



November 21, 2017

Ms. Marnie Ajello
State Water Resources
Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814-2828

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

RE: Notice of *Limited Extension of Time to Comment and Provide the Administrative Records Requested*

*California Regional Water Quality Control Board, San Francisco Bay Region,
Order No. R2-2015-0049, 16-TC-03
City of Union City, Claimant*

Dear Ms. Ajello:

As you are aware, Commission on State Mandates (Commission) staff issued the Notice of Complete Test Claim Filing, Schedule for Comments, Request for Administrative Record, and Notice of Tentative Hearing Date for the above-captioned Test Claim on September 11, 2017, indicating the due date for comments from parties, interested parties, and interested persons as well as for the administrative records of the above-named permit from the State Water Resources Control Board (State Board) and the San Francisco Bay Regional Water Quality Control Board (Regional Board; Collectively Water Boards). On October 10, 2017, the Department of Finance filed comments on this matter.

On November 1, 2017, Commission staff was informed that certain members of the Water Boards' staff, who will be tasked with the work on this Test Claim, wished to be added to the mailing list and would be submitting a request for extension of time to comment since they were not made aware of the filing until that date, though the September 11, 2017 notice was served on the acting executive director and chief counsel of the State Board and the executive officer of the Regional Board.

On November 7, 2017, the Commission received the claimant's request for extension of the 30-day rebuttal period provided in section 1183.3 of the Commission's regulations which requested that the extension run from the service of the Water Boards' yet-to-be-filed comments on the Test Claim. On November 9, 2017, Commission staff issued the Notice of Extension of Time to Comment and Provide the Administrative Records Requested and Approval of Claimant's Request for Extension of Time to File Rebuttal Comments, extending the due date for comments from parties, interested parties, and interested persons as well as for the administrative records of the above-named permit from the Water Boards to December 11, 2017, and extended claimant's rebuttal period to 30 days from the date of service of these items.

Also on November 9, 2017, immediately following issuance of the extension approval, the Commission received a Notice of Intent to File filed on State Board letterhead and with no indication that was from anyone other than the State Board. Specifically, this notice explained that the administrative record and a response would be filed sometime in mid-to-late January due

to the upcoming holidays and numerous vacations and unavailability of staff. In addition, the notice indicates that the State Board does not have an administrative record for the adoption of the Order, that several parties have filed administrative petitions for review of various aspects of the Order with the State Board, and that there is nothing in the claim that relates to actions of the State Board. On November 15, 2017, Commission staff issued the Response to the State Board's Notice of Intent to File noting that, although it is understood that the Regional Board adopted the test claim permit in the first instance and would have the majority of the documents relevant to the permit's findings and requirements, it is our understanding that the permit has also been approved by the State Board, which presumably had some sort of document and supporting documentation in the record before it to approve. The response also requested that the Water Boards submit the record or records relied upon by the Water Boards to support their respective approvals of the test claim permit.

November 16, 2017 Regional Board Request for Extension

Your request for an extension of time until 30 days after the issuance of a decision by the Third District Court of Appeals regarding test claims on a San Diego municipal stormwater permit is denied. However a more limited additional 30 day extension from the current due date is granted for good cause.

On November 16, 2017, the Commission received the Regional Board's response and request for extension of time to file comments on the Test Claim and the requested administrative records on the above-named permit, noting that Commission staff made some incorrect assumptions about the process for approval of permits adopted by the Regional Board, and clarified that the letter sent on November 9, 2017 was sent by the Regional Board's counsel, not the State Board, and that Order No. R2-2015-0049 was not and did not need to be approved by the State Board since Regional Water Board-issued permits are final once the Regional Water Board has adopted them, and in the absence of objections from U.S. EPA, become effective on the date specified on the permit. In addition, the response noted that parties aggrieved by a Regional Board decision may petition the State Board to review that decision, and that multiple permittees petitioned the adoption of Order No. R2-2015-0059 but the State Board has not ruled on their petitions nor held any hearings, and the permit remains in effect pending State Board review.

In addition, the Regional Board requested an extension of time to file comments on the Test Claim as well as the administrative record beyond the current December 11, 2017 deadline extension already granted, due to the fact that the holidays are approaching and multiple key staff will be out of the office. The request indicates that, the Monday, November 20, 2017, hearing of the Third District Court of Appeal regarding a test claim decision on a San Diego municipal stormwater permit, involves issues substantially similar to those in the above-captioned Test Claim and suggests that all parties may benefit from guidance from the Third District Court of Appeals before submitting comments on this Test Claim. Accordingly, the Regional Board requested an extension of time until 30 days from the date of the Court of Appeals decision.

