



May 11, 2017

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*And Parties, Interested Parties, and Interested Persons (See Mailing List)*

**RE: Notice of Approval of Request for Postponement, Limited Approval of Extension, and Follow-up on Telephone Inquiries About Responses to the Notice of Incomplete Filing**

*California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074, Provisions C.2.b, C.2.c, C.2.e, C.2.f, C.8.b, C.8.c, C.8.d, C.8.e.i, ii and iv, C.8.f, C.8.g, C.10.a.i, ii, and iii, C.10.b, C.10.c, C.10.d, C.11.f, and C.12.f, 10-TC-01, 10-TC-02, 10-TC-03, and 10-TC-05  
Cities of Alameda, Brisbane, and San Jose, and County of Santa Clara, Claimants*

Dear Messrs. Breault, Doyle, Duenas, Falk and Newmark:

On May 9, 2017, the Commission on State Mandates (Commission) received requests from Messrs. Breault, Doyle, and Falk and on May 11, 2017 the Commission received a request from Mr. Newmark, for a 90-day extension of time to file a response to the Notice of Incomplete Joint Test Claim Filing issued on April 19, 2017 for the above-captioned permit and for postponement of the tentatively scheduled September 22, 2017 hearing on the above-named matter to the next regularly scheduled meeting. Additionally, in several recent telephone calls regarding the Notice of Incomplete Joint Test Claim Filing, Commission staff have discussed with you the requirements for your response and it appears that a few issues require clarification. The following letter addresses these issues and requests.

Requests for Extension and Postponement

Section 1187.9(a) and (b) of the Commission's regulations provide that each request for extension and for postponement shall fully explain the reasons for the request and authorize the executive director to grant a postponement of hearing upon an affirmative showing of good cause. Additionally, Government Code section 17553(a)(3) permits the hearing of a test claim to

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be postponed at the request of the claimant to the next “regularly scheduled hearing” without prejudice.

Here, given the time that has passed since costs were first incurred under the subject permits beginning in 2009, it is understood that some of the evidence of costs may have been stored off-site or archived and that additional time is required to pull and organize the evidence of costs incurred under the provisions of the permit that are alleged to impose a state-mandate. Thus, there is good cause pursuant to Section 1187.9(b)(1)(D) to approve an extension and a postponement to the next regularly scheduled hearing – which will be on December 1, 2017.

However, because an extension of more than 60-days would require a postponement to the January 2018 hearing (rather than the next regularly scheduled hearing in December), the approval of your request for an extension of time is limited to 60-days for good cause, your response to the Notice of Incomplete Joint Test Claim Filing for all claimants is now due by **July 18, 2017**, and the hearing is postponed to the December 1, 2017 meeting of the Commission pursuant to Government Code section 17553(a)(3) and section 1187.9(a) and (b) of the Commission’s regulations.

Please also note, for your calendaring, that the Commission’s hearing dates are adopted at the September hearing but are traditionally set bi-monthly in odd months on the fourth Friday of the month, except for the November hearing which is usually set for the first Friday in December (December 1, 2017 this year). You may find the Commission’s hearing calendar at: [http://www.csm.ca.gov/meetings\\_minutes.php](http://www.csm.ca.gov/meetings_minutes.php).

#### A Test Claim Functions Similarly to a Class Action

As Mr. Newmark mentions in his request for extension and postponement, he must coordinate the responses of 38 co-claimants to respond to the Notice of Incomplete Joint Test Claim Filing. This is highly unusual and is an unnecessary burden because test claims function similarly to class actions so there is no need to have so many co-claimants.

A “test claim” is the first claim filed with the Commission alleging that a particular legislative enactment or executive order imposes costs mandated by the state. (Gov. Code § 17521.) Though multiple claimants may join together in pursuing a joint test claim, the Commission will not hear duplicate claims, and Commission decisions *apply statewide* to similarly situated school districts and local agencies (or in the case of a stormwater permit, to all entities under the permit).<sup>1</sup> Thus, the test claim “functions similarly to a class action and has been established to expeditiously resolve disputes affecting multiple agencies.”<sup>2</sup> Besides the claimants, other similarly situated local agencies may, but need not, participate in the test claim process as interested parties. In most test claims filed with the Commission, there is only one claimant (in some cases there are two or three joint claimants who must allege state-mandated costs from the same statute or executive order, agree on all issues of the test claim, and select a joint representative) although the class of eligible claimants to claim reimbursement if the test claim is

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<sup>1</sup> See California Code of Regulations, title 2, section 1183.1; *San Diego Unified v. Commission on State Mandates*, page 872, fn. 10.

<sup>2</sup> California Code of Regulations, title 2, section 1181.2(s).

successful can be in the hundreds (for cities and counties), or even more than one thousand (for school districts).

