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January 29, 2019  
**Commission on  
State Mandates**

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**LATE FILING**

January 28, 2019

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

**Response to Test Claim 17-TC-10, Water Code Section 13383(a) Phase I MS4 Trash Order Issued to City of Newport Beach, Santa Ana Regional Water Quality Control Board, Effective June 2, 2017**

Dear Ms. Halsey:

The Department of Finance (Finance) has reviewed Test Claim 17-TC-10, submitted by the City of Newport Beach (Claimant). The Test Claim alleges state-mandated, reimbursable costs associated with an executive order (Trash Order) issued to Claimant by the California Regional Water Quality Control Board, Santa Ana Region (Regional Board) on June 2, 2017.

The genesis of the Trash Order is Resolution No. 2015-0019 (Trash Amendments), issued by the State Water Resources Control Board on April 7, 2015. The Trash Order requires Claimant to select a track to follow to comply with the Trash Amendments to limit the discharge of trash into state waters via Claimant's Municipal Separate Storm Sewer Systems (MS4s). Significant among the alleged reimbursable costs are those to "determine which track would allow Claimant to comply with the Trash Provisions..." and to "interpret the Trash Order, including meetings with MS4 co-permittees." Finance rejects the notion that these sample activities are required by the Trash Order. We defer to the Water Boards on the assertion that the test claim activities impose a new program or higher level of service and that they are not a federal mandate. Finance comments on the fee authority issue raised by the Claimant.

Claimant's MS4 is part of their municipal sewer system. The municipal sewer system is funded at least in part by fees imposed on the system's users. Claimant alleges they do not have the authority to increase these fees to recoup the costs associated with the Trash Order because of limitations imposed by Article XIII D of the California Constitution (Proposition 218). Article XIII D states that "(e)xcept for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge..."

Claimant asserts it "...lacks sufficient 'authority' to pay for the mandates in the Trash Order within the meaning of Government Code section 17556 because any charge, fee, or assessment is contingent on the outcome of an election by voters or property owners and because a development fee is not available to fund the state mandates in the Trash Order."

Finance believes Claimant does have stormwater fee authority undiminished by Proposition 218. Senate Bill 231 (2017), effective January 1, 2018, defines "sewer" for purposes of

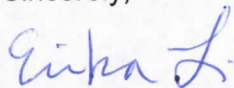
Proposition 218 and its exception to voter approval for sewer, water and refuse collection fees. The definition specifically includes stormwater and confirms stormwater fees are not subject to the voter approval requirement, but rather the majority protest procedure, in Proposition 218.

In *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal. App.4<sup>th</sup> 794, college districts challenged the State Controller's mandate claiming instructions that automatically reduced reimbursement claims by the amount the districts are statutorily authorized to charge students for health fees, regardless of whether the districts chose to charge the fees or not. The court held that "[to] the extent a local agency or school district 'has the authority' to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost. (*Clovis* at p. 812). The court reasoned that "this basic principle flows from common sense as well. As the Controller succinctly puts it, 'Claimants can choose not to require these fees, but not at the state's expense.'" (*Ibid.*)

The same reasoning applies to Claimant here. They can choose not to put a fee to the voters, or the voters can reject a fee, but not at the state's expense. Similarly, applying the vote-exception for stormwater fees confirmed by SB 231, a majority of property owners can protest and defeat a stormwater fee, but not with the result of creating a state mandate. The application of Proposition 218 does not result in alleged mandate costs recoverable solely from tax proceeds. Sufficient fee authority exists, regardless of political feasibility.

Further, Claimant has authority to impose property-related fees under their police power for alleged mandated permit activities whether or not it is politically feasible to impose such fees via a process that may be required by Proposition 218. Local governments can choose not to submit a fee to the voters and voters can indeed reject a proposed fee, but not with the effect of turning permit costs into state reimbursable mandates. Under Government Code section 17556, subdivision (d), Claimant has authority to impose fees sufficient to pay for permit activities, and they are not eligible for mandate reimbursement. Because SB 231 clarifies Claimant's authority to increase property related sewer fees and charges to recover any costs associated with the Trash Order, the Commission should reject the Test Claim in its entirety.

Sincerely,



ERIKA LI  
Program Budget Manager

**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.

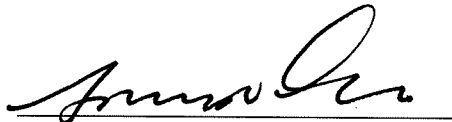
On January 30, 2019, I served the:

- **Finance's Late Comments on the Test Claim filed January 29, 2019**

*Water Code Section 13383(a) Phase I MS4 Trash Order Issued to City of  
Newport Beach, Santa Ana Regional Water Quality Control Board, Effective  
June 2, 2017, 17-TC-10  
City of Newport Beach, Claimant*

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 30, 2019 at Sacramento, California.



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# COMMISSION ON STATE MANDATES

## Mailing List

**Last Updated:** 1/9/19

**Claim Number:** 17-TC-10

**Matter:** Water Code Section 13383(a) Phase I MS4 Trash Order Issued to City of Newport Beach, Santa Ana Regional Water Quality Control Board, Effective June 2, 2017

**Claimant:** City of Newport Beach

### TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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