NO. B292446

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT – DIVISION ONE

STATE DEPARTMENT OF FINANCE, et al.,
Petitioners and Respondents,

v.

COMMISSION ON STATE MANDATES,
Defendant and Respondent

COUNTY OF LOS ANGELES, et al.
Real Parties In Interest and Appellants

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF AMICI CURIAE COUNTY OF SAN DIEGO, 17 CITIES IN SAN DIEGO COUNTY, AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, IN SUPPORT OF REAL PARTY IN INTEREST COUNTY OF LOS ANGELES OPENING AND REPLY BRIEFS

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I. APPLICATION

Pursuant to Rule 8.200(c) of the California Rules of Court, the County of San Diego and the incorporated cities within San Diego County of Carlsbad, Chula Vista, Coronado, Del Mar, El Cajon, Encinitas, Escondido, Imperial Beach, La Mesa, Lemon Grove, National City, Oceanside, Poway, San Marcos, Santee, Solana Beach, and Vista ("MS4 Operators"), and the California State Association of Counties ("CSAC") (collectively "*Amici*") respectfully apply for permission from the Presiding Justice to file the *Amici Curiae* Brief contained herein.

Amicus CSAC is a non-profit corporation. Its members are the 58 California counties. CSAC sponsors a Litigation Coordination Program. The County Counsel's Association of California administers the program. CSAC's Litigation Overview Committee, made up of county counsels throughout the state, oversees the program. The Litigation Overview Committee monitors litigation that is of concern to counties statewide. It has determined that this case affects all counties in California.

Amicus CSAC and its county members have a direct interest in the legal issues presented in this case. Counties throughout California operate municipal separate storm sewer systems (MS4s), and every five years, cities and counties must obtain a permit from one of nine regional water boards or from the State Water Resources Control Board.

Whether the State is obligated to reimburse counties for the costs of

complying with the permits will have potentially enormous financial impacts on *Amicus*' members. For example, MS4 Operators *Amici* estimated in their test claim before the Commission on State Mandates ("Commission") that challenged costs imposed by their 2007 governing permit would cost them collectively over $66 million to implement. As of the date of this brief, there are thirty-nine pending test claims before the Commission related to storm water permits, and counties are claimants in thirteen of those test claims.[1]

Additionally, on a broader scale, whether the State creates a reimbursable "program" within the meaning of Section 6, Article XIII B of the California Constitution by shifting to counties the cost of providing a public service will have ramifications beyond this case, and will impact counties' future claims for reimbursement from the State.

MS4 Operators *Amici* are regulated by a municipal storm water permit issued by the San Diego Regional Water Quality Control Board for the San Diego Region ("San Diego Permit"). MS4 Operators *Amici*, like Real Party in Interest and Appellant County of Los Angeles ("County"), challenged certain mandatory elements of the 2007 version of the San

[1] See the Commission's list of pending test claims, available at https://www.csm.ca.gov/documents/TestClaims040320_000.pdf (last accessed April 20, 2020).

Diego Permit through a test claim to the Commission.[2]

The Commission determined that several mandates in the San Diego Permit exceeded the requirements of the federal Clean Water Act, the federal regulations implementing the Clean Water Act, and the programs and activities contained in similar permits issued by the United States Environmental Protection Agency. The State Department of Finance challenged the Commission's decision in the Sacramento Superior Court. The Sacramento Superior Court remanded the matter to the Commission for an individualized assessment of each of the challenged provisions of the San Diego Permit under the "maximum extent practicable" language found in Section 402(p)(3)(B)(iii) of the Clean Water Act. (32 U.S.C. § 1342, subd. (p)(3)(B)(iii).) MS4 Operators *Amici* appealed the trial court's decision.[3]

The Third District Court of Appeal reversed based on the intervening California Supreme Court decision in this matter – *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749 – which addressed when challenged permit conditions were state mandates rather than federal mandates. (*Dept. of Fin. v. Comm'n on State Mandates* (2017) 18 Cal.App.5th 661.) Based on this new authority, the Court of Appeal held

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[2] *Amicus* CSAC submitted public comments to the Commission in support of the test claim.

