



October 5, 2017

Mr. David Burhenn
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Los Angeles, CA 90402

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

RE: Corrected Second Notice of Incomplete Joint Test Claim

San Diego Region Order No. R9-2015-0001 and Order No. R9-2015-0100, 15-TC-02
County of Orange, Orange County Flood Control District, and the Cities of
Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Lake Forest,
Mission Viejo, Rancho Santa Margarita, San Clemente, and San Juan Capistrano,
Claimants

Dear Mr. Burhenn:

The need to clarify this letter has been brought to Commission staff's attention. The Second Notice of Incomplete Joint Test Claim letter dated October 3, 2017 is hereby withdrawn and replaced with this corrected letter.

On June 30, 2016, the Commission on State Mandates (Commission) received a joint test claim filing submitted by the County of Orange, the Orange County Flood Control District, and the Cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, Rancho Santa Margarita, San Clemente, and San Juan Capistrano (claimants) on the above-captioned matter. Upon review, Commission staff found the joint test claim filing to be incomplete.

On July 29, 2016 Commission staff notified the claimants of the problems with the filing. The claimants cured the joint test claim and upon review, Commission staff found it to be complete and retain the original filing date of June 30, 2016 in accordance with section 1183.1(e) of the Commission's regulations (California Code of Regulations, Title 2).

On September 12, 2016, Commission staff issued the Notice of Complete Joint Test Claim Filing based upon the effective date of Order No. R9-2015-0100, adopted on November 18, 2015, effective on January 7, 2016 which is within 12 months of the June 30, 2016 filing date of this Test Claim. However, upon looking more closely at this filing, it was unclear whether you also intended to plead Order No. R9-2013-0001 as amended by Order No. R9-2015-0001, effective on April 1, 2015 which is not within 12 months of the filing date of this Test Claim. Each order is a separate executive order with its own effective date, which is critical for statute of limitations purposes, and based on the Water Boards' naming conventions and the language of your filing, it was difficult to determine exactly what was intended to be pled. Your filing specified:

Mr. Burhenn
October 5, 2017

Joint Test Claim of the County of Orange et al. Concerning California Regional Water Quality Control Board, San Diego Region, Order No. R9-2013-0001, as amended by Order No. R9-2015-0001, as amended by Order No. R9-2015-0100.¹

This is the title of the R9-2015-0100 order, but it could also be interpreted as a list of orders. Therefore, on July 28, 2017, Commission staff issued the Request for Clarification of the Pleading and Evidence of the Date of First Incurring Costs under the above-named permit(s). If you only intended to plead R9-2015-0100, effective January 7, 2016, nothing further was required, since the Test Claim was filed within 12 months of the effective date. However, if you intended to plead R9-2015-0001, effective April 1, 2015, evidence of the *date of first incurring costs* under that Order must be filed for the Commission to exercise jurisdiction over it.²

On September 18, 2017, claimants filed their response, and clarified claimants' pleading of both Order No. R9-2015-0001, effective April 1, 2015, and one section (B.3.c) of Order No. R9-2015-0100, effective January 7, 2016. Upon review, Commission staff found the joint test claim filing to be incomplete and notified the claimants of the problems with the filing on October 3, 2017.

A. To Be Considered Timely Filed Under Government Code 17551(c) a Test Claim Must Be Filed Not Later Than 12 Months Following the Effective Date of a Statute or Executive Order or, as Supported with Evidence in the Record, Within 12 Months of First Incurring Increased Costs as a Result of a Statute or Executive Order.

Government Code 17551(c) requires a local agency to file a test claim "not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later." Section 1183 of the Commission's regulations state that "[f]or the purposes of claiming based on *the date* of first incurred costs, 'within 12 months' means by June 30 of the fiscal year following the fiscal year in which increased costs were *first incurred* by the test claimant." (Emphasis added.)

