



Linda S. Adams  
Secretary for  
Environmental Protection

# State Water Resources Control Board

## Office of Chief Counsel

1001 I Street, 22<sup>nd</sup> Floor, Sacramento, California 95814  
P.O. Box 100, Sacramento, California 95812-0100  
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ <http://www.waterboards.ca.gov>



Arnold Schwarzenegger  
Governor

**TO:** Regional Water Board Executive Officers [via email only]

**FROM:** Michael A.M. Lauffer  
Chief Counsel  
**OFFICE OF CHIEF COUNSEL**

**DATE:** May 20, 2010

**SUBJECT:** RECENT DECISIONS ISSUED BY THE COMMISSION ON STATE MANDATES  
CONCERNING MUNICIPAL STORM WATER PERMITS

In two recent decisions, the Commission on State Mandates (Commission) found that certain provisions within two municipal storm water permits constituted reimbursable state mandates within the meaning of the California Constitution. The Los Angeles Regional Water Quality Control Board (Los Angeles Water Board), the San Diego Regional Water Quality Control Board (San Diego Water Board), and the State Water Resources Control Board (State Water Board) (collectively, the Water Boards) will challenge these decisions in court. In the meantime, regional water quality control boards (regional water boards) should understand the immediate effects of the decisions.

This memorandum briefly summarizes the two decisions and provides information on their immediate consequences, so that the regional water boards have a common understanding of the decisions.

## BACKGROUND

### *State Mandates Law*

Section 6 of Article XIII B of the California Constitution provides, in relevant part: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or higher level of service. . . ." These subvention requirements are commonly referred to as a prohibition on unfunded state mandates.

Local governments seeking reimbursement for state mandates must file test claims with the Commission. The Commission evaluates test claims and determines whether laws or "executive orders" that are the subject of the test claim constitute state mandates. If the Commission determines a law or executive order is a state mandate, it then determines whether the local government can assess fees to offset the cost of the state mandate. If the

Commission determines the local government cannot assess fees for the state mandate, the state must provide a subvention of funds.

Subsequent proceedings before the Commission determine the local governments entitled to reimbursement and the amount of the reimbursement. Under mandates law, eligible local governments will receive a reimbursement for each fiscal year that the state mandate remains in effect. The reimbursement is provided as a line item in the Budget Act. If the Legislature fails to provide a subvention of funds, the local government may file a suit to have the mandate declared unenforceable.<sup>1</sup>

### *The Los Angeles Decision*

In 2003 and 2007, the County of Los Angeles and 14 cities within the county (the Los Angeles claimants) submitted test claims 03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21. The test claims asserted that provisions of Los Angeles Water Board Order 01-182 constitute reimbursable state mandates. Order 01-182 is the 2001 renewal of the municipal storm water permit for Los Angeles County and most of its incorporated cities, and serves as a national pollutant discharge elimination system (NPDES) permit. The permit provisions require the Los Angeles claimants to install and maintain trash receptacles at specified transit stops and to inspect certain industrial, construction, and commercial facilities for compliance with local and/or state storm water requirements.

On September 3, 2009, the Commission issued a final decision entitled *In re Test Claim On: Los Angeles Regional Quality Control Board Order No. 01-182, Case Nos.: 03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21* (Los Angeles Decision). The Los Angeles Decision partially approved the test claims. The Commission found the trash receptacle requirement to be a reimbursable state mandate.

### *The San Diego Decision*

In 2007, the County of San Diego and 21 cities within the county (the San Diego claimants) submitted test claim 07-TC-09. The test claim asserted that many provisions of San Diego Water Board Order R9-2007-0001 constitute reimbursable state mandates. Order R9-2007-0001 is the 2007 renewal of the municipal storm water permit for San Diego County and many of its incorporated cities, and serves as an NPDES permit. The challenged permit provisions require the San Diego claimants to: (1) conduct and report on street sweeping activities; (2) clean and report on storm sewer cleaning; (3) implement a regional urban runoff management program; (4) assess program effectiveness; (5) conduct public education and outreach; (6) collaborate among co-permittees to implement the program; (7) implement hydromodification management plans; and (8) implement plans for low impact development.

On March 30, 2010, the Commission issued a final decision entitled *In re Test Claim on: San Diego Regional Quality Control Board Order No. R9-2007-0001, Case No. 07-TC-09* (San Diego Decision). The San Diego Decision partially approved the test claim. The

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<sup>1</sup> Gov. Code, § 17612, subd. (c).

Commission's decision took the relatively narrow Los Angeles Decision to its logical conclusion. The Commission found the following permit requirements to be reimbursable state mandates: (1) conduct and report on street sweeping activities; (2) conduct and report on storm sewer cleaning activities; (3) implement a regional urban runoff management program; (4) assess program effectiveness; (5) conduct public education and outreach; and (6) collaborate among co-permittees to implement the program. The Commission found the hydromodification and low impact development requirements to be state mandates, but not reimbursable mandates because the local agencies could charge fees to pay for these programs.

