STATE *of* CALIFORNIA
COMMISSION ON STATE MANDATES

REPORT TO THE LEGISLATURE: DENIED MANDATE CLAIMS

January 1, 2021 – December 31, 2021

Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814
(916) 323-3562
www.csm.ca.gov

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INTRODUCTION

The Commission on State Mandates (Commission) is required to annually report to the Legislature on the number of claims it denied during the preceding calendar year and the basis on which each of the claims was denied.[1]

This report includes a summary of two test claims that the Commission denied during the period from January 1, 2021 through December 31, 2021. The complete text of the decisions for the denied claims may be found on the Commission's website at https://www.csm.ca.gov/denied_mandates.php.

The decisions are based on the administrative record of the claims and include findings and conclusions of the Commission as required by the California Code of Regulations, Title 2, section 1187.11.

[1] Government Code section 17601.

SUMMARY OF DENIED CLAIMS

California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2010-0108, 11-TC-01

California Regional Water Quality Control Board, Los Angeles Region, Order No. R4-2010-0108, NPDES Permit No. CAS00-4002, Adopted July 8, 2010[2]

Public Information and Participation Program: Parts 4.C.2(c)(1)(C), 4.C.2(c)(2),(6),(8), 4.C.2(d), 4.C.3(a),(b); Reporting Program and Program Effectiveness Evaluation: 4.I.1; 3.E.1(e); Special Studies: 4.E.III.3(a)(1)(D-E); Attachment F, Section F, Part 4.E.IV.4; Part 4.E.III.2(c)(3)-(4); Watershed Initiative Participation: Part 4.B; Vehicle and Equipment Wash Areas: Part 4.G.1.3(a); and Illicit Connection/Illicit Discharge Elimination: Part 4.H.1.3(a)

County of Ventura and Ventura County Watershed Protection District, Claimants

Test Claim Filed: August 26, 2011

Decision Adopted: September 24, 2021

This Test Claim was filed on a National Pollutant Discharge Elimination System (NPDES) stormwater permit, Order No. R4-2010-0108, by the County of Ventura and the Ventura County Watershed Protection District (claimants).[3]

The Commission finds the test claim was not timely filed pursuant to Government Code section 17551(c) and is, therefore, dismissed.

Statutes of limitation do not begin to run until a cause of action accrues, and a cause of action accrues at "the time when the cause of action is complete with all of its elements."[4] Government Code section 17551(c) provides a period of limitation for test claim filings that states "[l]ocal agency and school district test claims shall be filed 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." Thus, the period of limitation in Government Code section 17551(c) begins to run following the effective date of the statute or executive order, and the claimants have 12 months from that date to file a test claim. That deadline can be extended if the claimants show that costs were first incurred after the effective date of the statute or executive order pled in the claim.

In this case, the test claim permit was adopted on July 8, 2010, and states that it became effective the same date provided that the U.S. Environmental Protection Agency (U.S. EPA) had no

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[2] The city co-permittees specified in the permit include Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, San Buenaventura (Ventura), Santa Paula, Simi Valley, and Thousand Oaks. Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017 (test claim permit), page 131.

[3] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 1. The city co-permittees specified in the permit include Camarillo, Fillmore, Moorpark, Ojai, Oxnard, Port Hueneme, San Buenaventura (Ventura), Santa Paula, Simi Valley, and Thousand Oaks. Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, pages 124, 131 (Permit).

[4] *Rubenstein v. Doe No. 1* (2017) 3 Cal.5th 903, 911.

objections.[5] The Test Claim was filed thirteen months after the effective date, on August 26, 2011.[6]

The claimants assert, however, that the Test Claim was timely filed because the effective date of the permit was delayed 50 days (until August 27, 2010) pursuant to the Memorandum of Agreement (MOA) between the State and U.S. EPA.

The Commission finds, based on the administrative records of the Los Angeles Regional Water Quality Control Board (Regional Board) and the State Water Resources Control Board (State Board) (collectively "Water Boards"), that the period of limitation for the permit sections pled by the claimants began to run on August 5, 2009, the effective date of Order No. 09-0057, or at the latest July 8, 2010, the effective date of the test claim permit noticed by the Regional Board, so the test claim filed August 26, 2011, was not timely filed within 12 months following the effective date of the executive order as required by Government Code section 17551(c).