[3] This case will be referenced as the San Diego Permit case throughout this brief.

the Commission applied the correct legal standard and the permit requirements at issue in MS4 Operator *Amici's* test claim were *state* mandates. (*Id.* at 667.) The Court of Appeal also remanded the case to the Sacramento Superior Court with instructions to "consider other issues the parties raised in their pleadings but the court did not address." (*Id.* at 668.)

On remand, the Sacramento Superior Court considered arguments substantially similar to the arguments raised in the present matter but reached a different conclusion than the superior court here. Relevant here, the Sacramento Superior Court denied the State's petition, finding: (1) the challenged permit requirements met all definitions of the term "program;" (2) the challenged permit conditions were mandated by the state and were not requested as part of an application for a "management permit;" and (3) the challenged permit conditions were new when compared to the requirements imposed by the prior permit.

Amici are therefore interested in this matter for legal, financial and policy reasons. Although the cases involve different permit provisions, the appellate decision here may bear on the outcome of the pending action on MS4 Operator *Amici*'s test claim and the ultimate determination of who must pay for the costs of implementing certain elements of the San Diego Permit which exceed federal requirements. This case also has the potential to impact other current and future permits for counties statewide.

No party or counsel for any party in the pending appeal authored the

Amici Curiae Brief contained herein or made a monetary contribution to fund the preparation or submission of the Brief. No other person or entity made a monetary contribution intended to fund the preparation or submission of the Brief.

For these reasons, the *Amici* respectfully request leave to file the *Amici Curiae* brief contained herein.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case arises under Section 6 of Article XIII B of the California Constitution ("Section 6"), which 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 increased level of service….

(Cal. Const. art. XIII B, § 6; see also *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 49 ("local government costs mandated by the state must be funded by the state.").) *Amici* urge this Court to reject the reasoning of the Los Angeles County Superior Court in this matter, and instead, to adopt the reasoning set out in the order issued by the Sacramento Superior Court. As in this case, the Sacramento Court Order addresses a claim for reimbursement of the costs of implementing certain requirements in a municipal separate storm sewer ("MS4") permit. (See Declaration of Rebecca Andrews ("Andrews Decl."), Exhibit ("Ex.") A, "Order After Hearing On Cross-Petitions For Writ of Mandate" Sacramento Superior Court Case No. 34-2010-80000604 (filed Feb. 6, 2020) ("Sacramento Court Order").) The Sacramento Court Order addresses many of the same issues in the present matter, applies the proper test for assessing those issues, and reaches the proper conclusion. This Court should do the same.

A. Statement of Issues

This brief urges the Court to reverse the Los Angeles County

Superior Court's holding in this matter and to adopt the reasoning and conclusions contained in the Sacramento Court Order, on two key issues:

(1) When do MS4 permit requirements constitute a "new program"?

(2) When are MS4 permit requirements "mandated" by the State?

First, as shown in the Sacramento Court Order, MS4 permit requirements meet both definitions of the term "program" under Section 6: (1) there is no real dispute that flood control and pollution prevention and abatement constitute public services; and (2) the proper focus for assessing the uniqueness of a program's requirements is on the particular mandate at issue rather than requirements imposed by general laws. (Andrews Decl. Ex. A, Sacramento Court Order ("Order") at pp. 10-13, citing *County of Los Angeles*, *supra*, 43 Cal.3d at pp. 50, 58 and *Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 874 ("*Building Industry Assn.*").) Here and in the San Diego Permit case, the MS4 permits apply only to local governments.

Second, the proper focus for assessing whether a program is mandated by the State in a case like this is on "whether participation in the underlying program is required, and not on whether the underlying program imposes certain requirements on participants." (Andrews Decl. Ex. A, Order at p. 14; citing *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 743 ("*Kern*").) Here and in the San Diego Permit case, an MS4 permit is not optional: local agency permittees cannot

avoid incurring the costs of complying with their MS4 permits.

