



October 3, 2017

Mr. David Burhenn  
Burhenn & Gest, LLP  
624 South Grand Avenue,  
Suite 2200  
Los Angeles, CA 90402

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

**RE: Second Notice of Incomplete Joint Test Claim**

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

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.

On August 25, 2016, the claimants cured the joint test claim filing on the above-captioned matter with the Commission and on September 6, 2016, the joint claimant corrected the signature on one of the certifications. Upon review, Commission staff found this joint test claim filing to be complete and retained 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 on the above-named matter 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 filing date of this Test Claim on June 30, 2016. 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. Your filing specified:

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.<sup>1</sup>

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

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

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. However, if you intended to plead R9-2015-0001, effective April 1, 2015, evidence of the *date of first incurring* costs under that permit must be filed for the Commission to exercise jurisdiction over that Order.<sup>2</sup>

A finding on the timeliness of the filing cannot be made because *the date* of first incurred costs for each new activity and modified existing activity alleged to be mandated by the state is not specified or associated with any of the activities described either in the written narrative or in the declarations as is required by the Government Code and the Commission's regulations. Moreover, no evidence (neither a declaration based on personal knowledge or other documentary evidence such as contracts, receipts, or meeting minutes that could go to prove that a cost was incurred) has been filed to support such a finding. The statements in the declaration regarding when costs were first incurred are not specific and, because they are not based on personal knowledge, are hearsay. The Commission must support its finding on jurisdiction, based on *first* incurring increased costs, with evidence of the date that costs were incurred in the record.

#### To Be Considered Timely Filed

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 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 indicated that Order No. R9-2015-0100, became effective January 7, 2016, and Order No. R9-2015-0001, became effective April 1, 2015, and that claimants first incurred costs to implement the Permit during fiscal year 2014-2015 but did not specify the date of first incurred costs or associate the date of first incurred costs with any of the activities or costs alleged to be mandated by the state as is required by Government Code section 17551(c).<sup>3</sup> The revised declarations similarly indicate generally, "informed and believe and therefore state... organizing a meeting... which

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

<sup>3</sup> *San Diego Region Order No. R9-2015-0100 and Order No. R9-2015-0001*, 15-TC-02, page 48 ("The Joint Test Claimants first incurred costs to implement the Regional Permit during the fiscal year that ended on June 30, 2015. This Narrative Statement includes fiscal year costs for FY 2014-2015, 2015-2016 and estimates for 2016-17." (Narrative)); page 118 ("The County first incurred costs to comply with the Regional Permit and its new and expanding mandates during fiscal year ("FY") 2014-2015." (Declaration of Khalid Bazmi)); and page 120 ("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." (Declaration of Khalid Bazmi)).

was held on or about April 15, 2015,”<sup>4</sup> or “informed and believe and therefore state...participation and email communications...and other deliverables on or about April 23, 2015”<sup>5</sup> but none specify the date costs were first incurred and the declarations of costs and when those costs were incurred are based only on information and belief - not on personal knowledge and are therefore hearsay. As discussed below, a finding of the Commission may not be based on hearsay evidence alone.

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. When an administrative agency acts in excess of the powers conferred upon it, its action is void.<sup>6</sup> The Commission is a quasi-judicial administrative agency, whose authority is provided solely by statute. 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), 17573, and 17574.

The Narrative and Any Allegations of Fact Must Be Supported with Evidence in the Record.

Government Code section 17553(b)(2)(A-D) specifies that the written narrative 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.
- (C) *Declarations describing new activities performed to implement specified provisions of the new statute or executive order* alleged to impose a reimbursable state-mandated program. Specific references shall be made to chapters, articles, sections, or page numbers alleged to impose a reimbursable state-mandated program.
- (D) If applicable, declarations describing the period of reimbursement and payments received for full reimbursement of costs for a legislatively determined mandate pursuant to Section 17573, and the authority to file a test claim pursuant to paragraph (1) of subdivision (c) of Section 17574.

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

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<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> *Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 103; *Aylward v. State Board etc. Examiners* (1948) 31 Cal.2d 833, 839; *Graves v. Commission on Professional Competence* (1976) 63 Cal.App.3d 970, 976.

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.<sup>7</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' 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.' . . .

Finally, Section 1187.5(a) of the Commission's regulations provides in relevant part: "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."

