

333 South Grand Avenue, Suite 1670
Los Angeles, California 90071
tel 213.626.2906
fax 213.626.0215
www.meyersnave.com

Gregory J. Newmark
Attorney at Law
gnewmark@meyersnave.com

meyers | nave

February 18, 2011

Nancy Patton, Assistant Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

**Re: Test Claim No. 10-TC-02
Grant of Request for Extension of Time to Submit Comments**

Dear Ms. Patton:

We are writing on behalf of the County of Alameda, the Cities of Alameda, Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Pleasanton, San Leandro, Union City, Alameda County Flood Control & Water Conservative District, and Alameda County Flood Control and Water Conservation, Zone 7 (hereinafter "Alameda County Jurisdictions") about the recent action granting a second extension of time to submit comments to the Regional Water Quality Control Board (hereinafter "Regional Board") for Test Claim No. 10-TC-02.

The Regional Board requested its first extension of time to submit comments on November 30, 2010. The Commission granted the extension the next day, December 1, 2010, without providing the Alameda County Jurisdictions the opportunity to respond. Recently, on February 3, 2011, the Regional Board requested a second extension of time to submit comments. Again, the Commission granted the extension the next day, February 4, 2011, without providing the opportunity to respond.

As a result of the extensions, the Regional Board must submit its comments by May 17, 2011, four months past the original January 17, 2011, deadline for submission. The Alameda County Jurisdictions understand that the Commission has the authority to grant these extensions upon a showing of good cause, and they are not requesting that the Commission rescind the extension. However, the Alameda County Jurisdictions emphasize that six (6) months will have passed since Test Claim No. 10-TC-02 was filed before the Regional Board submits its comments.

Under California Code of Regulations, title 2, section 1181.1, subdivision (h), good cause:

may include, but is not limited to, the following factors: (1) the number and complexity of the issues raised; (2) a party is new to the case, or other counsel is needed; (3) the individual responsible for preparing the document has other

time-limited commitments during the affected period; (4) the individual responsible for appearing at the hearing has other time-limited commitments during; (5) illness of a party; (6) a personal emergency; (7) a planned vacation that cannot reasonably be arranged; (8) a pending public records request; and (9) any other factor, which in the context of a particular claim shows good cause.

Although the courts have not interpreted this specific regulatory definition, the definition of good cause has been analyzed in many other circumstances. In numerous decisions, the courts have decided that “a number of factors are relevant to a determination of good cause: (1) the nature and strength of the justification for the delay, (2) the duration of the delay, and (3) the prejudice to either [of the parties] that is likely to result from the delay.” (*Watkins v. County of Alameda* (2010) 48 Cal.4th 533, 546, 106 Cal.Rptr.3d 883 (emphasis added); *See also Stroud v. Superior Court* (2000) 23 Cal.4th 952, 969-970, 98 Cal.Rptr.2d 677, 4 P.3d 933; *People v. Szeto* (1981) 29 Cal.3d 20, 29-30, 171 Cal.Rptr. 652, 623 P.2d 213; *Jensen v. Superior Court* (2008) 160 Cal.App.4th 266, 271-275, 72 Cal.Rptr.3d 594).

The Alameda County Jurisdictions are prejudiced by the two extensions of time. The Commission is required by statute to “[e]nsure that a statewide cost estimate is received within 12 months after receipt of a test claim,” and this deadline can only be extended for six months upon request by the claimant or the Commission – not the state agencies. (Gov’t. Code, § 17553, subd. (a)(2).) We understand that the Commission’s regulations (Cal. Code Regs., tit. 2, § 1183.01, subd. (a)(2)) provide that the time to adopt a statewide cost estimate is tolled during extensions, but we do not believe such tolling could operate to extend the total time period beyond the statutory limits set forth in Government Code section 17553, subdivision (a)(2). During this process, the Alameda County Jurisdictions must expend funds to comply with the Municipal Regional Stormwater Permit, including expenditures on capital improvements with ongoing operations and maintenance obligations. If the Commission finds a state mandate does exist, as we expect that it will, then the Alameda County Jurisdictions will have suffered prejudice by the extension of time in that they had to expend yet additional funds to comply with an unlawful mandate.

To make matters worse, the Alameda County Jurisdictions were never served with the Regional Board’s request for extension of time to submit comments. California Code of Regulations, title 2, section 1181.2, subdivision (b), requires any party or interested party who files with the Commission any written material concerning a claim to also simultaneously serve a copy on the other parties, interested parties, and interested persons identified on the mailing list provided by the Commission staff. A proof of service is to be included with any written material filed with the Commission staff. (Cal. Code Regs., tit. 2, § 1181.2, subd. (b).) This proof of service was not provided.

Furthermore, neither the Regional Board, nor the Commission, made an inquiry of the Alameda County Jurisdictions before either of the extensions. We are mindful of the fact that California Code of Regulations, title 2, Section 1183.01, subdivision (c)(1), requires the Commission to respond to an extension request within 48 hours. However, especially

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because the Alameda County Jurisdictions were not served with the request, we feel an opportunity should have been provided by the Commission to oppose the request or suggest that conditions be imposed to minimize prejudice.