As set forth in this Brief, the Sacramento Court Order applied the proper legal test for each issue, reached the correct conclusions, and properly rejected the same and similar arguments made by the State of California and the State Department of Finance (collectively "State") here. This Court should do the same and reverse the superior court's decision in this case.

B. Overview of Clean Water Act

The Clean Water Act prohibits any discharge of a pollutant to waters of the United States without a permit (33 U.S.C. § 1311) and establishes two main permits that allow the discharge of pollutants, including an NPDES permit (33 U.S.C. § 1342).

Even though Congress enacted the Clean Water Act in 1972, MS4s were not required to obtain an NPDES permit for their discharges until 1987. (33 U.S.C. § 1342(p)(3)(B); see also *NRDC v.Costle* (D.C. Cir. 1977) 568 F.2d 1369, 1377.) When Congress amended the Clean Water Act in 1987 to require permits for MS4s, it recognized the unique nature of MS4s by creating a permitting program that applied only to MS4s and which "distinguished between industrial and municipal stormwater discharges." (33 U.S.C. § 1342(p)(3)(B)(iii); see also *Building Industry Assn., supra,* 124 Cal.App.4th at p. 874.) Unlike industrial stormwater discharges,

required to meet "effluent limitations,"[4] MS4 permits are only required to include requirements to reduce the discharge of pollutants to the "maximum extent practicable[.]" (33 U.S.C. § 1342, subd. (p)(3)(B)(iii); *Building Industry Assn., supra*, 124 Cal.App.4th at pp. 873-874.) Thus, the maximum extent practicable standard applies exclusively to government entities and does not apply to all state residents or entities. (Andrews Decl. Ex. A, Order at p. 11.)

III. ARGUMENT

The Sacramento Court Order properly interpreted and applied Section 6 to claims seeking reimbursement for the costs of implementing MS4 permit requirements. It considered and properly rejected the arguments raised by the State and endorsed by the Los Angeles Superior Court in this matter. For these reasons, *Amici* urge this Court to adopt the legal standards articulated in the Sacramento Court Order on the State's Petition in that matter, apply them to the challenged permit conditions in this case, and reverse the judgment of the Los Angeles Superior Court.

A. The Challenged Permit Conditions Mandate a Program

The term "program" has two alternative but related meanings: (1) something "which carries out the governmental function of providing

[4] Effluent limitation is "any restriction …on quantities, discharge rates, and concentrations of "pollutants" which are "discharged" from "point sources" into "waters of the United States," the waters of the "contiguous zone," or the ocean.

services to the public," or (2) something "which . . . impose[s] unique requirements on local governments and do[es] not apply generally to all residents and entities in the state." (*County of Los Angeles, supra*, 110 Cal.App.4th at 1189.) Only one of the meanings must be shown. (*County of Los Angeles, supra*, 43 Cal.3d at p. 56; see also, *Carmel Valley Fire Prot. Dist. v. State of California* (1987) 190 Cal.App.3d 521, 538 (noting that the "second" prong is an "alternative").)

MS4 permit requirements meet both definitions of the term "program" under Section 6, even though only one definition must be satisfied. (See *Carmel Valley Fire Prot. Dist., supra,* 190 Cal.App.3d at p. 538.) First, flood control and pollution prevention are public services provided under the constitutional grant of police power to local government. (See Cal. Const. art. I, § 19; see also *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 337–338; see also *House v. Los Angeles County Flood Control Dist*. (1944) 25 Cal.2d 384, 387-389; see also Andrews Decl. Ex. A, Order at pp. 10-12.) Second, under the proper legal standard, which considers only the specific mandate at issue – here the MS4 permit – the challenged permit conditions impose unique requirements on local governments that do not apply generally to all residents and entities in the state. (*County of Los Angeles, supra*, 110 Cal.App.4th at 1189.)