The revised declarations, with regard to the first incurring costs, are based only on information and belief.<sup>8</sup> 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, they are hearsay evidence and thus not sufficient in themselves to support a finding of fact unless they would be admissible over a hearsay objection in a civil proceeding.<sup>9</sup>

For this Test Claim to be complete, the date of first incurring costs must be supported by evidence: declaration(s) signed under penalty of perjury, based on the declarant's personal knowledge, or other evidence (such contracts, receipts, meeting minutes, and the like). Likewise, 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.

The Commission, does not have jurisdiction over this Test Claim because based on the evidence in the record, the claim was filed beyond the statute of limitations as a matter of law and there is no evidence in the record to support a finding that it was filed within 12 months of first incurring

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<sup>7</sup> *Topanga Association for a Scenic Community v. County Of Los Angeles* (1974) 11 Cal.3d 506.

<sup>8</sup> 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; 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.

<sup>9</sup> Title 2, California Code of Regulations, section 1187.5.

costs. 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.<sup>10</sup>

#### Curing This Test Claim

For each co-claimant, file revised declaration(s) signed under penalty of perjury based on the declarant's personal knowledge or provide other evidence to support a finding of the date when costs were first incurred for each claimant. Please also submit evidence to support a finding of costs for each new activity and existing modified activity alleged to be mandated by the state.

#### Retaining Your Original Filing Date

To retain the original filing date, please refile *only* the following required elements to cure this Test Claim:<sup>11</sup> (1) a revised written narrative and declarations or other evidence to support a finding of first incurring costs, as specified above, which will supersede any prior filings with the Commission within 30 days of the date of this letter by **November 2, 2017**. 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](http://www.csm.ca.gov/dropbox_procedures.php)

Sincerely,



Heather Halsey  
Executive Director

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<sup>10</sup> *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.

<sup>11</sup> Please do not refile the correct test claim forms, written narrative, or declarations not requiring revision, or supporting documentation, which is already nearly 800 pages. Commission staff will replace the 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.

**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 3, 2017, I served the:

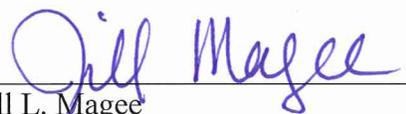
- **Second Notice of Incomplete Joint Test Claim issued October 3, 2017**

*San Diego Region Order No. R9-2015-0100 and Order No. R9-2015-0001, 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 3, 2017 at Sacramento, California.



Jill L. Magee  
Commission on State Mandates  
980 Ninth Street, Suite 300  
Sacramento, CA 95814  
(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. R9-2015-0100 and Order No. R9-2015-0001

**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.)

**Joe Ames**, *City of Mission Viejo*  
200 Civic Center, Mission Viejo, CA 92691  
Phone: (949) 470-8419  
james@cityofmissionviejo.org

**Socorro Aquino**, *State Controller's Office*  
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816  
Phone: (916) 322-7522  
SAquino@sco.ca.gov

**Harmeet Barkschat**, *Mandate Resource Services, LLC*  
5325 Elkhorn Blvd. #307, Sacramento, CA 95842  
Phone: (916) 727-1350  
harmeet@calsdrc.com

**Ryan Baron**, *Best Best & Krieger LLP*  
18101 Von Karman Avenue, Suite 1000, Irvine, CA 92612  
Phone: (949) 263-6568  
ryan.baron@bbklaw.com

