

BURHENN & GEST LLP
12401 WILSHIRE BOULEVARD
SUITE 200
LOS ANGELES, CALIFORNIA 90025
(213) 688-7715
WWW.BURHENNGEST.COM



Late Filing

WRITER'S DIRECT NUMBER
(213) 629-8788
(818) 426-7587 (cell)

WRITER'S E-MAIL ADDRESS
dburhenn@burhenngest.com

August 23, 2023

Via Drop Box

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 9th Street, Suite 300
Sacramento, CA 95814

Re: Notice of Errata Regarding Claimants' Comments on Draft Proposed Decision on California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016, etc. Test Claim 11-TC-03

Dear Ms. Halsey:

I am writing as Claimant Representative to advise of errata in the Comments of Claimants County of Riverside, the Riverside County Flood Control and Water Conservation District, and the Cities of Murrieta, Temecula and Wildomar on the Draft Proposed Decision issued by Commission staff on the above-referenced Joint Test Claim.

As indicated in the attached redline pages, in the third full paragraph on page 5 of the Comments, the citation should be to *Dept. of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 559. In footnote 12 at the bottom of the page, the full case name is added since it is the first time that the case is cited. On page 7, in the second paragraph, the partial case name is used since the case was previously cited.

Please let me know if you have any questions or if Commission staff require anything additional. Thank you.

BURHENN & GEST LLP

Ms. Heather Halsey

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I declare under penalty of perjury that the foregoing, signed on August 23, 2023, is true and correct to the best of my personal knowledge, information, or belief.

A handwritten signature in blue ink, appearing to read "D.W. Burhenn", with a long horizontal flourish extending to the right.

David W. Burhenn

Claimant Representative

Address, phone and e-mail set forth above

Claimants' Comments on Draft Proposed Decision, 11-TC-03

discharges “do not change or increase [the] level or quality of service to the public; they simply make the claimants comply with existing federal law to prohibit non-stormwater discharges.” DPD at 89.

Claimants disagree. First, “federal requirements” exempted irrigation-related discharges from the “effectively prohibit” non-stormwater discharge requirement *unless* they were identified by the *municipalities* as a source of pollutants to waters of the United States.¹⁰ The 2004 Permit did *not* require Claimants to address these discharges unless, *in the discretion of permittee or the Water Board*, they should be. Test Claim Permit Section B.2 removed that discretion, requiring Claimants to now address such discharges -- a “new” requirement. A “program is ‘new’ if the local government had not previously been required to institute it.” *County of Los Angeles v. Comm. on State Mandates* (2003) 110 Cal.App.4th 1176, 1189; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835 (“*Lucia Mar*”).

Second, general federal regulatory language does not impose a federal mandate if the regulation leaves the manner of implementation to the discretion of the permittee. *See LA County Permit Appeal I*.¹¹ Here, the language of the federal regulation left the discretion as to whether to include irrigation-related discharges to the permittees.

In addition, “the application of Section 6 . . . does not turn on whether the underlying obligations to abate pollution remain the same. It applies if any executive order, which each permit is, requires permittees to provide a new program or a higher level of existing services.” *Dept. of Finance v. Commission on State Mandates* (2022~~1~~) ~~8559~~ Cal.App.5th ~~53546~~, 559 (“*San DiegoLA County Permit Appeal II*”). The additional obligations imposed on Claimants by removal of the exemption, such as required changes to the CMP and JRMP and additional monitoring, represented a “higher level of service” to the public, contrary to the conclusion in the DPD. What constitutes a “higher level of service” are “state mandated increases in the services provided by local agencies in existing programs.”¹²

The removal of the exemption for irrigation-related discharges in Section B.2 of the Test Claim Permit constitutes a state mandate for which a subvention of funds is required.

C. Requirements in Sections C., F.4.d. and e. and Section II.C. of Attachment E Relating to Non-Stormwater Action Levels

The above-cited Test Claim Permit requirements mandated Claimants to undertake an entirely new program relating to Non-Stormwater Action Levels (“NALs”). As described in the DPD (at 99-103), permittees were required to do the following tasks, among others:

- Monitor at specified locations, including major outfalls, and such other sampling points as identified by the permittees and map those locations on their MS4 map;

the Test Claim Permit and the 2004 Permit were different and under *Lucia Mar, supra*, the removal of the exemption in the test Claim permit was a new requirement.

¹⁰ 40 CFR § 122.26(d)(2)(iv)(B)(1).

¹¹ 1 Cal. 5th at 770.