For example, in the Test Claim on Los Angeles Regional Quality Control Board Order No. 01-182, the cities of Artesia, Beverly Hills, Carson, Norwalk, Rancho Palos Verdes, Westlake Village, Azusa, Commerce, Vernon, Bellflower, Covina, Downey, Monterey Park, and Signal Hill, were the joint claimants. However, under the Parameters and Guidelines adopted for that approved Test Claim, any of the 84 co-permittees that were not subject to a TMDL were listed as eligible to submit reimbursement claims for placing trash receptacles at transit stops— not just the 14 joint claimants. Similarly here, if activities are approved for reimbursement in these consolidated test claims, all of the co-permittees subject to the approved activities will be eligible to claim reimbursement for their increased costs mandated by the state without regard to their participation in the Test Claim as co-claimants.

As stated in the Request for Additional Briefing and Evidence issued December 2, 2016, prior Commission staff determined that it would be allowable in this case to have one test claim per county area due to the different prior permits that will require analysis to determine whether and when an activity required by the test claim permit imposes a new program or higher level of service and, in one case, due to the fact that that was the only claim to plead the municipal operations activities. At that time Commission staff had received and returned numerous test claim duplicate filings on *Order No. R2-2009-0074* from other co-permittees who were not the first to file from their county jurisdictional area, because a test claim “is the first claim filed with the Commission alleging that a particular legislative enactment or executive order imposes costs mandated by the state.”<sup>3</sup> Arguably only two test claims should have been allowed to be filed at that time (Brisbane and San Jose since they were the first claims alleging different provisions of law impose a state-mandated new program of higher level of service). However these four claims were permitted to be filed many years ago, are now consolidated for hearing, and there is no prejudice to any of the parties as a result of allowing them to go forward, though it does significantly increase workload and slow down the process for Commission staff and the parties to have so many parties involved in the claim. However, just to reiterate, there is absolutely no need as a practical matter and no requirement in law for the other co-permittees to file individual test claims on *Order No. R2-2009-0074* (which would only have been returned as duplicative) or to act as co-claimants in the pending claims. That said, any interested party (which includes all co-permittees who are not co-claimants) is welcome to (but need not) participate in the test claim process and may submit any comments or evidence that they wish to have considered during the comment periods.

#### Evidentiary Requirements for Test Claim Narratives and Declarations

In a test claim, a claimant always bears the ultimate burden of persuasion. As explained by the Second District Court of Appeal:

The terms burden of proof and burden of persuasion are synonymous. . . . [¶]  
“Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” (Evid.Code, § 500.) To prevail, the party bearing

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<sup>3</sup> Government Code section 17521.

the burden of proof on the issue must present evidence sufficient to establish in the mind of the trier of fact or the court a requisite degree of belief (commonly proof by a preponderance of the evidence). (Evid.Code, §§ 115, 520.) The burden of proof does not shift during trial — it remains with the party who originally bears it. (Evid.Code, § 500; [Citations].) . . . .”<sup>4</sup>

In the record you have submitted a spreadsheet purporting to show some costs incurred for some of the countywide shared activities under the prior permit, sometime in 2010, and in 2011. However, the spreadsheet is considered hearsay. It is a compilation of data prepared by an unidentified person and all written representations of fact must be signed under penalty of perjury pursuant to section 1187.5 of the Commission’s regulations.

Moreover, Government Code section 17559(b) provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission’s decision is not supported by substantial evidence in the record. This requires that each finding of fact that the Commission makes (including whether there are costs mandated by the state, which is a mixed issue of law and fact) meet the *Topanga* standard.<sup>5</sup> In *Topanga* the court explained:

Section 1094.5 clearly contemplates that at minimum, the reviewing court must determine both whether substantial evidence supports the administrative agency’s findings and whether the findings support the agency’s decision. Subdivision (b) of Code of Civil Procedure section 1094.5 prescribes that when petitioned for a writ of mandamus, a court’s inquiry should extend, among other issues, to whether ‘there was any prejudicial abuse of discretion.’ Subdivision (b) then defines “abuse of discretion” to include instances in which the administrative order or decision ‘is not supported by the findings, or the findings are not supported by the evidence.’ (Emphasis added.) Subdivision (c) declares that ‘in all . . . cases’ (emphasis added) other than those in which the reviewing court is authorized by law to judge the evidence independently, ‘abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.’ . . .

The Notice fully explains the evidentiary requirements to resolve the specified issues and cure the filing. Pursuant to Government Code section 17559(b) and section 1183.6(a) of the Commission regulations, Commission staff must rely on evidence in the record, “which shall include but not be limited to a review of the written comments filed.” The narrative provides for the claimant’s opportunity to make its case with regard to what findings it wants the Commission to make and to show how claimant’s position is supported by the law and the evidence in the record.