**Lacey Baysinger**, *State Controller's Office*

Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 324-0254

lbaysinger@sco.ca.gov

**Khalid Bazmi**, Chief Engineer, *Orange County Flood Control District*

300 N. Flower Street, 7th Floor, Santa Ana, CA 92703

Phone: (714) 647-3999

khalid.bazmi@ocpw.ocgov.com

**Cindy Black**, City Clerk, *City of St. Helena*

1480 Main Street, St. Helena, CA 94574

Phone: (707) 968-2742

cityclerk@cityofsthelena.org

**Allan Burdick**,

7525 Myrtle Vista Avenue, Sacramento, CA 95831

Phone: (916) 203-3608

allanburdick@gmail.com

**J. Bradley Burgess**, *MGT of America*

895 La Sierra Drive, Sacramento, CA 95864

Phone: (916)595-2646

Bburgess@mgtamer.com

**David Burhenn**, *Burhenn & Gest, LLP***Claimant Representative**

624 South Grand Avenue, Suite 2200, Los Angeles, CA 90017

Phone: (213) 629-8788

dburhenn@burhenngest.com

**Gwendolyn Carlos**, *State Controller's Office*

Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816

Phone: (916) 323-0706

gcarlos@sco.ca.gov

**Daniel Carrigg**, Deputy Executive Director/Legislative Director, *League of California Cities*

1400 K Street, Suite 400, Sacramento, CA 95814

Phone: (916) 658-8222

Dcarrigg@cacities.org

**Deborah Carson**, Stormwater/Solid Waste Program Manager (Contract), *City of Rancho Santa Margarita*

22112 El Paseo, Rancho Santa Margarita, CA 92688

Phone: (949) 635-1800

dcarson@cityofrsm.org

**Jennifer Cervantez**, City Manager, *City of Rancho Santa Margarita*

22112 El Paseo, Rancho Santa Margarita, CA 92688

Phone: (949) 635-1800

JCervantez@cityofrsm.org

**Bruce Channing**, City Manager, *City of Laguna Hills*

24035 El Toro Road, Laguna Hills, CA 92653

Phone: (949) 707-2611

bchanning@lagunahillsca.gov

**Annette Chinn**, *Cost Recovery Systems, Inc.*

705-2 East Bidwell Street, #294, Folsom, CA 95630  
Phone: (916) 939-7901  
achinncrs@aol.com

**Carolyn Chu**, Senior Fiscal and Policy Analyst, *Legal Analyst's Office*  
925 L Street, Sacramento, CA 95814  
Phone: (916) 319-8326  
Carolyn.Chu@lao.ca.gov

**Michael Coleman**, *Coleman Advisory Services*  
2217 Isle Royale Lane, Davis, CA 95616  
Phone: (530) 758-3952  
coleman@muni1.com

**William Curley**, *Lozano Smith*  
515 S. Figuera Street, Los Angeles, CA 90071  
Phone: (213) 929-1066  
wcurley@lozanosmith.com

**Anita Dagan**, Manager, Local Reimbursement Section, *State Controller's Office*  
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740,  
Sacramento, CA 95816  
Phone: (916) 324-4112  
Adagan@sco.ca.gov

**Marieta Delfin**, *State Controller's Office*  
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816  
Phone: (916) 322-4320  
mdelfin@sco.ca.gov

**Douglas Dennington**, Attorney, *Rutan & Tucker, LLP*  
611 Anton Blvd., Suite 1400, Costa Mesa, CA 92626  
Phone: (714) 641-5100  
ddennington@rutan.com

**Mark Denny**, City Manager, *City of Dana Point*  
33282 Golden Lantern, Dana Point, CA 92629  
Phone: (949) 248-3513  
mdenny@danapoint.org

**David Doyle**, City Manager, *City of Aliso Viejo*  
12 Journey, Suite 100, Aliso Viejo, CA 92656-5335  
Phone: (949) 425-2530  
city-manager@cityofalisoviejo.com

**Robert Dunek**, City Manager, *City of Lake Forest*  
25560 Commercentre Drive, Suite 100, Lake Forest, CA 92630  
Phone: (949) 461-3400  
rdunek@lakeforestca.gov

**Donna Ferebee**, *Department of Finance*  
915 L Street, Suite 1280, Sacramento, CA 95814  
Phone: (916) 445-3274  
donna.ferebee@dof.ca.gov

**Rod Foster**, City Manager, *City of Laguna Niguel*  
30111 Crown Valley Parkway, Laguna Niguel, CA 92677

Phone: (949) 362-4300  
Rfoster@cityoflagunaniguel.org

**Susan Geanacou**, *Department of Finance*  
915 L Street, Suite 1280, Sacramento, CA 95814  
Phone: (916) 445-3274  
susan.geanacou@dof.ca.gov

**Dillon Gibbons**, Legislative Representative, *California Special Districts Association*  
1112 I Street Bridge, Suite 200, Sacramento, CA 95814  
Phone: (916) 442-7887  
dillong@csda.net

**David Gibson**, Executive Officer, *San Diego Regional Water Quality Control Board*  
9174 Sky Park Court, Suite 100, San Diego, CA 92123-4340  
Phone: (858) 467-2952  
dgibson@waterboards.ca.gov

**Catherine George Hagan**, Senior Staff Counsel, *State Water Resources Control Board*  
c/o San Diego Regional Water Quality Control Board, 2375 Northside Drive, Suite 100, San Diego,  
CA 92108  
Phone: (619) 521-3012  
catherine.hagan@waterboards.ca.gov

**Heather Halsey**, Executive Director, *Commission on State Mandates*  
980 9th Street, Suite 300, Sacramento, CA 95814  
Phone: (916) 323-3562  
heather.halsey@csm.ca.gov