¹² *Dept of Finance v. Commission on State Mandates LA County Permit Appeal II, (2021)* 59 Cal.App.5th ~~546~~, at 556 (“*LA County Permit Appeal II*”) (quoting *County of Los Angeles v. State of California* (1987) 43 Cal. 3d 46, 56).

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While stopping short of concluding that federal law compelled the NAL requirements, the DPD appears to “bootstrap” the federal illegal discharge requirements to support its conclusion that the NAL requirements are not “new” since these underlying federal requirements had been in place long before the Test Claim Permit.

Claimants disagree. In a recent case, *Dept. of Finance v. Comm. on State Mandates* (2022) 85 Cal.App.5th 535 (“*San Diego Permit Appeal II*”), the Third District Court of Appeal rejected a similar argument made by the state in an appeal of a test claim concerning the 2007 San Diego County MS4 Permit. That case is discussed next below.

2. The NAL Requirements Were “New” and Represented a “Higher Level of Service”

In *San Diego Permit Appeal II*, the state argued, *inter alia*, that various MS4 permit requirements were not “new” because permittees had an underlying obligation, dating from the adoption of the CWA’s provisions addressing MS4 discharges, and permittees’ first MS4 permit, to “prohibit nonstormwater discharges into their MS4s”¹³

The Court of Appeal rejected that argument:

The application of [article XIII B] Section 6 . . . does not turn on whether the underlying obligations to abate pollution remains the same. It applies if any executive order, which each permit is, requires permittees to provide a new program or a high level of existing services.”¹⁴

The court held that in determining “whether a program imposed by the permit is new, we compare the legal requirements imposed by the new permit with those in effect before the new permit became effective.”¹⁵ The court found that this “is so even though the [new] conditions were designed to satisfy the same standard of performance.”¹⁶

Here, the underlying obligations set forth in the CWA and in the cited MS4 permit application regulations have long existed and governed previous MS4 permits. The existence of any longstanding “underlying obligations,” however, does not mean that the specific NALs requirements in the Test Claim Permit are not “new.” To determine that, the inquiry must focus on whether the NAL requirements in the Test Claim Permit were required in the 2004 Permit. *See San Diego Unified School Dist. v. Comm. on State Mandates* (2004) 33 Cal. 4th 859, 878 (*San Diego Unified*); *Lucia Mar, supra*.¹⁷ That comparison shows that the NALs requirements in the Test Claim Permit were not present in the 2004 Permit.

Section II.C.1.a.(1) of the Test Claim Permit Monitoring and Reporting Program (Attachment E to the Test Claim Permit) (“Test Claim Permit MRP”) required that permittees “must” sample “at major outfalls” and “[o]ther outfall sampling points . . . identified by the Copermittees as potential high risk sources of polluted effluent or as identified under Section C.4

¹³ 85 Cal.App.5th at 559.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* (emphasis supplied).

¹⁷ 44 Cal. 3d at 835.

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 August 24, 2023, I served the:

- **Current Mailing List dated August 14, 2023**
- **Claimants' Late Comments on the Draft Proposed Decision filed August 23, 2023**

*California Regional Water Quality Control Board, San Diego Region,
Order No. R9-2010-0016, 11-TC-03*

California Regional Water Quality Control Board, San Diego Region, Order No. R9-2010-0016, Sections B.2., C., D., F.1.d.1., 2., 4., 7., F.1.f., F.1.h., F.1.i., F.2.d.3., F.2.e.6.e., F.3.a.10., F.3.b.4.a.ii., F.3.d.1.-5., F.4.d., F.4.e., G.1.-5., K.3.a.-c., Attachment E., Sections II.C. and II.E.2.-5., and Sections F., F.1., F.1.d., F.2., F.3.a.-d., and F.6., Adopted November 10, 2010
County of Riverside, Riverside County Flood Control and Water Conservation District, and Cities of Murrieta, Temecula, and Wildomar, 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 August 24, 2023 at Sacramento, California.

David Chavez

David Chavez
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 8/14/23

**Claim
Number:** 11-TC-03

Matter: California Regional Water Quality Control Board, San Diego
Region, Order No. R9-2010-0016

Claimants: City of Murrieta
City of Temecula
City of Wildomar
County of Riverside
Riverside County Flood Control and Water Conservation
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.)

