



December 8, 2016

Mr. Leon Page  
County of Orange  
333 West Santa Ana Blvd.  
Santa Ana, CA 92702-1379

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

**RE: Notice of Approval of Extension Request and Reply to Claimant Comments**  
*California Regional Water Quality Control Board, San Diego Region,*  
*Order No. R9-2009-0002, 10-TC-11*  
County of Orange, Orange County Flood Control District, Cities of Dana Point,  
Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, and San Juan Capistrano,  
Co-Claimants

Dear Mr. Page:

On December 2, 2016, the Commission on State Mandates (Commission) received the County of Orange and Orange County Flood Control District's request for extension of time to file and comments asserting to represent the position of "all other Test Claim co-claimants" with regard to the Notice of Incomplete Joint Test Claim Filing (Notice) in the above-entitled matter.

In the Notice, Commission staff expressly requested all the co-claimants on this matter (County of Orange, Orange County Flood Control District, and the Cities of Dana Point, Laguna Hills, Laguna Niguel, Lake Forest, Mission Viejo, and San Juan Capistrano) to file revised test claim forms pursuant to California Code of Regulations, title 2, section 1183.1(g) indicating that this Test Claim is a joint effort between two or more claimants and *designate a single claimant representative*, common to all joint claimants, in *Section 3. Claimant Representative Information* on the test claim form. Based on your assertion that you are speaking for all of the co-claimants, the co-claimants must have agreed to your representation and should have no problem revising their forms for the record. Please also note for all matters, that a party must designate *in writing* the authorized representative to act as its *sole representative* and that any change in representation shall be authorized by the party *in writing and filed and served* in accordance with section 1181.3 of the Commission's regulations. (See 2 CCR 1187.7.)

While December 19, 2016 was specified as the date to cure the filing for this issue and the deficiencies of evidence cited in the Notice, the Commission has not received a written designation of you as the representative of the other joint claimants and therefore can only consider your December 2, 2016 comments as representing the position of the County of Orange and Orange County Flood Control District at this time. This illustrates one of the reasons behind the rule that joint claimants must designate a single representative.

In addition, the County of Orange and Orange County Flood Control District allege that there is sufficient evidence in the record regarding both the timeliness of the Test Claim filing and description of increased costs. However, nowhere in the record do the parties assert, under penalty of perjury, a date on which costs were first incurred under the 2009 Order. There are cost sharing summary sheets purporting to show some costs incurred for some of the countywide shared activities sometime in 2010-2011 and 2011-2012, but the sheets do not identify the date

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costs were first incurred nor is it clear from the record whether these were the *first* costs incurred by any of the co-claimants to perform activities alleged to impose a state mandate in the Test Claim. In addition, the summary sheets are considered hearsay. They are compilations of data prepared by an unidentified person.

The Test Claim was filed June 30, 2011, more than 12 months after the December 16, 2009 effective date of the 2009 Order. Thus, evidence is required to support the assertion of the date costs were *first* incurred pursuant to Government Code section 17551(c) and section 1183.1(c) of the Commission's regulations. All written representations of fact must be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge, information or belief pursuant to section 1187.5 of the Commission's regulations.

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 timeliness, which is an issue of fact, and whether there are costs mandated by the state, which is a mixed issue of law and fact) must meet the *Topanga* standard.<sup>1</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.' . . .

With regard to your speculation in footnote 3 that Commission staff would "disclaim" the very regulation that it relies on to interpret Government Code section 17551- that does not merit a response. However, Commission staff is aware of no inducement for the co-claimants to delay in the timely filing of this Test Claim. If the Test Claim cannot be considered timely under either the 12-month provision or by providing evidence to demonstrate timeliness under the first incurring cost provision, co-claimants should look to their own counsel as to the reason for not filing within 12 months as required by law.<sup>2</sup>

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<sup>1</sup> *Topanga Association for a Scenic Community v. County Of Los Angeles* (1974) 11 Cal.3d 506.

<sup>2</sup> Moreover, the Commission is not the "defendant" or even a party to the Test Claim. The Commission is the quasi-judicial entity that will hear and decide the claim based on evidence in the record.