**Sunny Han**, Project Manager, *City of Huntington Beach*  
2000 Main Street, Huntington Beach, CA 92648  
Phone: (714) 536-5907  
Sunny.han@surfcity-hb.org

**Chris Hill**, Principal Program Budget Analyst, *Department of Finance*  
Local Government Unit, 915 L Street, Sacramento, CA 95814  
Phone: (916) 445-3274  
Chris.Hill@dof.ca.gov

**Justyn Howard**, Program Budget Manager, *Department of Finance*  
915 L Street, Sacramento, CA 95814  
Phone: (916) 445-1546  
justyn.howard@dof.ca.gov

**Mark Ibele**, *Senate Budget & Fiscal Review Committee*  
California State Senate, State Capitol Room 5019, Sacramento, CA 95814  
Phone: (916) 651-4103  
Mark.Ibele@sen.ca.gov

**Edward Jewik**, *County of Los Angeles*  
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012  
Phone: (213) 974-8564  
ejewik@auditor.lacounty.gov

**Dorothy Johnson**, Legislative Representative, *California State Association of Counties*  
1100 K Street, Suite 101, Sacramento, CA 95814  
Phone: (916) 327-7500  
djohnson@counties.org

**Jeremy Jungreis**, Attorney, *Rutan & Tucker, LLP*  
611 Anton Boulevard, 14th Floor, Costa Mesa, CA 92626  
Phone: (714) 338-1882  
jjungreis@rutan.com

**Jill Kanemasu**, *State Controller's Office*  
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816  
Phone: (916) 322-9891  
jkanemasu@sco.ca.gov

**Anita Kerezi**, *AK & Company*  
3531 Kersey Lane, Sacramento, CA 95864  
Phone: (916) 972-1666  
akcompany@um.att.com

**Michael Lauffer**, Acting Executive Director and Chief Counsel, *State Water Resources Control Board*  
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828  
Phone: (916) 341-5183  
mlauffer@waterboards.ca.gov

**Iain MacMillan**, Attorney, *Lozano Smith*  
515 S Figueroa St, Suite 750, Los Angeles, CA 90071  
Phone: (213) 929-1066  
imacmillan@lozanosmith.com

**James Makshanoff**, City Manager, *City of San Clemente*  
100 Avenida Presidio, San Clemente, CA 92672  
Phone: (949) 361-8322  
CityManager@San-Clemente.org

**Cynthia Mallett**, Environmental Programs Supervisor, *City of San Clemente*  
910 Calle Negocio, Ste. 100, San Clemente, CA 92673  
Phone: (949) 361-8204  
MallettC@san-clemente.org

**Hortensia Mato**, *City of Newport Beach*  
100 Civic Center Drive, Newport Beach, CA 92660  
Phone: (949) 644-3000  
hmato@newportbeachca.gov

**Michelle Mendoza**, *MAXIMUS*  
17310 Red Hill Avenue, Suite 340, Irvine, CA 95403  
Phone: (949) 440-0845  
michellemendoza@maximus.com

**Meredith Miller**, Director of SB90 Services, *MAXIMUS*  
3130 Kilgore Road, Suite 400, Rancho Cordova, CA 95670  
Phone: (972) 490-9990  
meredithcmiller@maximus.com

**Geoffrey Neill**, Senior Legislative Analyst, Revenue & Taxation, *California State Association of Counties (CSAC)*  
1100 K Street, Suite 101, Sacramento, CA 95814  
Phone: (916) 327-7500  
gneill@counties.org

**Andy Nichols**, *Nichols Consulting*

1857 44th Street, Sacramento, CA 95819  
Phone: (916) 455-3939  
andy@nichols-consulting.com

**Adriana Nunez**, Staff Counsel, *State Water Resources Control Board*  
P.O. Box 100, Sacramento, CA 95812  
Phone: (916) 322-3313  
Adriana.nunez@waterboards.ca.gov

**Lori Okun**, Assistant Chief Counsel, *State Water Resources Control Board*  
Regional Water Board Legal Services, 1001 I Street, Sacramento, CA 95814  
Phone: (916) 341-5165  
Lori.Okun@waterboards.ca.gov

**Arthur Palkowitz**, *Artiano Shinoff*  
2488 Historic Decatur Road, Suite 200, San Diego, CA 92106  
Phone: (619) 232-3122  
apalkowitz@as7law.com

**Steven Pavlov**, Budget Analyst, *Department of Finance*  
Local Government Unit, 915 L Street, Sacramento, CA 95814  
Phone: (916) 445-3274  
Steven.Pavlov@dof.ca.gov

