



State Water Resources Control Board

May 19, 2023

VIA DROP BOX

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RECEIVED
May 19, 2023
**Commission on
State Mandates**

COMMENTS OF THE STATE WATER RESOURCES CONTROL BOARD AND CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION Draft Proposed Decision, Schedule for Comments, and Notice of Hearing
California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016, 11-TC-03

California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016, Sections B.2., C., D., F.1.d.1., 2., 4., 7., F.1.f., F.1.h., F.1.i., F.2.d.3., F.2.e.6.e., F.3.a.10., F.3.b.4.a.ii., F.3.d.1.-5., F.4.d., F.4.e., G.1.-5., K.3.a.-c., Attachment E., Sections II.C. and II.E.2.-5., and Sections F., F.1., F.1.d., F.2., F.3.a.-d., and F.6., Adopted November 10, 2010
County of Riverside, Riverside County Flood Control and Water Conservation District, and Cities of Murrieta, Temecula, and Wildomar, Claimants

Dear Ms. Halsey:

By letter dated March 13, 2023, the Commission on State Mandates (Commission) issued a Draft Proposed Decision, Schedule for Comments, and Notice of Hearing in the above test claim matter. The letter established an April 3, 2023, deadline for filing written comments on the Draft Proposed Decision. The Commission granted requests for extension of time and established that written comments on the Draft Proposed Decision are due on May 19, 2023. This matter is scheduled for public hearing at the Commission's July 28, 2023, meeting.

The State Water Resources Control Board (State Water Board) and California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) (collectively, Water Boards) have reviewed the Draft Proposed Decision dated March 13, 2023, for the above-referenced Test Claim. The Water Boards appreciate the careful and thoughtful work of the Commission staff and concur with the conclusions to deny the Test Claim as to most of the challenged provisions in the San Diego Water Board's Order No. R9-2010-0016 (test claim permit).

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

As a preliminary matter, the Water Boards note that after claimants filed their initial test claim on November 10, 2011, the Commission staff issued a Notice of Incomplete Joint Test Claim Filing on March 18, 2017, identifying, among other items, that the original test claim was “missing a detailed description of increased costs and a statewide estimate of costs as required by Government Code section 17553.” (Notice of Incomplete Joint Test Claim Filing, p. 1.) On April 28, 2017, claimants submitted a response, including a revised Narrative Statement and declarations of claimant representatives. On May 8, 2017, the Commission staff issued a Notice of Complete Joint Test Claim Filing, Removal from Inactive Status, Scheduling of Comments, Renaming of Matter, Request for Administrative Record and Notice of Hearing Date. As claimants have already had one opportunity to submit updated cost information in this matter, the Water Boards request an opportunity to review and respond to additional new cost information, if any, claimants submit with their written comments on the Draft Proposed Decision.

The Water Boards respectfully submit the following comments on limited aspects of the Draft Proposed Decision.

I. Comments on Test Claim Permit Provisions

A. Watershed Workplan

Section G.1-5. of the test claim permit address development and implementation of a Watershed Water Quality Workplan. This section of the test claim permit “requires copermitees in a watershed management area to develop a workplan to assess and prioritize the water quality problems within the watershed’s receiving waters, identify sources of the highest priority water quality problems, develop a watershed-wide BMP implementation strategy to abate the highest priority water quality problems, and a monitoring strategy to evaluate BMP effectiveness and changing water quality prioritization in the watershed management area.” (Draft Proposed Decision, p. 243.)

The Draft Proposed Decision recognizes that the prior permit imposed a requirement that claimants collaborate with other watershed permittees to develop and implement a watershed stormwater management plan and imposed numerous related requirements. The Draft Proposed Decision recommends the Commission partially approve the Test Claim for this Section, finding that most requirements in Section G.1.-5. are not new programs, but the five requirements in Sections G.1.d., G.3, G.4. and G.5, below, are new as compared to the prior permit and mandate a new program or higher level of service:

1. The watershed BMP implementation strategy shall include a map of any implemented and proposed BMPs. (Section G.1.d.)
2. The copermitees shall pursue efforts to obtain any interagency agreements, or other coordination efforts, with non-copermittee owners of

the MS4 (such as Caltrans, Native American tribes, and school districts) to control the contribution of pollutants from one portion of the shared MS4 to another portion of the shared MS4. (Section G.3.)

3. The watershed workplan must include the identification of the persons or entities anticipated to be involved during the development of the Watershed Workplan. (Section G.4.)
4. The annual watershed review meetings shall be open to the public and adequately noticed. (Section G.5.)
5. Each permittee shall review and modify jurisdictional programs and JRMP annual reports, as necessary, so they are consistent with the updated watershed workplan. (Section G.5.)¹

The Water Boards request the Commission instead find that none of these five requirements in Section G.1.-5. impose a new program or higher level of service. As discussed in the Water Boards' written comments on the Test Claim, in adopting the test claim permit, the San Diego Water Board intended the entirety of Section G.1.-5. as facets of the prior permit's requirements to continue implementation of the watershed water quality program initiated under the prior permit. To the extent the Commission finds any of the above five requirements to be new programs or require higher levels of service, the Commission should find that any costs to implement these requirements are de minimis.

