. Thus, in this way, the failure of the permittees to comply with SAL exceedance requirements could lead to liability for a violation of the Permit.

developed pursuant to this section must itself by annually evaluated by the permittees, who must then propose and implement changes to their activities and modifications of BMPs.

Additionally, the Annual Reports filed by the permittees must include nine specific additional items addressing various assessments activities, with specific and prescriptive requirements associated with each item. Finally, the Permit requires the permittees to develop work plans to "demonstrate a responsive and adaptive approach for the judicious and effective use of available resources to attack the highest priority problems" relating to water quality. Permit Section J.4.

What is especially characteristic of these requirements is their prescriptive nature. Permittees are given little flexibility in how they assess and adapt their stormwater programs to address pollution in stormwater discharges from MS4s. There is no evidence that these specific requirements were found by the SDWB to be the only means by which the MEP standard could be implemented.

As set forth further in the Narrative Statement (49-50), the CWA regulations do not require the extensive and specific measures set forth in Section J of the Permit. The scope and detail of these requirements was not compelled by federal law, but represent the choice of the SDWB in exercising its discretion. As the Supreme Court found in *Department of Finance*, in those circumstances the requirements constitute reimbursable state mandates. Slip op. at 24-27 (reviewing inspection and trash receptacle requirements in Los Angeles County permit).

7. Annual Noticed Public Meetings for Watershed Workplan Review

As set forth in the Narrative Statement (pages 55-57), Section G.6 and K.1 of the Permit require the permittees to conduct noticed public meetings in each watershed when performing a required annual update to Watershed Workplans. The federal stormwater regulations do not address any procedural requirements that must be followed by permittees, including with respect to the holding of public meetings.

As with other requirements in the Permit, the choice of the SDWB to require such public meetings is an exercise of their discretion outside of the requirements of federal law or regulation. The meetings are clearly not "compelled" by federal law within the test set forth in *Department of Finance* (slip op. at 18). By including them as an exercise of the SDWB's discretion, the requirement is a reimbursable state mandate under *Department of Finance.*

8. New Development and Flood Control System Reporting Requirements

As set forth in the Narrative Statement (pages 57-60), Sections F.1, F.3, K.3 and Attachment D of the Permit requires the permittees to include in their annual reports descriptions of priority development projects choosing to participate in the LID waiver program, including details of the feasibility analysis, BMPs implemented and funding details, as well as an inventory and evaluation of the permittee's existing flood control devices, identifying those devices causing or contributing to conditions of pollution, identifying measures to reduce or eliminate that effect, and evaluating the feasibility of retrofitting structural flood control devices, as well as submitting the inventory and evaluation to the SDWB. The Permit further requires a new reporting checklist.

As the Narrative Statement sets forth, none of these requirements is contained in federal regulations governing the content of stormwater permits (pages 57-59). Although annual reports

are required by regulation, none of the specific requirements in the sections of the Permit at issue are required in that regulation.

As the Los Angeles water board did in requiring the placement and maintenance of trash receptacles at issue in the test claim at issue in *Department of Finance* (slip op. at 26-27), the SDWB exercised its discretion to require the specific reporting in the Permit. Similarly, the federal regulations concerning the content of stormwater management plans (cited in the Narrative Statement at 59) do not require that permittees inventory their flood control devices or submit that information to the SDWB.

9. GIS Requirements

As set forth in the Narrative Statement (pages 60-61), Section F.4 of the Permit requires each permittee to create an updated map of its MS4 and drainage areas utilizing GIS technology. Nothing in the CWA or its implementing regulations requires the use of such technology, and the SDWB identified none in the Permit. Given the absence of such authority, it is clear that under the test in *Department of Finance*, slip op. at 18, there was no federal compulsion for permittees to use GIS technology.

The inclusion of GIS requirements was an act of pure discretion by the SDWB, unconnected to any federal requirement. Under *Department of Finance,* the requirement is a reimbursable state mandate.

10. New Retrofitting Program for Existing Development

Section F.3 of the Permit requires a program of retrofitting for areas of existing development, as described in the Narrative Statement (pages 61-65). The Permit requires the permittees, among other things, to identify and inventory areas of existing development for possible retrofitting based on various criteria, evaluate and rank all inventoried development to prioritize retrofitting based on specific criteria set forth in the Permit, consider the results of the evaluation in prioritizing workplans for the following year, require cooperation with private landowners using specified incentives, encourage the landowners to retrofit existing development, track and inspect completed retrofit BMPs, and propose regional mitigation projects where constraints on retrofitting preclude effective BMP deployment.

As noted in the Narrative Statement (page 64), nothing in the federal stormwater regulations require a retrofitting program, and certainly no federal authority requires the specificity of requirements set forth in Section F.3 of the Permit. Under *Department of Finance,* the specification of the retrofitting program requirements by the SDWB in the Permit is analogous to (though much more prescriptive than) the inspection and trash receptacle requirements found to be state mandates in the Los Angeles County permit. *Department of Finance,* slip op. at 24-27.

11. BMP Maintenance Tracking Requirements

As described in the Narrative Statement (65-68), Section F.1.f of the Permit requires the permittees to develop and maintain a watershed-based database to track and inventory all approved post-construction BMPs and BMP maintenance constructed since July 2001. The database is required to meet certain minimum requirements with regard to the information contained therein. Permittees are further required to verify that post-construction BMPs are "operating effectively and have been adequately maintained" by undertaking various required additional steps.

There are no requirements in the CWA or in federal regulations requiring permittees to develop, fund or implement this program. The regulations require the permit to include a "description of maintenance activities and a maintenance schedule for structural controls to reduce pollutants (including floatables) in discharges from municipal separate storm sewers." 40 C.F.R. §122.26(d)(2)(iv)(A)(1). This regulation, like the general regulations reviewed by the Supreme Court in *Department of Finance* as support for the permit requirements at issue there, cannot be bootstrapped by a regional board into a federal mandate. Under the Supreme Court's test, when, as here, the SDWB "exercises its discretion to impose the requirement by virtue of a 'true choice,' the requirement is not federally mandated." *Id.* at 18.

* * *

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:

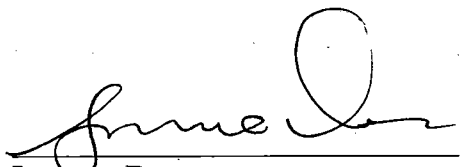
I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On October 24, 2016, I served the:

Claimant's Response to Request for Additional Briefing
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 24, 2016 at Sacramento, California.



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COMMISSION ON STATE MANDATES

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