Commission staff appreciates your willingness to amend the narrative statement with regard to actual costs and the detailed cost estimate (of *all* costs alleged to be imposed), but, based on our discussion, you seem to be averse to including a detailed discussion of costs in the narrative *and*

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<sup>4</sup> *Sargent Fletcher, Inc. v. Able Corp.* (2003) 10 Cal.App.4th 1658, 1667.

<sup>5</sup> *Topanga Association for a Scenic Community v. County Of Los Angeles* (1974) 11 Cal.3d 506.

supporting that narrative with documentary evidence in the record due to the work involved for the co-claimants.

However, completeness issues aside, the proponent of a test claim has the burden of proof on the issue of whether there are costs mandated by the state and a finding of the Commission of costs mandated by the state must be supported by substantial evidence in the record.<sup>6</sup>

Pursuant to the Commission's regulations, the technical rules of evidence and witnesses that are required in court are not required before the Commission. Under the Commission's process, evidence to support or rebut any issue can be by either oral or written testimony provided under oath or affirmation.<sup>7</sup> Hearsay evidence may be used only for the purpose of supplementing or explaining other evidence, but shall not be sufficient itself to support a finding unless it would be admissible over objection in civil actions.<sup>8</sup> Hearsay evidence is defined as an out-of-court statement (either oral or written) that is offered to prove the truth of the matter stated. Under the evidentiary requirements for the courts, written testimony in the form of a declaration or affidavit is considered hearsay because the declarant is an out-of-court witness making statements about the truth of the matters asserted and is not available for cross examination. However, under the relaxed rules of evidence in section 1187.5 of the Commission's regulations, written testimony made under oath or affirmation by a person with personal knowledge is considered direct evidence and may properly be used to support a fact.<sup>9</sup>

Out-of-court statements that are not made under oath or affirmation, however, are hearsay. Unless there is an exception provided by law, hearsay evidence alone cannot be used to support a finding under Government Code section 17518.5 because out-of-court statements are generally considered unreliable. The witness is not under oath, there is no opportunity to cross-examine the witness, and the witness cannot be observed at the hearing.<sup>10</sup> There are many exceptions to the hearsay rule, however.<sup>11</sup> If one of the exceptions applies, then an out-of-court statement is considered trustworthy under the circumstances and may be used to prove the truth of the matter stated.<sup>12</sup> In such an instance, the filing should explain which exception is being applied and why it applies in this case.

In addition, the Commission may take judicial notice of any facts which may be judicially noticed by the courts. Such facts include the official acts of any legislative, executive, or judicial

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<sup>6</sup> Evidence Code section 500; *Cornell v. Reilly* (1954) 127 Cal.App.2d 178, holding that the party asserting the affirmative in an administrative proceeding has the burden of proof.

<sup>7</sup> California Code of Regulations, title 2, section 1187.5 (Register 2014, No. 21.)

<sup>8</sup> *Ibid.*

<sup>9</sup> *Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, 597.

<sup>10</sup> *People v. Cudjo* (1993) 6 Cal.4th 585.

<sup>11</sup> See Evidence Code sections 1200 et seq. for the statutory hearsay exceptions.

<sup>12</sup> California Code of Regulations, title 2, section 1187.5, See also, Evidence Code sections 451 and 452.

body; records of the court; and other facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination.<sup>13</sup>

The Commission's regulation governing evidence is borrowed from the evidence requirements of the Administrative Procedures Act.<sup>14</sup> The courts have interpreted the evidentiary requirement for administrative proceedings as follows:

While administrative bodies are not expected to observe meticulously all of the rules of evidence applicable to a court trial, common sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts are to be determined. Among these are the following: the evidence must be produced at the hearing by witnesses personally present, or by authenticated documents, maps or photographs; ordinarily, hearsay evidence standing alone can have no weight [citations omitted], and this would apply to hearsay evidence concerning someone else's opinion; furthermore, cross-examination within reasonable limits must be allowed. Telephone calls to one of the officials sitting in the case, statements made in letters and arguments made in petitions should not be considered as evidence.<sup>15</sup>

In that case, the board of supervisors denied a permit to use land subject to a zoning ordinance as a race track. The board based its decision on testimony, letters and phone calls from members of the public opposing horse racing and betting on moral grounds. The court held that there was no evidence in the record to support the decision. On remand, the court directed the board to "reconsider the petition of appellants as to land use, wholly excluding any consideration as to the alleged immorality of horse racing and betting as authorized by state law, and wholly excluding from such consideration all testimony not received in open hearing, and all statements of alleged fact and arguments in petitions and letters on file, except the bare fact that the petitioners or letter writers approve or oppose the granting of the petition; also wholly excluding each and every instance of hearsay testimony unless supported by properly admissible testimony, it being further required that the attorneys representing any party in interest be granted a reasonable opportunity to examine or cross-examine every new witness produced."<sup>16</sup>

Accordingly, the plain language of the statutory and regulatory mandates scheme requires substantial evidence in the record to support a finding of costs mandated by the state.