1. The Challenged Permit Conditions Require The Provision of Public Services.

Contrary to the Los Angeles Superior Court's decision and the State's arguments, the challenged permit conditions require local governments to carry out the governmental function of providing services to the public for purposes of Section 6: (1) flood control services; and (2) pollution prevention and pollution control services. MS4 permits effectively convert flood control programs into pollution prevention programs. In doing so, the State shifts its own obligation to control pollution in water onto MS4s.

a. Flood Control Is A Public Service

Operation of MS4s provides essential public flood control services that protect lives and communities from flooding. (See *House*, *supra* 25 Cal.2d at pp. 388–389 (describing flood control as an exercise of police power); see also *Locklin*, *supra,* 7 Cal.4th at pp. 337–338.) Co-Permittees cannot stop providing public flood control services as a practical matter, because "rain water will run downhill, and not even a law passed by the Congress of the United States can stop that." (See *Hughey v. JMS Development Corp*. (11th Cir. 1996) 78 F.3d 1523, 1530.)

Even if Co-Permittees could stop conveying and discharging stormwater as a practical matter, they cannot do so as a constitutional matter. (See Cal. Const. art. I, § 19; see also *Locklin*, *supra,* 7 Cal.4th at pp.

337–338.) Without Co-Permittees' flood control services, flooding will occur, resulting in the potential taking of private property. (*Locklin*, 7 Cal.4th at pp. 337–338 ("a governmental entity may be liable under the principles of inverse condemnation for downstream damage").) Indeed, constitutional takings claims are premised entirely on the *public purpose* behind flood control activities. (*Ibid.*) There is no real dispute: MS4s provide public flood control services.

b. The Challenged Permit Conditions Require Flood Control Programs to Control Pollution

Through the challenged permit conditions, the State requires MS4 Operators *Amici* and the County to provide flood control services in specific, detailed ways that effectively convert a *flood control* program into a *pollution control* program. Some of the challenged permit conditions in the San Diego Permit case, for example, require MS4 Operators *Amici* to create a regulatory program applicable to development projects to address the impacts of those developments on water quality, sweep streets a set number of times per year, inspect storm drain inlets once per year, remove waste from the MS4 each year before the rainy season, and develop and implement a public education program intended to increase community knowledge about stormwater pollution and reduce behaviors that result in pollutants entering stormwater. (See e.g., Andrews Decl., Ex. B, San Diego Regional Water Quality Control Board Order No. R9-2007-0001 (the San

Diego Permit) at Provisions D.1.d; D.1.g; D.3.a.(3); D.3.a.(5); D.5; J.3.a.(3).) MS4 Operators *Amici* must also establish a management structure for intergovernmental collaboration and create regional and watershed runoff management plans designed to address water quality issues on a regional and watershed basis. (See e.g., *id.* at Provisions E.2.f, E.2.g; F.1; F.2; F.3; L.1.a.)

Each of these activities is intended to provide the public service of reducing society's discharge of pollutants to waters of the state. That is, the State requires *Amici* to use a flood control system (which is only designed to protect the public health and safety from flooding) to also provide the public service of cleaning up the pollution a modern society generates. As the Sacramento Court Order recognizes, requiring these cleanup activities constitutes a state mandated program. (Andrews Decl. Ex. A, Order at p. 10.) All challenged permit conditions at issue in the present matter and in the San Diego County Permit case require a flood control program to create new program elements or increase its levels of service in a manner that transforms flood control into pollution control – both of which are public services to residents of the community.

c. The Challenged Permit Conditions Shift the Water Boards' Pollution Control Obligations Onto MS4s

By converting a flood control program into a pollution control program, the State also shifts its own obligation to control pollution in

waters of the state onto local agencies. The Water Code obligates the State Water Board and Regional Water Boards to regulate pollutant discharges to waters of the state and United States. (Water Code, §§ 13160 ("state board is designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act and any other federal act…"), 13263 ("The regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge…"); see also *San Francisco Baykeeper v. Levin Enterprises, Inc.* (N.D. Cal. 2013) 12 F.Supp.3d 1208, 1211.) The State and Regional Water Boards directly regulate thousands of dischargers through individual and general permits. (See, e.g., State Water Resources Control Board Order No. 2014-0057-DWQ (the Industrial General Permit); see also State Water Resources Control Board Order No. 2009-0009-DWQ (the Construction General Permit).)