Aaron Adams, City Manager, *City of Temecula*

Claimant Contact

41000 Main Street, Temecula, CA 92590

Phone: (951) 506-5100

aaron.adams@temeculaca.gov

Adaoha Agu, *County of San Diego Auditor & Controller Department*

Projects, Revenue and Grants Accounting, 5530 Overland Avenue, Ste. 410 ,

MS:O-53, San Diego, CA 92123

Phone: (858) 694-2129

Adaoha.Agu@sdcounty.ca.gov

Rachelle Anema, Division Chief, *County of Los Angeles*
Accounting Division, 500 W. Temple Street, Los Angeles, CA 90012
Phone: (213) 974-8321
RANEMA@auditor.lacounty.gov

Lili Apgar, Specialist, *State Controller's Office*
Local Reimbursements Section, 3301 C Street, Suite 740, Sacramento, CA
95816
Phone: (916) 324-0254
lapgar@sco.ca.gov

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

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

Ben Benoit, Auditor-Controller, *County of Riverside*
Claimant Contact
4080 Lemon Street, 11th Floor, Riverside, CA 92502
Phone: (951) 955-3800
bbenoit@rivco.org

Cindy Black, City Clerk, *City of St. Helena*
1480 Main Street, St. Helena, CA 94574
Phone: (707) 968-2742
ctzafopoulos@cityofsthelena.org

Guy Burdick, Consultant, *MGT Consulting*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 833-7775
gburdick@mgtconsulting.com

Allan Burdick,
7525 Myrtle Vista Avenue, Sacramento, CA 95831
Phone: (916) 203-3608
allanburdick@gmail.com

David Burhenn, *Burhenn & Gest, LLP*
Claimant Representative
12401 Wilshire Blvd, Suite 200, Los Angeles, CA 90025

Phone: (213) 629-8788
dburhenn@burhenngest.com

Rica Mae Cabigas, Chief Accountant, *Auditor-Controller*
Accounting Division, 500 West Temple Street, Los Angeles, CA 90012
Phone: (213) 974-8309
rcabigas@auditor.lacounty.gov

Evelyn Calderon-Yee, Bureau Chief, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments,
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-5919
ECalderonYee@sco.ca.gov

Sheri Chapman, General Counsel, *League of California Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8267
schapman@calcities.org

Annette Chinn, *Cost Recovery Systems, Inc.*
705-2 East Bidwell Street, #294, Folsom, CA 95630
Phone: (916) 939-7901
achinnrs@aol.com

Carolyn Chu, Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, 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

Kris Cook, Assistant Program Budget Manager, *Department of Finance*
915 L Street, 10th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
Kris.Cook@dof.ca.gov

Brian Cote, Senior Government Finance & Administration Analyst, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 650-8184
bcote@counties.org

Thomas Deak, Senior Deputy, *County of San Diego*
Office of County Counsel, 1600 Pacific Highway, Room 355, San Diego, CA

92101

Phone: (619) 531-4810

Thomas.Deak@sdcountry.ca.gov

Kalyn Dean, Senior Legislative Analyst, *California State Association of Counties (CSAC)*

Government Finance and Administration, 1100 K Street, Suite 101,
Sacramento, CA 95814

Phone: (916) 327-7500

kdean@counties.org

Ted Doan, Budget Analyst, *Department of Finance*

Local Government Unit, 915 L Street, Sacramento, CA 95814

Phone: (916) 445-3274

Ted.Doan@dof.ca.gov

Donna Ferebee, *Department of Finance*

915 L Street, Suite 1280, Sacramento, CA 95814

Phone: (916) 445-8918

donna.ferebee@dof.ca.gov

Tim Flanagan, Office Coordinator, *Solano County*

Register of Voters, 678 Texas Street, Suite 2600, Fairfield, CA 94533

Phone: (707) 784-3359

Elections@solanocounty.com

Jennifer Fordyce, Assistant Chief Counsel, *State Water Resources Control Board*

Office of Chief Counsel, 1001 I Street, 22nd floor, Sacramento, CA 95814

Phone: (916) 324-6682

Jennifer.Fordyce@waterboards.ca.gov

Craig Foster, Chief Operating Officer, *Building Industry Legal Defense Foundation*

Building Association of Southern California, 17744 Sky Park Circle, Suite
170, Irvine, Irvin 92614

Phone: (949) 553-9500

cfoster@biasc.org

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

Juliana Gmur, *Commission on State Mandates*

980 9th Street, Suite 300, Sacramento, CA 95814

Phone: (916) 323-3562
juliana.gmur@csm.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, Acting Chief Financial Officer, *City of Huntington Beach*