The existing written narrative, declarations, and supporting documentation all indicate that Order No. R9-2015-0001, became effective April 1, 2015, and that claimants first incurred costs to implement the Order during fiscal year 2014-2015. However, the original written narrative and declarations do not specify the date of first incurred costs as a result of this executive order as required by section 1183 of the Commission's regulations.³ In addition, the revised declarations indicate that the declarants are "informed and believe and therefore state... organizing a

¹ *San Diego Region Order No. R9-2015-0100 and Order No. R9-2015-0001*, 15-TC-02, page 1.

² Request for Clarification of Pleading and Evidence of the Date of First Incurring Costs, page 2.

³ See e.g., Test Claim, page 48 (Narrative) ("The Joint Test Claimants first incurred costs to implement the Regional Permit during the fiscal year that ended on June 30, 2015."); Test Claim, page 119-120 (Declaration of Khalid Bazmi) ("The County first incurred costs to comply with the Regional Permit and its new and expanding mandates during fiscal year ("FY") 2014-2015....However, I am informed and believe and therefore state that efforts required to address such standards have resulted in a cost sharing assessment to the County of \$26,304 in FY 2014-2015, \$135,090 in FY 2015-2016 and an estimated assessment during FY 2016-17 of \$196,368.").

meeting... which was held on or about April 15, 2015,”⁴ or “informed and believe and therefore state... participation and email communications... and other deliverables on or about April 23, 2015.”⁵ All of the declarations of costs and when those costs were incurred are also based only on “information and belief,” and none on personal knowledge, and therefore the assertions are considered hearsay.⁶ As discussed below, findings of the Commission, including whether a test claim is timely filed, may not be based on hearsay evidence alone. Although it is true that declarations based on information and belief are admissible in Commission proceedings and may be used to supplement or explain other evidence to support a finding of fact, hearsay evidence is not sufficient in itself to support a finding of fact unless it would be admissible over a hearsay objection in a civil proceeding.⁷

Therefore, based on the filings to date, the Commission does not have jurisdiction over the portions of this Test Claim filed on *Order No. R9-2015-0001* effective on April 1, 2015, because the claim was not filed within 12 months following the effective date of the executive order, and there is no evidence in the record to support a finding that the claim was filed within 12 months of first incurring costs.

It is settled principle that administrative agencies have only such powers as have been conferred upon them, expressly or by implication, by constitution or statute. An administrative agency, therefore, must act within the powers conferred upon it by law and may not validly act in excess of such powers. Administrative orders are void when rendered without fundamental jurisdiction, or in excess of the agency’s statutory powers, and may be collaterally attacked at any time.⁸ And, pursuant to Government Code section 17551(b), the Commission’s review of a test claim may be had “*only if*” the test claim is filed within the time limits specified in sections 17551(c).

Accordingly, for this Test Claim with regard to *Order No. R9-2015-0001*, effective on April 1, 2015, to be deemed complete, the date of first incurring costs as a result of that executive order must be alleged and supported by evidence in the record, which may include declaration(s) signed under penalty of perjury, based on the declarant’s personal knowledge, or in conjunction with other evidence (such contracts, receipts, meeting minutes, and the like).

⁴ Claimants’ Response to the Request for Clarification of Pleading and Evidence of the Date of First Incurring Costs, pages 7, 9, 13, 15, 19, 21, and 27.

⁵ Claimants’ Response to the Request for Clarification of Pleading and Evidence of the Date of First Incurring Costs, pages 11, 17, 23, 25, and 30.

⁶ Test Claim, pages 117-263; Claimants’ Response to the Request for Clarification of Pleading and Evidence of the Date of First Incurring Costs, pages 7-32.

⁷ Title 2, California Code of Regulations, section 1187.5.

⁸ *City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 677–679; *Aylward v. State Board etc. Examiners* (1948) 31 Cal.2d 833, 839; *B.W. v. Board of Medical Quality Assurance* (1985) 169 Cal.App.3d 219, 234; *City and County of San Francisco v. Padilla* (1972) 23 Cal.App.3d 388, 400.

B. The Narrative and Any Allegations of Fact Must Be Supported with Evidence in the Record as Required by Government Code sections 17553 and 17559(b), and California Code of Regulations Title 2, Section 1187.5.