Rather than imposing the challenged permit conditions *directly* on the individuals that generate pollutants, the State requires the County and MS4 Operators *Amici* to exercise their police power and land use authority to regulate activities of third parties. For example, private development activities affect water quality, however, in the case of the San Diego Permit, the State elected not to regulate developers directly and instead required MS4 Operators *Amici* to exercise their land use authority to develop

regulations to mitigate pollution and hydromodification conditions caused by development activities. (See e.g., Exhibit B, San Diego Permit at Provisions D.1.g; D.1.d; D.5.) Similarly, although the State, as the water pollution control agency, is required to institute programs to control pollution from nonpoint sources, including any necessary education programs, the challenged permit conditions shift this requirement to Co-Permittees by requiring Co-Permittees to develop and implement a public education program and create regional and watershed runoff management plans. (See e.g., Andrews Decl. Ex. B, San Diego Permit at Provision D.5; see also 33 U.S.C. § 1329, subd. (b)(2) ("[e]ach [state] management program … shall include … programs (including, as appropriate, nonregulatory or regulatory programs for … education…)); Water Code § 13160.)

Even though the State is obligated to control pollution in waters of the state, it uses MS4 Permits to require MS4s to modify their flood control programs to control pollution created by the public. The challenged permit conditions thus require quintessential public services for purposes of Section 6.

Ultimately, any MS4 permit issued to the County or MS4 Operators *Amici* is issued because they operate a *municipal* separate storm sewer system. As the name implies, a municipal separate storm sewer is system that is owned or operated "by a State, city, town, borough, county, parish,

district, association, or other public body". (40 C.F.R. § 122.26, subd. (b)(8).) By definition, an MS4 is government entity. These government entities are subject to special rules, and are regulated differently than other entities that discharge storm water. (Compare 40 C.F.R. § 122.26, subd. (c) [describing "requirements for storm water discharges associated with industrial activity and storm water discharges associated with small construction activity"] with subd. (d) [describing requirements for large and medium municipal separate storm sewer discharges]; see also *Building Industry Assn., supra,* 124 Cal.App.4th at p. 874.) The first definition of "program" under Section 6 is therefore met.

2. The Challenged Permit Conditions Impose Unique Requirements That Do Not Apply Generally.

Although the second definition of "program" is an alternative, it is also met here. The State's and Los Angeles Superior Court's reliance on the general prohibitions found in the Clean Water Act and Porter Cologne Water Quality Control Act is misplaced. (See Response Brief at pp. 40-44, citing *County of Los Angeles*, 43 Cal.3d at p. 56; *City of Sacramento v. California* (1990) 50 Cal.3d 51, 57, 67-69; *City of Richmond v. Comm'n on State Mandates* (1998) 64 Cal.App.4th 1190, 1193, 1197-1199.) There is no claim that the general prohibition provisions imposed the challenged permit conditions. Further, the Supreme Court has already determined the state mandate at issue in this case is *not* the general discharge prohibition, but the

challenged permit conditions. (*See Department of Finance, supra,* 1 Cal.5th at pp. 768-772.) As articulated in the Sacramento Court Order, the proper reference for assessing the uniqueness of challenged permit conditions is the permit itself, and not a more general law or policy. (Andrews Decl. Ex. A, Order at pp. 12-13, citing *County of Los Angeles*, *supra*, 150 Cal.App.4th at p. 919.)