Again, this letter is not intended as an appeal to the Commission's decision. However, we request that the Commission take the Alameda County Jurisdictions' stance into account going forward in these proceedings. It is critical to ensure that all parties are given an opportunity to be heard, not only with regard to extension requests, but also with regard to any other procedural or substantive issues.

Sincerely,



Gregory J. Newmark

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DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Los Angeles and I am over the age of 18 years, and not a party to the within action. My place of employment is 333 South Grand Avenue, Suite 1670, Los Angeles, California 90071.

On February 18, 2011, I served the:

1. Letter regarding the grant of request for extension of time

by electronically filing it on the Commission's website, which provides notice of how to locate it to the email addresses provided on the test claim 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 February 18, 2011, at Los Angeles, California.



Patricia Anne McNulty

Commission on State Mandates

Original List Date: 11/14/2010
Last Updated: 12/15/2010
List Print Date: 02/22/2011
Claim Number: 10-TC-02
Issue: Municipal Regional Stormwater Permit - Alameda County

Mailing List

TO ALL PARTIES AND INTERESTED PARTIES:

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, § 1181.2.)

Mr. J. Bradley Burgess Public Resource Management Group 895 La Sierra Drive Sacramento, CA 95864	Tel: (916)595-2646 Email Bburgess@mgtamer.com Fax:
Ms. Annette Chinn Cost Recovery Systems, Inc. 705-2 East Bidwell Street, #294 Folsom, CA 95630	Tel: (916)939-7901 Email achinnrcs@aol.com Fax: (916)939-7801
Ms. Harmeet Barkschat Mandate Resource Services, LLC 5325 Elkhorn Blvd. #307 Sacramento, CA 95842	Tel: (916)727-1350 Email harmeet@calsdrc.com Fax: (916)727-1734
Mr. Randy L. Breault City of Brisbane 50 Park Place Brisbane, CA 94005	Tel: (415)508-2131 Email rbreault@ci.brisbane.ca.us Fax: (415)467-5547
Ms. Evelyn Tseng City of Newport Beach 3300 Newport Blvd. P. O. Box 1768 Newport Beach, CA 92659-1768	Tel: (949)644-3127 Email etseng@city.newport-beach.ca.gov Fax: (949)644-3339
Ms. Hasmik Yaghobyan County of Los Angeles Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	Tel: (213)893-0792 Email hyaghobyan@auditor.lacounty.gov Fax: (213)617-8106
Mr. Matt Fabry City of Brisbane 50 Park Place Brisbane, CA 94005	Tel: mfabry@ci.brisbane.ca.us Email mfabry@ci.brisbane.ca.us Fax:

Ms. Donna Ferebee Department of Finance (A-15) 915 L Street, 11th Floor Sacramento, CA 95814	Tel: (916)445-3274 Email donna.ferebee@dof.ca.gov Fax: (916)323-9584
Mr. Jeff Carosone Department of Finance (A-15) 915 L Street, 8th Floor Sacramento, CA 95814	Tel: (916)445-8913 Email jeff.carosone@dof.ca.gov Fax:
Mr. Allan Burdick CSAC-SB 90 Service 2001 P Street, Suite 200 Sacramento, CA 95811	Tel: (916)443-9136 Email allan_burdick@mgtamer.com Fax: (916)443-1766
Ms. Juliana F. Gmur MAXIMUS 2380 Houston Ave Clovis, CA 93611	Tel: (916)471-5513 Email julianagmur@msn.com Fax: (916)366-4838
Ms. Elizabeth G. Pianca County of Santa Clara 70 West Hedding Street, 9th Floor, East Wing San Jose, CA 95110-1770	Tel: (408)299-5920 Email elizabeth.pianca@cco.sccgov.org Fax: (408)292-7240
Mr. David Wellhouse David Wellhouse & Associates, Inc. 9175 Kiefer Blvd, Suite 121 Sacramento, CA 95826	Tel: (916)368-9244 Email dwa-david@surewest.net Fax: (916)368-5723
Mr. Gregory J. Newmark Meyers, Nave, Riback, Silver & Wilson 555 12th Street, Suite 1500 Oakland, CA 94607	Tel: (510)808-2000 Email gnewmark@meyersnave.com Fax: (510)444-1108
Mr. Gary Galliano City of Newark 37101 Newark Boulevard Newark, CA 94560	Tel: (510)578-4427 Email gary.galliano@newark.org Fax: (510)578-4296
Ms. Dorothy Dickey San Francisco Bay Regional Water Quality Control 1515 Clay Street, Suite 1400 Oakland, CA 94612	Tel: (510)622-2490 Email DDickey@waterboards.ca.gov Fax:
Ms. Marianne O'Malley Legislative Analyst's Office (B-29) 925 L Street, Suite 1000 Sacramento, CA 95814	Tel: (916)319-8315 Email marianne.Omalley@lao.ca.gov Fax: (916)324-4281
Ms. Nicole Almaguer City of Albany 1000 San Pablo Avenue	Tel: (510)528-5754 Email nalmaguer@albancyc.org Fax: (510)524-9359