Government Code section 17553 requires that the Commission adopt procedures to ensure a statewide cost estimate is adopted within 12 months after receipt of a test claim, which may be extended for up to six months. The procedures must also permit the hearing of a claim to be postponed *at the request of the claimant* "until the next scheduled hearing." Government Code section 17554 also allows the waiver of procedural requirements, with the agreement of all

parties, and generally with the intent to shorten periods of time or to consolidate claims. Section 1187.9(a) of the Commission's regulations does provide that so long as a postponement of a hearing would *not* be required, there is no prejudice to any party or interested party, and there is no other good reason for denial, the request for extension of time made by any party shall be approved for good cause as defined.

However, your request for an extension of time until 30 days after the decision of the Third District Court of Appeal (or until March 27, 2018), almost certain to lead to another request to postpone until resolution by the California Supreme Court, does not present good cause. Section 1187.9(b)(1) of the Commission's regulations provides examples of good cause, which include the Commission's backlog of matters and whether the interests of justice are best served by a postponement. The resolution of this Test Claim, as well as other pending stormwater test claims, were delayed pursuant to the Commission's prior regulations,¹ first due to a historic backlog of test claims pending with the Commission,² and second because of the stormwater litigation in California Supreme Court Case No. S214855. With the exception of the pending stormwater test claims, the test claim backlog has since been eliminated.³

There are numerous and sundry cases pending in the courts in a variety of postures that could potentially be relevant to any given test claim filed with the Commission. If such decisions are issued and appear to be relevant while the test claim is pending, all parties will be invited to provide additional briefing on that new authority. Otherwise, the Commission has a process to re-determine prior Commission decisions based on a subsequent change in law. If the Commission were to wait for every stormwater issue to be conclusively resolved by the courts prior to requiring comments and a hearing on a test claim, the pending test claims might never be heard and decided.

Neither the Government Code nor the courts have stayed the administrative process for the stormwater claims and now that the federal mandate issue has been addressed by the California Supreme Court, there is no good cause to halt the Commission's process. Under California Code of Civil Procedure section 1094.5, a request for a stay can be made to the court which, if granted, would be honored by the Commission.

However, due to the holidays and vacations of key staff, your request for extension is approved for 30 days from the current due date.

Therefore, pursuant to section 1187.9(a) of the Commission's regulations, comments from parties, interested parties, and interested persons as well as the administrative records of the

¹ Former California Code of Regulations, title 2, section 1183.01(c), which did not contain time limitations on the executive director's authority to postpone a matter.

² This backlog resulted in it taking an average of approximately five years to adopt a statewide cost estimate from the time of filing a test claim during the time period from about 2003 to 2013 and the reasons for this backlog are discussed at length in the Commission's annual Report to Finance and Backlog Reduction Plan, which may be found on the Commission's website.

³ For test claims filed since 2013, excluding the stormwater claims, the Commission has been adopting test claims within an average of 13 months and statewide cost estimates within an average of 15 months from the time of the test claim filing.

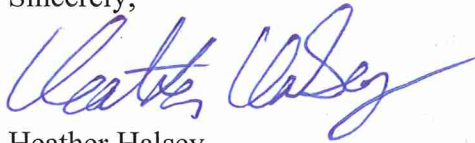
Ms. Ajello
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above-named permit from both the State and Regional Water Boards are now due **January 10, 2018**. The claimant's rebuttal period will extend 30 days from the date of service of these items.

This matter remains tentatively set for hearing on September 28, 2018.

You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your documents. Refer to http://www.csm.ca.gov/dropbox_procedures.php on the Commission's website for electronic filing instructions. (Cal. Code Regs., tit. 2, § 1181.3.)

Sincerely,



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.

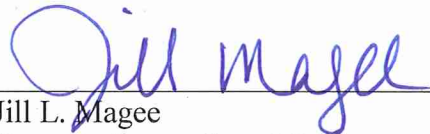
On November 21, 2017, I served the:

- **Notice of *Limited* Extension of Time to Comment and Provide the Administrative Records Requested issued November 21, 2017**
- **San Francisco Bay Regional Water Quality Control Board Request for Extension of Time filed November 16, 2017**

*California Regional Water Quality Control Board, San Francisco Bay Region,
Order No. R2-2015-0049, 16-TC-03
City of Union City, Claimant*

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 November 21, 2017 at Sacramento, California.



Jill L. Magee
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 11/21/17

Claim Number: 16-TC-03

Matter: California Regional Water Quality Control Board, San Francisco Bay Region,
Order No. R2-2015-0049

Claimant: City of Union City

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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