Even if a statewide discharge prohibition was properly at issue in this case, which it is not, the application of that prohibition to the County through the challenged permit conditions is unique. The cases cited by the State actually support this conclusion and stand for the proposition that if a state mandate imposes requirements that are "distinguishable" from those imposed on private entities, the mandate is unique to local government, but if they are "indistinguishable," they are not unique to local government. (See *County of Los Angeles*, *supra,* 43 Cal.3d at p. 58 (concluding that Labor Code provisions imposed requirements that were "indistinguishable" as applied to public and private employers); *Sacramento*, *supra*, 50 Cal.3d at p. 67 (finding that "[m]ost private employers in the state already were required to provide unemployment protection to their employees"); *Richmond*, *supra*, 64 Cal.App.4th at p. 1199 (noting that challenged Labor Code provisions made "workers' compensation death benefit requirements as applicable to local governments as they are to private employers.") Here, because the challenged permit conditions do not apply to any private

entities, the mandate is "distinguishable" and unique to the County.

Further, only MS4s are subject to the "maximum extent practicable" standard. (See 33 U.S.C. § 1342(p)(3)(B)(iii); see also *Building Industry Assn., supra*, 124 Cal.App.4th at p. 874.) Private construction sites, private industrial sites, and private streets, for example, discharge pollutants in stormwater, but are not subject to the maximum extent practicable standard. (See 33 U.S.C. § 1342(p)(3)(A); State Water Resources Control Board Order No. 2014-0057-DWQ at p. 2-004 (Finding 12); State Water Resources Control Board Order No. 2009-0009-DWQ at p. 3-007 (Finding 11).)[5] The distinct standard applicable to MS4s is based on the recognition that MS4s are unique systems that collect pollutants generated by society rather than pollutants generated by and under the control of individual discharges. (*Costle*, 568 F.2d at pp. 1377-1380 (describing stormwater runoff as "unpredictable"; see also 55 Fed. Reg. 47990 (Nov. 16, 1990) (Phase I stormwater regulations); 64 Fed. Reg. 68722 (Dec. 8, 1999) (Phase II stormwater regulations).) Thus, by definition, the MS4 program is a unique water quality program distinguishable from all other discharge programs.

Each of the activities required by the challenged permit conditions is

5 If MS4s undertake regulated construction or industrial activities governed by these General Permits, they enroll in and comply with those General Permits in addition to the requirements in an MS4 permit. The County does not claim that the requirements in these General Permits constitute state mandates.

a quintessential public service unique to local government and distinguishable from the requirements applicable to private dischargers. (*County of Los Angeles*, 43 Cal.3d at pp. 56, 58.) Because the challenged permit conditions require the County to provide public services and apply uniquely to the County, they constitute a "program" for purposes of Section 6 under either definition of the term.

B. The Challenged Permit Conditions Are "Mandated" and Are Not The Result of Co-Permittees' Discretionary Actions

The Sacramento Court Order applies the proper test for assessing whether a challenged program is mandated. (Andrews Decl. Ex. A, Order at pp. 13-14, citing Cal. Const., art. XIII B, § 6 and *Kern, supra*, 30 Cal.4th at p. 743.) Participation in the program at issue must be "required" or "commanded" or "legally compelled." (*Kern, supra*, 30 Cal.4th at p. 741.) The proper focus of a court's inquiry in a case like this is on "whether participation in the underlying program is required, and not on whether the underlying program imposes certain requirements on participants." (Andrews Decl. Ex. A, Order at p. 14; citing *ibid.*)

The State takes the erroneous position that the County's application for a "flexible permit" rather than a "numeric end-of-pipe permit" was a discretionary choice rather than a legal compulsion. (Response Brief at pp. 50-51.) Our Supreme Court and the Sacramento Superior Court have already considered and rejected this argument. (See *Dept. of Finance,*

supra, 1 Cal.5th at pp. 771-772; see also Andrews Decl. Ex. A, Order at pp. 13-14.) The Supreme Court rejected this argument in this matter in *Dept. of Finance v. Comm'n on State Mandates* (2016) 1 Cal.5th 749, 771-772, noting that although federal "regulations required the Operators to include in their permit application a description of priorities and procedures for [conducting the challenged requirements]" the regulations did not require the State "to make those practices conditions of the permit." (*Id*. at p. 772.)