Albany, CA 94706

Mr. Leonard Kaye Los Angeles County Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	Tel: (213)974-9791 Email lkaye@auditor.lacounty.gov Fax: (213)617-8106
Mr. Richard E. Nosky, Jr. Downey Brand Attorneys LLP 3425 Brookside Road, Suite A Stockton, CA 95219	Tel: (209)473-6450 Email rnosky@DowneyBrand.com Fax: (209)473-6455
Mr. Jim Spano State Controller's Office (B-08) Division of Audits 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916)323-5849 Email jspano@sco.ca.gov Fax: (916)327-0832
Mr. Ram Venkatesan County of Santa Clara Controller - Treasurer Department 70 West Hedding Street, East Wing San Jose, CA 95110	Tel: (408)299-5210 Email ram.venkatesan@fin.sccgov.org Fax: (408)299-8629
Ms. Jill Kanemasu State Controller's Office (B-08) Division of Accounting and Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916)322-9891 Email jkanemasu@sco.ca.gov Fax:
Mr. Gary J. Grimm Law Office of Gary J. Grimm 2390 Vine Street Berkeley, CA 94708	Tel: (510)848-4140 Email gjgrimm@mindspring.com Fax: (510)848-4164
Ms. Carla Shelton Department of Finance 915 L Street, 7th Floor Sacramento, CA 95814	Tel: carla.shelton@dof.ca.gov Email carla.shelton@dof.ca.gov Fax:
Mr. Jay Lal State Controller's Office (B-08) Division of Accounting & Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916)324-0256 Email JLal@sco.ca.gov Fax: (916)323-6527
Mr. Michael Lauffer State Water Resources Control Board 1001 I Street, 22nd Floor Sacramento, CA 95814-2828	Tel: (916)341-5183 Email mlauffer@waterboards.ca.gov Fax: (916)641-5199

Mr. Andy Nichols Nichols Consulting 1857 44th Street Sacramento, CA 95819	Tel: (916)455-3939 Email andy@nichols-consulting.com Fax: (916)739-8712
Ms. Jolene Tollenaar MGT of America 2001 P Street, Suite 200 Sacramento, CA 95811	Tel: (916)443-9136 Email jolene_tollenaar@mgtamer.com Fax: (916)443-1766
Mr. Wayne Shimabukuro County of San Bernardino Auditor/Controller-Recorder-Treasurer-Tax Collector 222 West Hospitality Lane, 4th Floor San Bernardino, California 92415-0018	Tel: (909)386-8850 Email wayne.shimabukuro@atc.sbcounty.gov Fax: (909)386-8830
Mr. Edward Jewik Los Angeles County Auditor-Controller's Office 500 W. Temple Street, Room 603 Los Angeles, CA 90012	Tel: (213)974-8564 Email ejewik@auditor.lacounty.gov Fax: (213)617-8106
Ms. Susan Geanacou Department of Finance (A-15) 915 L Street, Suite 1280 Sacramento, CA 95814	Tel: (916)445-3274 Email susan.geanacou@dof.ca.gov Fax: (916)449-5252
Ms. Lorena Romero Department of Finance 915 L Street, 7th Floor Sacramento, CA 95814	Tel: lorena.romero@dof.ca.gov Email lorena.romero@dof.ca.gov Fax:
Ms. Joan Borger City of Fremont 3300 Capitol Avenue Fremont, CA 94538	Tel: (510)284-4030 Email jborger@fremont.gov Fax: (510)284-4031
Ms. Julie Harryman City of Pleasanton 123 Main Street Pleasanton, CA 94566	Tel: (925)931-5018 Email jharryman@ci.pleasanton.ca.us Fax: (925)931-5482
Ms. Angie Teng State Controller's Office (B-08) Division of Accounting and Reporting 3301 C Street, Suite 700 Sacramento, CA 95816	Tel: (916)323-0706 Email ateng@sco.ca.gov Fax:
Mr. Bruce Wolfe San Francisco Bay Regional Water Quality Control 1515 Clay Street, Suite 1400 Oakland, CA 94612	Tel: (510)622-2314 Email bwolfe@waterboards.ca.gov Fax: (510)622-2460

Mr. Celso Ortiz
City of Oakland
One Frank Ogawa Plaza, 6th Floor
Oakland, CA 94612

Tel: (510)238-6236
Email cortiz@oaklandcityattorney.org
Fax: (510)238-6500

COMMISSION ON STATE MANDATES

980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
FAX: (916) 445-0278
E-mail: csminfo@csm.ca.gov

**DECLARATION OF SERVICE BY EMAIL**

I, the undersigned, declare as follows:

I am a resident of the County of Solano 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 February 22, 2011, I served the:

Claimant Letter Regarding Request for Extension of Time to Submit Comments dated February 22, 2011

Municipal Regional Stormwater Permit – Alameda County, 10-TC-02

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 February 22, 2011 at Sacramento, California.



Heidi J. Palchik