2000 Main Street, Huntington Beach, CA 92648
Phone: (714) 536-5630
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

Tiffany Hoang, Associate Accounting Analyst, *State Controller's Office*

Local Government Programs and Services Division, Bureau of Payments,
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-1127
THoang@sco.ca.gov

Ivan Holler, *City of Murrieta*

1 Town Square, 24601 Jefferson Ave., Murrieta, CA 92562
Phone: (951) 461-6078
iholler@murrietaca.gov

Jason Jennings, Director, *Maximus Consulting*

Financial Services, 808 Moorefield Park Drive, Suite 205, Richmond, VA
23236
Phone: (804) 323-3535
SB90@maximus.com

George Johnson, Chief Executive Officer, *County of Riverside*

4080 Lemon Street, 4th Floor, Riverside, CA 92501
Phone: (951) 955-1100
gajohnson@rivco.org

Angelo Joseph, Supervisor, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments,
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0706
AJoseph@sco.ca.gov

Anita Kerezsi, *AK & Company*
2425 Golden Hill Road, Suite 106, Paso Robles, CA 93446
Phone: (805) 239-7994
akcompanysb90@gmail.com

Joanne Kessler, Fiscal Specialist, *City of Newport Beach*
Revenue Division, 100 Civic Center Drive , Newport Beach, CA 90266
Phone: (949) 644-3199
jkessler@newportbeachca.gov

Lisa Kurokawa, Bureau Chief for Audits, *State Controller's Office*
Compliance Audits Bureau, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 327-3138
lkurokawa@sco.ca.gov

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

Kim-Anh Le, Deputy Controller, *County of San Mateo*
555 County Center, 4th Floor, Redwood City, CA 94063
Phone: (650) 599-1104
kle@smcgov.org

Fernando Lemus, Principal Accountant - Auditor, *County of Los Angeles*
Auditor-Controller's Office, 500 West Temple Street, Room 603, Los Angeles,
CA 90012
Phone: (213) 974-0324
flemus@auditor.lacounty.gov

Erika Li, Chief Deputy Director, *Department of Finance*
915 L Street, 10th Floor, Sacramento, CA 95814
Phone: (916) 445-3274
erika.li@dof.ca.gov

Diego Lopez, Consultant, *Senate Budget and Fiscal Review Committee*
1020 N Street, Room 502, Sacramento, CA 95814
Phone: (916) 651-4103
Diego.Lopez@sen.ca.gov

Everett Luc, Accounting Administrator I, Specialist, *State Controller's Office*
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0766
ELuc@sco.ca.gov

Jill Magee, Program Analyst, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
Jill.Magee@csm.ca.gov

Darryl Mar, Manager, *State Controller's Office*
3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-0706
DMar@sco.ca.gov

Tina McKendell, *County of Los Angeles*
Auditor-Controller's Office, 500 West Temple Street, Room 603, Los Angeles,
CA 90012
Phone: (213) 974-0324
tmckendell@auditor.lacounty.gov

Jane McPherson, Financial Services Director, *City of Oceanside*
300 North Coast Highway, Oceanside, CA 92054
Phone: (760) 435-3055
JmcPherson@oceansideca.org

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

Lourdes Morales, Senior Fiscal and Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8320
Lourdes.Morales@LAO.CA.GOV

Marilyn Munoz, Senior Staff Counsel, *Department of Finance*
915 L Street, Sacramento, CA 95814
Phone: (916) 445-8918
Marilyn.Munoz@dof.ca.gov

Kaleb Neufeld, Assistant Controller, *City of Fresno*
2600 Fresno Street, Fresno, CA 93721
Phone: (559) 621-2489
Kaleb.Neufeld@fresno.gov

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*
Los Angeles Regional Water Quality Control Board, 1001 I Street, 22nd Floor,
Sacramento, CA 95814
Phone: (916) 322-3313
Adriana.Nunez@waterboards.ca.gov

Patricia Pacot, Accountant Auditor I, *County of Colusa*
Office of Auditor-Controller, 546 Jay Street, Suite #202 , Colusa, CA 95932
Phone: (530) 458-0424
ppacot@countyofcolusa.org

Arthur Palkowitz, *Law Offices of Arthur M. Palkowitz*
12807 Calle de la Siena, San Diego, CA 92130
Phone: (858) 259-1055
law@artpalk.onmicrosoft.com

Kirsten Pangilinan, Specialist, *State Controller's Office*
Local Reimbursements Section, 3301 C Street, Suite 740, Sacramento, CA
95816
Phone: (916) 322-2446
KPangilinan@sco.ca.gov

