

# California must pay for stormwater mandates

Rebecca Andrews | September 2, 2016

The California Supreme Court just issued an important decision in the ongoing battle over funding for state-mandated water quality controls imposed on municipal separate storm sewer system permits. *Dept. of Finance v. Commission on State Mandates*, 2016 DJDAR 8996 (Aug. 29, 2016). The court held that requirements in an MS4 Permit issued in Los Angeles County are state mandates subject to reimbursement under the California Constitution. The court's decision resolves more than a decade of conflict over whether the state is required to reimburse cities for portions of their increasingly expensive stormwater programs. It will have far-reaching implications for cities and counties across California.

## Clean Water Act and Porter-Cologne Act

Under the federal Clean Water Act and California's Porter-Cologne Water Quality Control Act, municipalities must obtain a permit to operate their storm drain systems. An MS4 Permit must require controls to reduce the discharge of pollutants to the "maximum extent practicable" (MEP). A state may establish its own permitting program, and if the Environmental Protection Agency concludes the state program is adequate to meet federal requirements, the EPA approves the state program and suspends issuance of permits. California was the first state authorized to issue its own pollutant discharge permits.

## California Constitution, Article XIII B, Section 6(a)

In 1979, California voters added Article XIII B, Section 6 to the California Constitution. The constitutional amendment was passed in the wake of Proposition 13, which limited the ability of local government agencies to impose taxes. Article XIII B Section 6 was

intended to prevent the state from imposing new programs or requirements on local governments unless the state funds the cost of the program. Specifically, Article XIII B Section 6 requires the state to reimburse local agencies whenever the Legislature or a state agency mandates a new program or higher level of service and the local government has no fee authority to pay for it. If a federal law requires the program, the local agency does not receive reimbursement from the state.

**For stormwater,** this means that any provision in a state-issued MS4 Permit that is mandated by federal law is not subject to reimbursement. However, MS4 Permits are a blend of state and federal requirements. Any provision in a state-issued MS4 Permit that exceeds the federal requirements may qualify as a state mandate. To the extent local governments cannot raise funds to pay for these state-law imposed requirements, the state must reimburse the local governments for the costs of compliance.

MS4 Permit, Test Claim, and **Supreme Court Decision**

The Los Angeles Regional Water Quality Control Board issued an MS4 Permit to Los Angeles County, the Los Angeles County Flood Control District, and 84 cities in 2001. The permittees submitted a test claim to the Commission on State Mandates (the administrative agency that hears and decides unfunded state mandates claims) claiming, among other things, that requirements to inspect commercial and industrial facilities and to place trash receptacles at transit stops constituted unfunded state mandates. They argued that the requirements were not mandated by federal law **because nothing in federal law specifically required the permittees to install trash receptacles or perform site inspections.**

In defense, the state argued that the Federal Clean Water Act requires the state and regional board to impose requirements in MS4 Permits designed to reduce discharges of pollutants to the

“maximum extent practicable.” The standard is not defined in law, and the state argued that the State Water Resources Control Board and the individual regional water quality control boards are the only agencies with the expertise and authority to decide what constitutes MEP. In this case, the state argued that everything in the MS4 Permit was necessary to attain MEP, and therefore a federal requirement.

The court rejected the state’s arguments, holding that federal law does not compel the state to administer its own permitting system, and the state was not compelled by federal law to impose any particular requirement. Instead, the Los Angeles Regional Board had discretion to fashion requirements it determined would meet the MEP standard. On the challenged programs, the court held that the MEP standard does not “expressly require []” that permittees to conduct the required inspections or place trash receptacles at transit stops.

### Implications

The Supreme Court’s long-awaited decision will restart consideration of 14 test claims pending at a California Court of Appeal and the Commission on State Mandates. Each test claim asserts that the regional boards have imposed a substantial number of requirements under state law rather than federal law. These requirements are estimated to cost local governments billions of dollars over the life of the MS4 Permits. The commission and courts will now turn their attention to whether these requirements are state mandates, and if so, whether local governments have a source of funding available to pay for them. If a local funding source is not available, the state must fund the requirements. In the event the Legislature does not fund the mandates in the annual budget, a local agency may seek a court declaration that the mandates are unenforceable and injunction against their enforcement for that fiscal year.

The implications of the funding challenge may raise questions about the desirability of continuing a state-administered National Pollutant Discharge Elimination System program, or at a minimum, of continuing to issue increasingly prescriptive MS4 Permits. In the end, if California wishes to continue regulating local agencies and to tailor MS4 Permit requirements to meet California's unique water quality needs, then California must reimburse local agencies the cost of exceeding federal standards.

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