With regard to section 1183.1 of the Commission's regulations (which was section 1183 since 2005 but was renumbered to section 1183.1 without substantive change on July 1, 2014), *that* provision provides, and has provided since 2005, in part that "for purposes of claiming *based on the date of first incurring costs*, "'within 12 months' means by June 30 of the fiscal year following the fiscal year in which costs were first incurred by the test claimant." Nowhere in the Test Claim is it asserted that costs were *first* incurred on any particular date and in fact the filing does not even assert that it relies on first incurring costs, appearing to ignore the statute of limitations completely. Whether a test claim is timely filed is a mixed question of law and fact. Here, the Test Claim was not filed within 12 months of the effective date of the Order. Therefore, co-claimants have been given an opportunity to put evidence in the record to prove its timeliness within 12 months of the date of first incurring costs.

The County of Orange and Orange County Flood Control District also requested a conference if Commission staff does not concur with the December 2, 2016 comments. Commission regulations allow the parties to request an informal conference to "identify issues and determine methods of resolving those issues." (Cal. Code Regs., tit. 2, § 1187.4(c)(5).) However, a conference is not necessary at this juncture since 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's 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."

Commission staff appreciates your willingness to amend the narrative statement with regard to timeliness and the detailed cost estimate (of *all* costs alleged to be imposed), but, based on your comments, you seem to not understand what a detailed description of costs or evidence means.

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.)
- (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 costs for all co-permittees whether co-claimants or not - a test claim is like a class action.)

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

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. (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.)

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. (California Code of Regulations, title 2, section 1187.5 (Register 2014, No. 21.) 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. (Ibid.) 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. (*Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, 597.)

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. (*People v. Cudjo* (1993) 6 Cal.4th 585.) There are many exceptions to the hearsay rule, however. (See Evidence Code sections 1200 et seq. for the statutory hearsay exceptions.) 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. (California Code of Regulations, title 2, section 1187.5, See also, Evidence Code sections 451 and 452.)

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 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. (Evidence Code section 452(c)(d)(g)(h).)

The Commission's regulation governing evidence is borrowed from the evidence requirements of the Administrative Procedures Act (Gov. Code, § 11513). 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.

(*Desert Turf Club v. Board of Supervisors for Riverside County* (1956) 141 Cal.App.2d 446, 455.) 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." (*Id.* at p. 456.)

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.

This matter is tentatively set for hearing on May 26, 2017. If the co-claimants do not file additional evidence regarding the above-stated issues, Commission staff will consider the existing record for the Draft Proposed Decision, which will issue at least eight weeks before the hearing.

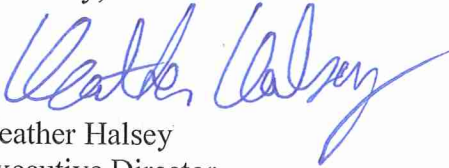
Commission staff regrets that this matter was not more closely reviewed and returned when it was filed, however a completeness review is not a legal review. Nonetheless, opportunity has been provided in the November 19, 2016 Notice to cure the filing, ensuring that there is no prejudice to the co-permittees. 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.

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Finally, the County of Orange and Orange County Flood Control District requested an extension of time from December 19, 2016 to January 5, 2017 to file the required elements to cure the filing because "key personnel have retired and relevant documents have in some cases been placed into storage or become not readily accessible."

Accordingly, the request for extension of time to cure the filing is approved until **January 5, 2017.**

Sincerely,

A handwritten signature in blue ink, appearing to read "Heather Halsey", with a stylized flourish at the end.

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 December 8, 2016, I served the:

**Notice of Approval of Extension Request and Reply to Claimant Comments**

*California Regional Water Quality Control Board, San Diego Region,*

*Order No. R9-2009-0002, 10-TC-11*

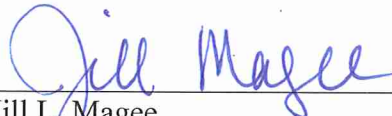
County of Orange, Orange County Flood Control District,

Cities of Dana Point, Laguna Hills, Laguna Niguel,

Lake Forest, Mission Viejo, and San Juan Capistrano, Co-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 December 8, 2016 at Sacramento, California.



Jill L. Magee

Commission on State Mandates

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# COMMISSION ON STATE MANDATES

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**Matter:** California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002

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City of Laguna Hills  
City of Laguna Niguel  
City of Lake Forest  
City of Mission Viejo  
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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