Order No. 09-0057, an executive order within the meaning of article XIII B, section 6 of the California Constitution, was the permit that *first* ordered the requirements that were pled by the claimants, and it was never stayed or vacated by the Regional Board.[7] The Regional Board reconsidered some sections of Order No. 09-0057 when it adopted the test claim permit on July 8, 2010, but did not change the requirements pled by the claimants other than extending some due dates. Thus, even if the test claim permit made the "cause of action . . . complete with all of its elements," then the period of limitation would have accrued and began to run on July 8, 2010, which was the date noticed by the Regional Board as the effective date of the test claim permit. There is no evidence in the record or in documents publicly available of any notices issued by the Regional Board indicating that the test claim permit had a delayed effective date as asserted by the claimants.

The Commission further finds that the claimants' reliance on the MOA is misplaced. The claimants rely on the delay provisions of the MOA, arguing that the 21 comments received before the test claim permit was adopted were significant, and that changes were made to the latest version of the tentative permit that were not to accommodate U.S. EPA requests.[8] The claimants assert that either of these required a 50-day delay in the effective date of the permit to provide U.S. EPA time to review the permit changes.[9] The claimants also argue that the MOA is

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[5] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 162 (test claim permit, which states in Finding G4, "This Order shall serve as a NPDES permit, pursuant to CWA § 402, and shall take effect on (Order adoption date) provided the Regional Administrator of the U.S. EPA has no objections.").

[6] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 162 (test claim permit, Finding G4).

[7] *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 919-920 (finding that Government Code section 17516 was unconstitutional to the extent it purports to exempt orders issued by Regional Water Boards from the definition of "executive orders.").

[8] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 17; Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, pages 3-4.

[9] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 17; Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, pages 3-4.

an extension of U.S. EPA's authority under the Clean Water Act and so the provisions of the permit cannot "modify or supersede the provisions in the MOA."[10]

The record in this case shows that U.S. EPA was notified of all 21 comments and made no objection to the tentative permit.[11] U.S. EPA fully supported the terms of the tentative permit, as stated in its June 4, 2010 comments.[12] At the July 8, 2010 hearing, a representative from U.S. EPA expressed support for the terms of the permit, as modified by the Regional Board.[13]

More importantly, the MOA is signed by a State and U.S. EPA, committing them to specific responsibilities relevant to the administration and enforcement of the State's regulatory program and U.S. EPA's program oversight under the Clean Water Act and thus, governs "the working relationship between the State and EPA."[14] It is a contract between those parties.[15] The MOA does *not* provide notice to the permittees of the effective date of an NPDES permit, which is required by the Regional Board when it adopts a quasi-judicial order.[16] All notices issued by the Regional Board indicate that the test claim permit became effective on July 8, 2010.[17] There is no evidence in the record or in documents publicly available that the permit had a delayed effective date.

Accordingly, this Test Claim is dismissed on the ground that it is not timely filed pursuant to Government Code section 17551(c).

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[10] Exhibit E, Claimants' Rebuttal Comments, filed January 2, 2018, page 2.

[11] Exhibit I(1)(k), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Regional Board Memo, July 2, 2010, mailing list, pages 6-7); Exhibit I(1)(l), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (Regional Board, Notice of Public Meeting/Hearing, July 8, 2010, pages 7-16).

[12] Exhibit I(1)(m), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (U.S. EPA letter of June 4, 2010, pages 1-2).

[13] Exhibit I(1)(e), Excerpt of the Regional Board's Administrative Record for the 2009 and 2010 Permits, filed October 12, 2017 (July 8, 2010 Hearing Transcript, pages 110-113, 155-156).

[14] 40 Code of Federal Regulations, section 123.24; Exhibit A, Test Claim filed August 26, 2011 and revised May 17, 2017, pages 72-73 (Memorandum of Agreement).

[15] *Tyler v. Cuomo* (9th Cir. 2000) 236 F.3d 1124, 1134, analyzing an MOA between U.S. Department of Housing and Urban Development and the City of San Francisco, finding that the MOA is a contract and the City is bound by its terms.

[16] Water Code section 13263(f); *Marathon Oil Co. v. EPA* (1977) 564 F.2d 1253, 1260-1263; *City of Rancho Cucamonga v. Regional Water Quality Control Board* (2006) 135 Cal.App.4th 1377, 1385.

[17] Exhibit A, Test Claim, filed August 26, 2011 and revised May 17, 2017, page 162 (test claim permit, Finding G4). Exhibit I(4), Regional Board, Region 4, Adopted Orders https://www.waterboards.ca.gov/losangeles/board_decisions/adopted_orders/query.php?id=5894 (accessed April 5, 2021).