Declarations Based on Information and Belief Are Admissible in Test Claim Proceedings.

Government Code section 17553(b)(2) specifies, in relevant part, that the written narrative of a test claim shall be supported with declarations under penalty of perjury, based on the declarant's personal knowledge, information, or belief, and signed by persons who are authorized and competent to do so, as follows:

(A) *Declarations of actual or estimated increased costs* that will be incurred by the claimant to implement the alleged mandate.

(B) *Declarations identifying all local, state, or federal funds, or fee authority that may be used to offset the increased costs* that will be incurred by the claimant to implement the alleged mandate, including direct and indirect costs.

The information required by section 17553(b)(2)(A) and (B), addresses the evidence necessary to find that a statute or executive order imposes increased costs mandated by the state within the Government Code section 17514 and 17556. In this case, the declarations filed with the Test Claim filing indicate that the declarants are "informed and believe and therefore state..."⁹ and are thus not based on personal knowledge, nor has other evidence been submitted to support these allegations and declarations. Though it is generally permissible to file declarations based only on information and belief with the Commission, such declarations are hearsay and not sufficient in themselves to support a finding unless admissible over an objection in civil actions. Here, for purposes of determining jurisdiction, the declarations filed based only on information and belief and without other supporting evidence do not provide support for a finding of timely filing and this is jurisdictional.

A Finding of Costs Mandated by the State May Not Be Made Based on Hearsay Evidence Alone.

As indicated above, section 1187.5(a) of the Commission's regulations provides that "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over an objection in civil actions." 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) must meet the *Topanga* standard.¹⁰ 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

⁹ Test Claim, pages 117-263.

¹⁰ *Topanga Association for a Scenic Community v. County Of Los Angeles* (1974) 11 Cal.3d 506.

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' 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.' . . .

A finding of increased costs mandated by the state is often a mixed question of law and fact under sections 17514 and 17556. Thus, any costs alleged, for which you seek a favorable finding of increased costs mandated by the state, must be supported by evidence in the record in accordance with section 1187.5 of the Commission's regulations.

Thus, claimants may choose not to submit evidence that would be admissible over an objection in civil actions with regard to the issue of costs mandated by the state at this time (since this issue is not jurisdictional). However, the Commission will then have no evidence of costs mandated by the state in the record and, without such evidence, cannot make a finding of costs mandated by the state and approve this Test Claim. In that case, Commission staff would issue the Draft Proposed Decision recommending denial of the claim on the basis that there is no evidence of costs in the record.

C. Pursuant to Government Code 17553, Title 2 California Code of Regulations Section 1183 and Section 7 of the Commission's Test Claim Form, Claimants Are Required to File a Copy of Each Executive Order, Identified by its Effective Date, Alleged to Impose or Impact a Mandate.

An essential test claim filing requirement under the Government Code 17553, Title 2 California Code of Regulations section 1183, and section 7 of the Commission's Test Claim Form, is to include a copy of each executive order, identified by its effective date, alleged to impose or impact a mandate. In this case no copy of *Order No. R9-2015-0001*, effective April 1, 2015 was included in the test claim filing or attached to the request for clarification, which of course added to the uncertainty about what claimants intended to plead.

Please include a copy of *Order No. R9-2015-0001*, effective April 1, 2015 to complete this test claim with regard to that order.

Curing This Test Claim

Provide Evidence of the Date of First Incurring Costs and Include a Copy of *Order No. R9-2015-0001*, effective April 1, 2015:

For this Test Claim with regard to *Order No. R9-2015-0001*, effective on April 1, 2015, to be deemed complete, the date of first incurring costs as a result of that executive order must be alleged and supported by evidence in the record which may include declaration(s) signed under penalty of perjury, based on the declarant's personal knowledge, or in conjunction with other evidence (such contracts, receipts, meeting minutes, and the like).

Mr. Burhenn
October 5, 2017

Please also include a copy of *Order No. R9-2015-0001*, effective April 1, 2015 to complete this test claim with regard to that order.