**John Pietig**, City Manager, *City of Laguna Beach*  
505 Forest Avenue, Laguna Beach, CA 92651  
Phone: (949) 497-0704  
lhall@lagunabeachcity.net

**Jai Prasad**, *County of San Bernardino*  
Office of Auditor-Controller, 222 West Hospitality Lane, 4th Floor, San Bernardino, CA 92415-0018  
Phone: (909) 386-8854  
jai.prasad@atc.sbcounty.gov

**Mark Rewolinski**, *MAXIMUS*  
808 Moorefield Park Drive, Suite 205, Richmond, VA 23236  
Phone: (949) 440-0845  
markrewolinski@maximus.com

**Nick Romo**, Policy Analyst, *League of California Cities*  
1400 K Street, Suite 400, Sacramento, CA 95814  
Phone: (916) 658-8254  
nromo@cacities.org

**Camille Shelton**, Chief Legal Counsel, *Commission on State Mandates*  
980 9th Street, Suite 300, Sacramento, CA 95814  
Phone: (916) 323-3562  
camille.shelton@csm.ca.gov

**Carla Shelton**, *Commission on State Mandates*  
980 9th Street, Suite 300, Sacramento, CA 95814  
Phone: (916) 327-6490  
carla.shelton@csm.ca.gov

**Ben Siegel**, City Manager, *City of San Juan Capistrano*  
32400 Paseo Adelanto, San Juan Capistrano, CA 92675  
Phone: (949) 493-1171  
bsiegel@sanjuancapistrano.org

**Jim Spano**, Chief, Mandated Cost Audits Bureau, *State Controller's Office*  
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816  
Phone: (916) 323-5849  
jspano@sco.ca.gov

**Dennis Speciale**, *State Controller's Office*  
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816  
Phone: (916) 324-0254  
DSpeciale@sco.ca.gov

**Tracy Sullivan**, Legislative Analyst, *California State Association of Counties (CSAC)*  
Government Finance and Administration, 1100 K Street, Suite 101, Sacramento, CA 95814  
Phone: (916) 650-8124  
tsullivan@counties.org

**Derk Symons**, Staff Finance Budget Analyst, *Department of Finance*  
Local Government Unit, 915 L Street, Sacramento, CA 95814  
Phone: (916) 445-3274  
Derk.Symons@dof.ca.gov

**Jolene Tollenaar**, *MGT of America*  
2251 Harvard Street, Suite 134, Sacramento, CA 95815  
Phone: (916) 243-8913  
jolenetollenaar@gmail.com

**Evelyn Tseng**, *City of Newport Beach*  
100 Civic Center Drive, Newport Beach, CA 92660  
Phone: (949) 644-3127  
etseng@newportbeachca.gov

**Travis Van Ligten**, *Rutan & Tucker, LLP*  
611 Anton Blvd, Suite 1400, Costa Mesa, CA 92626  
Phone: (714) 641-3435  
tvanligten@rutan.com

**Renee Wellhouse**, *David Wellhouse & Associates, Inc.*  
3609 Bradshaw Road, H-382, Sacramento, CA 95927  
Phone: (916) 797-4883  
dwa-renee@surewest.net

**Jennifer Whiting**, Assistant Legislative Director, *League of California Cities*  
1400 K Street, Suite 400, Sacramento, CA 95814  
Phone: (916) 658-8249  
jwhiting@cacities.org

**Patrick Whitnell**, General Counsel, *League of California Cities*  
1400 K Street, Suite 400, Sacramento, CA 95814  
Phone: (916) 658-8281  
pwhitnell@cacities.org

**Dennis Wilberg**, City Manager, *City of Mission Viejo*  
200 Civic Center, Mission Viejo, CA 92691  
Phone: (949) 470-3051  
dwillberg@cityofmissionviejo.org

**Julia Woo**, Deputy County Counsel, *County of Orange*  
333 West Santa Ana Blvd, Santa Ana, CA 92702-1379

Phone: (714) 834-3300  
Julia.woo@coco.ocgov.com

**Eric Woolery**, Auditor-Controller, *County of Orange*  
12 Civic Center Plaza, Room #200, Santa Ana, CA 92702  
Phone: (714) 834-2450  
eric.woolery@ac.ocgov.com

**Hasmik Yaghobyan**, *County of Los Angeles*  
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012  
Phone: (213) 974-9653  
hyaghobyan@auditor.lacounty.gov