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January 25, 2019  
**Commission on  
State Mandates**

EDMUND G. BROWN JR. ■ GOVERNOR

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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-05, California Regional Water Quality Control Board, San Diego Region, Order No. R9-2017-0077, Sections A.1, A.3, and A.5**

Dear Ms. Halsey:

The Department of Finance (Finance) has reviewed Test Claim 17-TC-05, jointly submitted by the County of San Diego and the City of San Juan Capistrano (Claimants). The Test Claim alleges state-mandated, reimbursable costs associated with an executive order (Trash Order) issued to Claimants by the California Regional Water Quality Control Board, San Diego 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 Claimants to select a track to follow to comply with the Trash Amendments to limit the discharge of trash into state waters via Claimants' Municipal Separate Storm Sewer Systems (MS4s). Significant among the alleged reimbursable costs are those associated with conducting "numerous assessments and studies" to determine which track to pursue, as well as staff and consultant time spent interpreting the Trash Order. 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 Claimants.

Claimants' MS4s are part of their municipal sewer systems. These municipal sewer systems are funded at least in part by fees imposed on the systems' users. Claimants allege 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..."

Claimants assert "(a)ny fees developed by Claimants to fund the mandates in the Trash Order could only be imposed by some form of special tax or property related fee that would require approval by either a 2/3 vote of the electorate subject to the tax, or a majority vote of the property owners subject to the property related fee. Claimants thus lacks (*sic*) sufficient 'authority' for purposes of Government Code section 17556 to levy service charges, fees, or assessments to pay for the Trash Order's mandates."

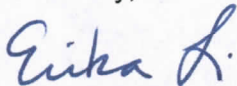
Finance believes claimants do have stormwater fee authority undiminished by Proposition 218. Senate Bill 231 (2017), effective January 1, 2018, defines "sewer" for purposes of Proposition 218 and its exception to voter approval for sewer, water and refuse collection fees. The definition specifically 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.4th 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 Claimants 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, claimants have 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), claimants have authority to impose fees sufficient to pay for permit activities and they are not eligible for mandate reimbursement. Because SB 231 clarifies Claimants' 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.

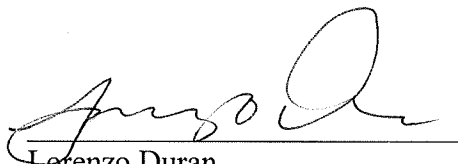
On January 28, 2019, I served the:

- **Finance's Late Comments on the Test Claim filed January 25, 2019**

*California Regional Water Quality Control Board, San Diego Region,  
Order No. R9-2017-0077, Sections A.1, A.3, and A.5, 17-TC-05  
City of San Juan Capistrano and County of San Diego, 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 28, 2019 at Sacramento, California.



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

**Claim Number:** 17-TC-05

**Matter:** California Regional Water Quality Control Board, San Diego Region, Order No. R9-2017-0077, Sections A.1, A.3, and A.5

**Claimants:** City of San Juan Capistrano  
County of San Diego

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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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**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.

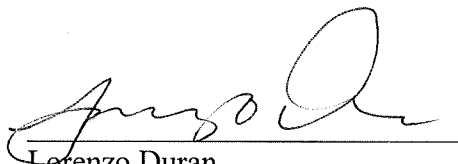
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