B. Annual JRMP Report

Section K.3.a.-c. of the test claim permit requires annual reporting relating to development and implementation of permittee individual jurisdictional runoff management programs (JRMP.) These provisions require each permittee to prepare an individual JRMP annual report covering implementation of its jurisdictional activities during the past annual reporting period, and specifies the contents of the annual report, which claimants contend includes a new reporting requirement that constitute a reimbursable state-mandated program. The Water Boards concur with the Draft Proposed Decision's finding that Sections K.3.a. and b. do not impose any new activities on claimants and also agree that the state has not mandated any of these requirements as to claimants' own municipal projects.

The Draft Proposed Decision finds that the following test claim permit provisions are new programs or higher levels of service:

1. Include in the annual fiscal analysis a narrative description of circumstances resulting in a 25 percent or greater annual change for any budget line items. (Section K.3.c.1.)

¹ Draft Proposed Decision, pp. 46-47.

2. Provide in the annual report an updated timeframe for attainment of a desired outcome level in the annual report when an assessment indicates that the desired outcome level has not been achieved at the end of the projected timeframe, but the review of the existing activities and BMPs are adequate, or that the projected timeframe should be extended. (Section K.3.c.2.)
3. Providing the following information in the Reporting Checklist: Illicit Discharges and Connections (Number of IC/ID Elimination and Violations), and MS4 Maintenance (Total Miles of MS4 Inspected). (Section K.3.c.3.)
4. Providing the following information the Annual JRMP Reporting Requirements listed on Table 5: Illicit Discharge Detection and Elimination (A description of instances when field screening and analytical data exceeded action levels, including those instances for which no investigation was conducted), and Updated Workplans including priorities, strategy, implementation schedule, and effectiveness evaluation. (Section K.3.c.4.)²

The Water Boards request that the Commission find that none of the requirements in Sections K.3.c.1., 2., 3., and 4.³ listed above impose a new program or higher level of service. As discussed in the Water Boards' written comments on the Test Claim, the prior permit also required preparation of updated JRMPs and reduced the amount of program activity-based reporting as compared to the prior permit. And as reflected in the written comments, the prior permit required extensive and comparably detailed reporting provisions. As the test claim permit largely continued the prior permit's JRMP requirements, these provisions should not be considered new programs or higher levels of service as compared to the prior permit. To the extent the Commission finds that the provisions in Sections K.3.c.1., 2., 3., and 4. impose new programs or higher levels of service, any costs associated with implementation of those provisions are de minimis.

II. Claimants Have Fee Authority for Any Mandated Costs

The Draft Proposed Decision 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).⁴ The Water Boards agree with the Draft Proposed Decision's conclusion that claimants have sufficient fee authority as a legal matter based on the reasoning in *Paradise Irrigation District* ((2019) 33 Cal.App.5th 174) and the Legislature's enactment of Government Code sections 57350 and 57351 for costs incurred beginning January 1, 2018. Importantly, however, San Diego Water Board Order No. R9-2015-0100, which superseded the test claim permit as to claimants, became effective January 7, 2016.⁵ Accordingly, the Draft Proposed

² Draft Proposed Decision, p. 47.

³ The test claim permit provisions Commission staff would find are new programs or higher levels of service are reproduced in the Draft Proposed Decision at pages 268-290.

⁴ See Draft Proposed Decision, pp. 345-379.

⁵ See, San Diego Water Board Website, [R9-2015-0100.pdf \(ca.gov\)](https://www.sandiegowaterboard.com/Portals/0/Files/R9-2015-0100.pdf), p. 7.

Decision should be revised to recognize that the scope of the Test Claim period of reimbursement for any mandated costs ends January 6, 2016.

As explained below, the Water Boards *disagree* with the Draft Proposed Decision's conclusion that claimants lack fee authority for costs incurred *prior* to 2018 due to Proposition 218's voter approval provisions.⁶ The Water Boards contend that claimants had sufficient fee authority as a legal matter under Government Code section 17556(d) for the entire test claim period and are entitled to no reimbursement. 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 superimposes 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 the property owners submit 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

⁶ Draft Proposed Decision, pp. 377-379.

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 and finding that Claimant Riverside County Flood Control and Water Conservation District is not entitled to any cost reimbursement, the Water Boards also urge the Commission to find that claimants have necessary fee authority for any state mandated costs incurred during the permit term, and are not entitled to any reimbursement.

III. Conclusion

For the above reasons, the Water Boards request the Commission adopt the Draft Proposed Decision with the limited changes requested by the Water Boards.

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
Attorney IV

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 May 19, 2023, I served the:

- **Water Boards' Comments on the Draft Proposed Decision filed May 19, 2023**

*California Regional Water Quality Control Board, San Diego Region,
Order No. R9-2010-0016, 11-TC-03*

California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016, Sections B.2., C., D., F.1.d.1., 2., 4., 7., F.1.f., F.1.h., F.1.i., F.2.d.3., F.2.e.6.e., F.3.a.10., F.3.b.4.a.ii., F.3.d.1.-5., F.4.d., F.4.e., G.1.-5., K.3.a.-c., Attachment E., Sections II.C. and II.E.2.-5., and Sections F., F.1., F.1.d., F.2., F.3.a.-d., and F.6.,
Adopted November 10, 2010

County of Riverside, Riverside County Flood Control and Water Conservation District, and Cities of Murrieta, Temecula, and Wildomar, 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 May 19, 2023 at Sacramento, California.



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COMMISSION ON STATE MANDATES

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Last Updated: 5/17/23

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Matter: California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016

Claimants: City of Murrieta
City of Temecula
City of Wildomar
County of Riverside
Riverside County Flood Control and Water Conservation District

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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