Relying on the *Dept. of Finance v. Comm'n on State Mandates* decision, the Sacramento Court Order also rejected this argument in MS4 Operators *Amici*'s case, noting that MS4s are "legally required to submit an application for a permit." (See Andrews Decl. Ex. A, Order at p. 14, citing *Dept. of Finance, supra,* 1 Cal.5th at p. 771; see also 40 C.F.R. § 122.21, subd. (a) ("must submit a complete application"); Water Code § 13376 ("shall file a report of the discharge").) Contrary to the State's argument, submitting an application for an MS4 permit is not discretionary. Both the Supreme Court and Sacramento Superior Court correctly note the law requires the County and *Amici* to include the following in their permit application:

> A proposed management program [that] covers the duration of the permit. It shall include a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions

> which are appropriate. The program shall also include a description of staff and equipment available to implement the program. Separate proposed programs may be submitted by each coapplicant. Proposed programs may impose controls on a systemwide basis, a watershed basis, a jurisdiction basis, or on individual outfalls. *Proposed programs will be considered by the Director when developing permit conditions to reduce pollutants in discharges to the maximum extent practicable.*

(40 C.F.R. § 122.26, subd. (d)(2)(iv), italics added.) As the italicized language demonstrates (and as held by our Supreme Court in *Department of Finance*), it is ultimately the Regional Board that determines which conditions or requirements to include in the permit – that is, whether the MS4 permit is a "flexible permit" or a "numeric end-of-pipe" permit. Thus, the challenged permit requirements are not activities undertaken at the County's option or discretion – they are activities undertaken at the command of the Regional Board and are therefore "mandated" for purposes of Section 6.[6]

IV. CONCLUSION

For the reasons set forth above, *Amici Curiae* urge this Court to reverse the Los Angeles County Superior Court's holding in this matter and

[6] The State makes a thinly-veiled threat to issue a numeric end-of-pipe permit despite a permit application that proposes a management program as required by federal regulations. (See Response Brief at p. 48 ("regional boards would have little incentive to work with operators to craft flexible permit terms.") However, by requiring MS4 Operators *Amici* and the County to implement specific activities (either as strict compliance with numeric limitation or as strict compliance with specific mandated activities), the State would remove flexibility reserved to MS4s to create their own programs, and thus directly mandate particular programs and activities.

to adopt the reasoning and conclusions contained in the Sacramento Court Order.

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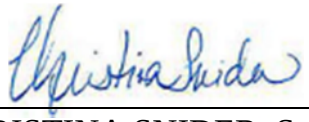
By: 

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CERTIFICATE OF SERVICE

State Department of Finance v. Commission on State Mandates, et al.
Case No. B292446

At the time of service I was over 18 years of age and not a party to this action. My business address is 655 W Broadway, 15th Floor, San Diego, California 92101.

I certify that on April 24, 2020, I served the foregoing document:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF AMICI CURIAE COUNTY OF SAN DIEGO, 17 CITIES IN SAN DIEGO COUNTY, AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, IN SUPPORT OF REAL PARTY IN INTEREST COUNTY OF LOS ANGELES OPENING AND REPLY BRIEFS

on all parties or their counsel of record through the TrueFilings Electronic system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

via TrueFiling:

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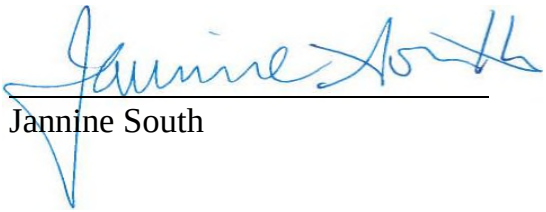
I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 24, 2020, at San Diego, California.



Jannine South