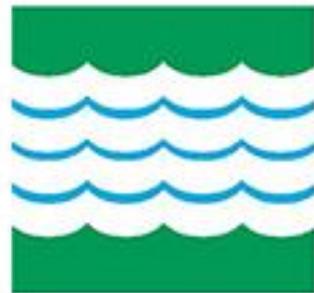


STATE SUPREME COURT DECISION: MS4 PERMIT REQUIREMENTS AND UNFUNDED MANDATES

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SOUTH BAY CITIES
COUNCIL OF GOVERNMENTS

Summary

- State Supreme Court ruled on August 29th that MS4 Permit provisions are unfunded mandates (UM) and reimbursable under the California Constitution if:
 - State UM exceeds federal stormwater requirements
 - not paid for through a fee or other source of funding (e.g., Prop O, grant, stormwater parcel fee, user fee)
- If the State cannot pay the UMs during any given budget cycle it is required to suspend them (this would mean that the State would be required to compel the water boards to void the MS4 Permit requirements that give rise to the UMs)
- Decision applies to all MS4 Permittees in the State
- City cannot claim reimbursement if it is committed to comply voluntarily to meet TMDLs through EWMPs/WMPs – City and County of LA fall in this category

Quick Background

➤ What is the Unfunded Mandate Commission?

It is a quasi-judicial administrative body that decides if local agencies and school districts are entitled to reimbursements for state-mandated increased costs to their budgets. Local governments that allege the state Legislature, the governor or a state agency imposed a state-mandated reimbursable program upon them are able appeal to the commission, which holds hearings to determine if they are eligible to receive money back from the state.

➤ Seven members (two are local government officials)

Quick Background

- Unfunded mandate claims go back to the 2002 MS4 Permit
 - Several cities filed claims for reimbursement to the Unfunded Mandate Commission
 - Claims held up because of court challenges (over the last decade) at the trial court and appellate court level
 - Initial claims included reimbursements for: (1) placing trash receptacles at transit stops; (2) industrial and commercial inspections
 - None of these are federally required
 - Cities can now recover the costs of these MS4 Permit tasks (must have records and show that they were NOT paid for through fees -- e.g., storm water parcel fee, sewer fees, grants, etc.) – these are small costs compared to the 2012 MS4 Permit

Current MS4 Permit

- MS4 Permit was adopted in 2012 – over 20 cities filed “test claims” with the Unfunded Mandate Commission (through Burhenn & Gest legal counsel) for the following cities: *Agoura Hills, Bellflower, Beverly Hills, Carson, Cerritos, Commerce, Covina, Downey, Huntington Park, Lakewood, Manhattan Beach, Norwalk, Pico Rivera, Rancho Palos Verdes, Redondo Beach, San Marino, Santa Clarita, Santa Fe Springs, Signal Hill, South El Monte, Vernon, Westlake Village and Whittier*
 - Claim identified several MS4 Permit requirements that exceed federal law and are subject to reimbursement or invalidation – includes but are not limited to (1) TMDLs; (2) watershed management programs (enhanced and non-enhanced) huge costs intended to meet TMDLs (trash, bacteria, metals, nutrients); (3) excessive monitoring requirements; (4) compliance with non-water discharge pollution limitations
 - Because of the millions the State would have to pay back (claims will be reviewed in 2017), it is likely that the mandates would be invalidated
 - Decision would apply to all local governments, not just those that filed the test claims with UM Commission

EWMP/WMP Participation

➤ Almost all cities participate in a EWMP/WMP

Cities that have payments coming up should consider not paying (if legally possible) or “exiting” the EWMP/WMP, which would put them in the SWMP/iterative process compliance category

- Gardena argues that the SWMP is a valid compliance determinant supported by language in the MS4 Permit (the standard for all counties in the State)
 - Cities that join with Gardena would have injunction protection in the event the Regional Board decides to take enforcement action for their defection
 - Or, cities could simply explain their reason for exiting the EWMP/WMP is that they are unfunded mandates and that they do not want to spend any more money on a mandate that the State is likely to invalidate (would be easy to argue because the EWMPs/WMPs do not exist any where else except Los Angeles County)
 - Caution: the longer your City remains in an EWMP/WMP the Regional Board could argue that it is doing so voluntarily and is willing to pay the costs

What About the Stormwater Fee?

- Invalidating the unfunded mandate MS4 Permit requirements would lessen the need for a stormwater fee.
- SB 1298 (Hertzberg) which would have made it easy for local governments to adopt stormwater fees, was defeated
 - Word has it that the legislature intends to bring it back under a different guise – but should not have support for it given the UM decision
- County's Stormwater Fee (renamed "Water Resiliency Plan") proposed for November of 2017 would be unnecessary

What to Do

- City Councils should ask their respective legislative reps (assembly and senate) to urge the Governor to stay the MS4 Permit
 - This would freeze compliance with EWMPs/WMPs and other requirements
 - Spare cities from having to waste any more money on a doomed state mandate

Questions?

- Call me at 626.369.9424/email: rtahir@tecsenv.com
- Contact Howard Gest (for questions regarding the unfunded mandate claims):

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