For a detailed description of costs, the following is required (please review Government Code section 17553(b)):

(A) A detailed description of the new activities and costs that arise from the mandate. (This includes a detailed description of each activity alleged to be a reimbursable state-mandate and the specific costs of each activity.)

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<sup>13</sup> Evidence Code section 452(c)(d)(g)(h).

<sup>14</sup> Government Code section 11513.

<sup>15</sup> *Desert Turf Club v. Board of Supervisors for Riverside County* (1956) 141 Cal.App.2d 446, 455.

<sup>16</sup> *Id.*, page 456.

Messrs. Breault, Doyle, Duenas, Falk, and Newmark

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(B) A detailed description of existing activities and costs that are modified by the mandate. (Please describe in detail the costs increased or decreased based on modifications of requirements under prior law (including the prior permit) which are now alleged to impose a new program or higher level of service.)

(C) The *actual* increased costs incurred by the claimant during the fiscal year for which the claim was filed to implement the alleged mandate. (This requires the *actual* costs incurred for the whole of 2009-2010 for each activity alleged to impose a mandate.)

(D) The actual or estimated annual costs that will be incurred by the claimant to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed. (This requires actual or estimated costs incurred for the whole of 2010-2011, and should be actual given that it is in the past, for each activity alleged to impose a mandate.)

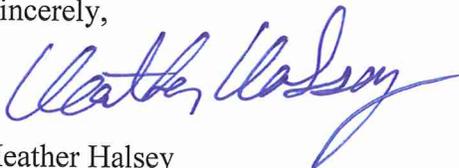
(E) A statewide cost estimate of increased costs that all local agencies or school districts will incur to implement the alleged mandate during the fiscal year immediately following the fiscal year for which the claim was filed. (This means an estimate of costs for all co-permittees whether co-claimants or not - a test claim is like a class action and this information is intended to apprise the Legislature of the State's potential liability under the test claim permit.)

Evidence to support alleged costs could include contracts, receipts, and declarations of persons with personal knowledge of the costs incurred. Spreadsheets are not evidence in themselves unless supported by declarations from each of the entities whose costs are included in the spreadsheet by persons with personal knowledge.

Commission staff regrets that this matter was not more closely reviewed and returned when it was filed, however a completeness review is not a legal review. Nonetheless, opportunity has been provided in the April 19, 2017 Notice to cure the filing, ensuring that there is no prejudice to the co-permittees. It is hoped that for future filings the co-permittees will know what needs to be included for purposes of completeness and also to support the findings that claimants are asking the Commission to make, thus making the process easier for all involved.

This matter is now tentatively set for hearing on December 1, 2017. Commission staff will consider evidence timely filed for the record in the Draft Proposed Decision, which will issue at least eight weeks before the hearing.

Sincerely,



Heather Halsey  
Executive Director

**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 May 11, 2017, I served the:

- Notice of Approval of Request for Postponement, Limited Approval of Extension, and Follow-up on Telephone Inquiries About Responses to the Notice of Incomplete Filing issued May 11, 2017
- Claimant (Cities of Alameda and Brisbane) Request for Extension and Postponement filed May 11, 2017
- Claimant (City of Santa Clara) Request for Extension and Postponement filed May 9, 2017
- Claimant (City of San Jose) Request for Extension and Postponement filed May 9, 2017

*California Regional Water Quality Control Board, San Francisco Bay Region,  
Order No. R2-2009-0074, Provisions C.2.b, C.2.c, C.2.e, C.2.f, C.8.b, C.8.c, C.8.d,  
C.8.e.i, ii and iv, C.8.f, C.8.g, C.10.a.i, ii, and iii, C.10.b, C.10.c, C.10.d, C.11.f, and  
C.12.f,*

10-TC-01, 10-TC-02, 10-TC-03, and 10-TC-05

Cities of Alameda, Brisbane, and San Jose, and County of Santa Clara, Claimants

by making them available on the Commission's website and providing notice of how to locate them 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 May 11, 2017 at Sacramento, California.



---

Jill L. Magee  
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# COMMISSION ON STATE MANDATES

## Mailing List

**Last Updated:** 4/25/17

**Claim Number:** 10-TC-01, 10-TC-02, 10-TC-03, and 10-TC-05

**Matter:** California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074, Provisions C.2.b, C.2.c, C.2.e, C.2.f, C.8.b, C.8.c, C.8.d, C.8.e.i, ii, and iv, C.8.f, C.8.g, C.10.a.i, ii, iii, C.10.b, C.10.c, C.10.d, C.11.f, and C.12.f

**Claimant:** Cities of Alameda, Brisbane, and San Jose, and County of Santa Clara

### TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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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