This Test Claim filed by the County of San Diego (claimant) alleges that reimbursement is required for state-mandated activities arising from Statutes 2019, chapter 565 (SB 72), which amended Elections Code section 2170 by expanding the locations at which county elections officials provide conditional voter registration and related provisional voting (CVR and CVR provisional voting).

The Commission finds that the Test Claim was timely filed within one year of the effective date of the test claim statute.

The Commission further finds that the test claim statute does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Prior to the test claim statute, the county elections official was required by state law to provide CVR and CVR provisional voting to any voter requesting them at its permanent offices during the 14-day period prior to election day and on election day.[18] In addition, pursuant to Elections Code section 4005, all vote centers for counties that chose to operate under the Voter's Choice Act were required to provide CVR and CVR provisional voting pursuant to Elections Code section 2170.[19] Under prior law, counties were permitted, but not required, to provide CVR and CVR provisional voting at satellite offices of the county elections official during the 14-day period prior to election day and on election day.[20]

The test claim statute amended Elections Code section 2170(d) and (e) to extend the requirement for elections officials to provide CVR and CVR provisional voting at all satellite offices and polling places in the county, and polling places are defined in the Elections Code to include vote centers.[21] Providing CVR and CVR provisional ballots requires county elections officials to provide a voter registration affidavit pursuant to Elections Code section 2170(d)(1) and perform the activities specified in Elections Code section 2170(d)(2) through (d)(5) to process conditional voter registrations and include CVR provisional ballots in the official canvass, and requires county elections officials in non-Voter's Choice Act counties to follow the procedures specified in Elections Code section 2170(e)(1) through (e)(3) when providing a CVR voter with a provisional ballot.

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[18] Elections Code section 2170(d)(1), (e) (Stats. 2012, ch. 497, § 2); California Code of Regulations, title 2, section 20023(b).

[19] Elections Code sections 4005(a)(2)(A)(ii), 4007 (Stats. 2016, ch. 832); Exhibit A, Test Claim, filed December 23, 2020, page 161 (California Secretary of State, About California's Voter's Choice Act).

[20] Elections Code section 2170(d)(1), (e) (Stats. 2012, ch. 497, § 2); Statutes 2015, chapter 734, section 2.

[21] Elections Code sections 338.5, 357.5 (which defines "vote center" as "a location established for holding elections that offers the services described in Sections 2170, 4005, and 4007 [the Voter's Choice Act].").

However, the Commission finds that Elections Code section 2170, as amended by the test claim statute, does not mandate a new program or higher level of service on county elections officials and, thus, does not impose a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution because:

- The requirement to provide CVR and CVR provisional voting at vote centers and satellite offices of the county elections official is not mandated by the state because county elections officials are not required by state law to participate in the Voter's Choice Act and have vote centers, or to establish satellite offices;[22] and
- The test claim statute does not impose a new program or higher level of service. Elections have always been conducted by local elections officials, not the state; the cost of which is borne by the counties.[23] Thus, no costs have been shifted from the state to local government. Furthermore, county elections officials have a preexisting duty to provide CVR and CVR provisional voting to any voter requesting them, regardless of cost. The test claim statute expands the locations where CVR and CVR voting are required to be provided by the counties to existing polling places and satellite offices, but does not expand the times for which these services are provided by the counties or require the counties to create new locations where voters have access to CVR and CVR voting. Nor does the test claim statute impose any new or additional activities on county elections officials. Even without the test claim statute, counties are required to provide and process CVRs and CVR provisional ballots, and that has not changed.[24] Under the test claim statute, county elections officials are simply performing the same activities during the same time period as required under preexisting law, except now at additional, existing locations. Thus, the activities of providing CVR and CVR provisional voting at satellite offices and polling places do not constitute a new program or higher level of service.

Accordingly, the Commission denies this Test Claim.

[22] Elections Code sections 3018(b), 4005, 4007; *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 743 and 754 (agreeing with the court's analysis in *City of Merced v. State of California* (1984) 153 Cal.App.3d 777); *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1368.

[23] Elections Code section 13001 (Stats. 2008, ch. 179) provides that "[a]ll expenses authorized and necessarily incurred in the preparation for, and conduct of, elections as provided in this code shall be paid from the county treasuries, except that when an election is called by the governing body of a city the expenses shall be paid from the treasury of the city."

[24] Elections Code sections 2170(d) (Stats. 2012, ch. 497, § 2, eff. Jan. 1, 2017), 14310.