Only If Claimants Seek a Finding of Costs Mandated by the State:

Though not a jurisdictional issue, for the Commission to make a finding of costs mandated by the state, which is what your clients seek, the detailed cost descriptions set forth in Government Code section 17553 must also be supported by evidence in the record that would be admissible over a hearsay exception. Otherwise, there is no support in the record to approve this test claim.

Thus, to satisfy the requirements of Section 1187.5(a) of the Commission's regulations, please also submit either revised declaration(s) signed under penalty of perjury based on the declarant's personal knowledge or provide other evidence that would be admissible over a hearsay exception to support a finding of costs for each new activity and existing modified activity alleged to be mandated by the state as a result of the statute or executive order(s) pled.

Retaining Your Original Filing Date

To retain the original filing date, please refile *only* the following required elements to cure this Test Claim:¹¹ (1) a revised written narrative that specifies the date costs were first incurred under *Order No. R9-2015-0001*, effective April 1, 2015, and declarations or other evidence to support a finding of the date of first incurring costs as a result of that order; (2) a copy of *Order No. R9-2015-0001*, effective April 1, 2015; and (3) optionally, but in order to support a finding of increased costs mandated by the state and satisfy the requirements of Section 1187.5(a) of the Commission's regulations, please also submit either revised declaration(s) signed under penalty of perjury based on the declarant's personal knowledge or provide other evidence that would be admissible over a hearsay exception to support a finding of costs for each new activity and existing modified activity alleged to be mandated by the state as a result of the statute or executive order(s) pled with the Commission within 30 days of the date of this letter, by **November 6, 2017**. The revised narrative will supersede any prior filings and the revised or additional declarations or other evidence may supersede or may supplement the existing declarations (please indicate your preference on this point). If a complete test claim filing is not received within 30 calendar days from the date of this letter, the executive director may disallow the original test claim filing date. (Cal. Code Regs., tit. 2, § 1183.1(f).) As provided in the Commission's regulations, a real party in interest may appeal to the Commission for review of the actions and decisions of the executive director. Please refer to California Code of Regulations, title 2, section 1181.1(c).

You may file electronically via the Commission's e-filing system pursuant to section 1181.3 of the Commission's regulations which will replace the specified elements of the original filing. Please see the Commission's website at http://www.csm.ca.gov/dropbox_procedures.php

¹¹ Please do not refile the correct test claim forms or declarations not requiring revision, or supporting documentation, which is already nearly 800 pages. Commission staff will replace the written narrative and declarations with the revised ones, as appropriate, and will append any additional supporting documentation filed as evidence of costs to the back of the supporting documentation currently on file.

Mr. Burhenn
October 5, 2017

If you have questions or require further assistance please call Jill Magee at (916) 323-3562. If she is unable to answer your questions, please request to speak to me.

Sincerely,

A handwritten signature in blue ink, appearing to read "Heather Halsey". The signature is fluid and cursive, with the first name being more prominent than the last.

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 October 5, 2017, I served the:

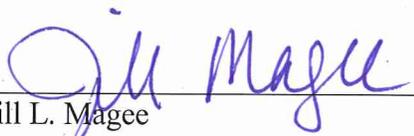
- **Corrected Second Notice of Incomplete Joint Test Claim issued October 5, 2017**

San Diego Region Order No. R9-2015-0001 and Order No. R9-2015-0100, 15-TC-02

County of Orange, Orange County Flood Control District, and the Cities of Aliso Viejo, Dana Point, Laguna Beach, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, Rancho Santa Margarita, San Clemente, and San Juan Capistrano, Claimants

By making it available on the Commission's website and providing notice of how to locate it 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 October 5, 2017 at Sacramento, California.



Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
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(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 9/29/17

Claim Number: 15-TC-02

Matter: San Diego Region Order No. R9-2015-0001 and Order No. R9-2015-0100

Claimants: City of Aliso Viejo
City of Dana Point
City of Laguna Beach
City of Laguna Hills
City of Laguna Niguel
City of Lake Forest
City of Mission Viejo
City of Rancho Santa Margarita
City of San Clemente
City of San Juan Capistrano
County of Orange
Orange County Flood Control District

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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