Johnnie Pina, Legislative Policy Analyst, *League of Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8214
jpina@cacities.org

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@sbcountyatc.gov

Jonathan Quan, Associate Accountant, *County of San Diego*
Projects, Revenue, and Grants Accounting, 5530 Overland Ave, Suite 410, San
Diego, CA 92123
Phone: 6198768518
Jonathan.Quan@sdcounty.ca.gov

Roberta Raper, Director of Finance, *City of West Sacramento*
1110 West Capitol Ave, West Sacramento, CA 95691

Phone: (916) 617-4509
robertar@cityofwestsacramento.org

Alex Sauerwein, Attorney, *State Water Resources Control Board*
San Diego Regional Water Quality Control Board, 1001 I Street, 22nd Floor,
Sacramento, CA 95814
Phone: (916) 327-8581
Alex.Sauerwein@waterboards.ca.gov

Cindy Sconce, Director, *MGT*
Performance Solutions Group, 3600 American River Drive, Suite 150,
Sacramento, CA 95864
Phone: (916) 276-8807
csconce@mgtconsulting.com

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) 323-3562
carla.shelton@csm.ca.gov

Natalie Sidarous, Chief, *State Controller's Office*
Local Government Programs and Services Division, 3301 C Street, Suite 740,
Sacramento, CA 95816
Phone: 916-445-8717
NSidarous@sco.ca.gov

Michelle Skaggs Lawrence, City Manager, *City of Oceanside*
300 North Coast Highway, Oceanside, CA 92054
Phone: (760) 435-3055
citymanager@oceansideca.org

Eileen Sobeck, Executive Director, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828
Phone: (916) 341-5183
Eileen.Sobeck@waterboards.ca.gov

Kim Summers, City Manager, *City of Murrieta*
Claimant Contact
1 Town Square, Murrieta, CA 92562
Phone: (951) 461-6010
KSummers@murrietaCA.gov

Jolene Tollenaar, *MGT Consulting Group*
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

Brian Uhler, Principal Fiscal & Policy Analyst, *Legislative Analyst's Office*
925 L Street, Suite 1000, Sacramento, CA 95814
Phone: (916) 319-8328
Brian.Uhler@LAO.CA.GOV

Jason Uhley, General Manager - Chief Engineer, *Riverside County Flood Control*

Claimant Contact
and Water Conservation District, 1995 Market Street, Riverside, CA 95201
Phone: (951) 955-1201
juhley@rivco.org

Antonio Velasco, Revenue Auditor, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3143
avelasco@newportbeachca.gov

Vincent Vu, Attorney, *State Water Resources Control Board*
San Diego Regional Water Quality Control Board, 1001 I Street, 22nd Floor,
Sacramento, CA 95814
Phone: (916) 323-5669
Vincent.Vu@waterboards.ca.gov

Emel Wadhvani, Senior Staff Counsel, *State Water Resources Control Board*
Office of Chief Counsel, 1001 I Street, Sacramento, CA 95814
Phone: (916) 322-3622
emel.wadhvani@waterboards.ca.gov

Ada Waelder, Legislative Analyst, Government Finance and Administration,
California State Association of Counties (CSAC)
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
awaelder@counties.org

Renee Wellhouse, *David Wellhouse & Associates, Inc.*
3609 Bradshaw Road, H-382, Sacramento, CA 95927

Phone: (916) 797-4883
dwa-renee@surewest.net

Colleen Winchester, Senior Deputy City Attorney, *City of San Jose*
200 East Santa Clara Street, 16th Floor, San Jose, CA 95113
Phone: (408) 535-1987
Colleen.Winchester@sanjoseca.gov

Jacqueline Wong-Hernandez, Deputy Executive Director for Legislative
Affairs, *California State Association of Counties (CSAC)*
1100 K Street, Sacramento, CA 95814
Phone: (916) 650-8104
jwong-hernandez@counties.org

Elisa Wynne, Staff Director, *Senate Budget & Fiscal Review Committee*
California State Senate, State Capitol Room 5019, Sacramento, CA 95814
Phone: (916) 651-4103
elisa.wynne@sen.ca.gov

Dan York, City Manager, *City of Wildomar*

Claimant Contact

23873 Clinton Keith Rd., Suite 110, Wildomar, CA 92595
Phone: (951) 677-7751
dyork@cityofwildomar.org

Helmholt Zinser-Watkins, Associate Governmental Program Analyst, *State
Controller's Office*

Local Government Programs and Services Division, Bureau of Payments,
3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-7876
HZinser-watkins@sco.ca.gov