## DISCUSSION

The Water Boards will challenge both the Los Angeles and San Diego decisions and seek to have them overturned on a variety of grounds. In the meantime, the Office of Chief Counsel has received questions from the various regional water boards about the immediate consequences of the decisions. The summary below responds to many of those questions, both in terms of what the decisions do – and do not – mean for the municipal storm water program.

### *1. The Decisions' Direct Effects Are Limited to the Storm Water Permits Identified in the Test Claims*

The decisions directly affect only the municipal storm water permits identified by the two test claims. That is, the effect of the decisions is limited to the provisions of Los Angeles Water Board Order 01-182 and San Diego Order R9-2007-0001 identified by the Commission as reimbursable state mandates. No other municipal storm water permits (or provisions therein) in California are directly affected by the decisions, even if those permits contain similar provisions.

### *2. The Decisions' Effects Cannot Extend to Storm Water Permits Issued to State or Federal Agencies*

Under federal storm water regulations, entities that operate municipal separate storm sewer systems are subject to NPDES permitting requirements. Municipal separate storm sewer systems include systems owned or operated by federal and state agencies. For example, the California Department of Transportation is currently regulated by a municipal storm water permit.

Because state and federal agencies cannot receive state reimbursement pursuant to Article XIII B of the California Constitution, the Commission does not have any jurisdiction over municipal storm water permits issued to those agencies. Reimbursement requirements can only apply to mandates imposed upon "local government."<sup>2</sup>

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<sup>2</sup> Cal. Const., art. XIII B, § 6, subd. (a).

### *3. The Claimants Must Continue to Comply With the Permits While the Reimbursement Phase Proceeds*

The Los Angeles and San Diego claimants must, respectively, continue to comply with all provisions of their municipal storm water permits. These permits are still valid in their entirety. The Commission proceedings were not about validity of the permits; the proceedings are and have always been about funding. The Commission has determined that the state must reimburse the claimants for the costs of complying with the identified permit provisions, not that the provisions are invalid.

While, as described below, a provision of state law could affect the permits' enforceability should the state fail to provide reimbursement, that provision cannot apply until the Legislature considers a local government claims bill towards the end of the reimbursement phase or affirmatively indicates that it will not provide reimbursement for a specific fiscal year as part of a Budget Act.<sup>3</sup> The reimbursement phase includes, but is not limited to, the Commission's adoption of Parameters and Guidelines, the State Controller's adoption of Claiming Instructions, and the Legislature's consideration of a local government claims bill as part of the annual Budget Act.

### *4. If the Legislature Does Not Provide Reimbursement, the Provisions May Become Unenforceable as a Matter of State Law*

As mentioned above, the Legislature ultimately considers a local government claims bill in order to provide the necessary reimbursement. At that point, the Legislature could choose not to provide a reimbursement of funds in the annual Budget Act. If the legislature deletes funding from the annual Budget Act, the affected municipalities could bring suit in Sacramento Superior Court to render unenforceable the permit provisions identified by the Commission as reimbursable mandates.<sup>4</sup> For that fiscal year, the provisions would be unenforceable for the purposes of state law.<sup>5</sup> Alternatively, the Legislature may affirmatively indicate that it will not provide a reimbursement for a particular fiscal year, which as a matter of state law suspends the mandate.<sup>6</sup>

## **CONCLUSION**

The Los Angeles and San Diego decisions could have significant long-term consequences on California's municipal storm water program, but the immediate effects are limited. While the Water Boards' challenges to the Commission's decisions are pending, the regional water boards should understand the following: (1) the decisions' effects are limited to the storm water permits identified in the test claims; (2) the decisions' effects cannot extend to storm water permits issued to state or federal agencies; (3) the claimants must continue to comply with the permits

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<sup>3</sup> Gov. Code, § 17581, subd. (a).

<sup>4</sup> *Id.*, § 17612, subd. (c).

<sup>5</sup> *Ibid.* It is unclear whether a legislative failure to provide the required reimbursement would relieve the permittees of their obligations under federal law to comply with the permits.

<sup>6</sup> *Id.*, § 17581, subd. (a).

while the reimbursement phase proceeds; and (4) the provisions may become unenforceable as a matter of state law if the legislature does not provide reimbursement or affirmatively indicates that it will not provide a reimbursement.

If you have any questions about this matter, please contact Alex P. Mayer of my staff at (916) 341-5051.

cc: **[All via email only]**

Dorothy Rice, EXEC  
Jonathan Bishop, EXEC  
Tom Howard, EXEC  
Darrin Polhemus, DWQ  
AEOs  
Regional Board Attorneys