Hearing Date: January 27, 2023
J:\MANDATES\2017\TC\17-TC-03 Lead Sampling in Schools PWS No. 3710020\TC\Order to Set Aside\TOC.docx

ITEM 4

PROPOSED ORDER

TO SET ASIDE THE TEST CLAIM DECISION ADOPTED MARCH 22, 2019 PURSUANT TO COURT'S JUDGMENT AND WRIT

Pursuant to the unpublished opinion issued April 29, 2022 in *City of San Diego v. Commission on State Mandates*, Court of Appeal, Third Appellate District, Case No. C092800; Judgment and Writ of Mandate issued by the Sacramento County Superior Court, Case No. 34-2019-80003169-CU-WM-GDS

Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017

Lead Sampling in Schools: Public Water System No. 3710020

17-TC-03

City of San Diego, Claimant

TABLE OF CONTENTS

Filed 4/29/22 City of San Diego v. Com. on State Mandates CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

CITY OF SAN DIEGO, Plaintiff and Appellant, v. COMMISSION ON STATE MANDATES, Defendant and Respondent. DEPARTMENT OF FINANACE et al., Real Parties in Interest and Respondents.	C092800 (Super. Ct. No. 34201980003169CUWMGDS)

Section 6 of article XIII B of the California Constitution requires the State of California, subject to certain exceptions, to "provide a subvention of funds to reimburse" local governments "[w]henever the Legislature or any state agency mandates a new program or higher level of service." In this case, the City of San Diego (the City) seeks

reimbursement under this provision for the costs of complying with a new permit condition that the State Water Resources Control Board (the Water Board) imposed on operators of water systems that serve K-12 schools. Under the new permit condition, these operators must provide free lead testing at each K-12 school they serve on the school's request.

In this appeal, we must determine whether the Water Board's new condition requires "a new program or higher level of service" within the meaning of article XIII B, section 6. The Commission on State Mandates (the Commission), which is charged with hearing claims under section 6, concluded it did not. It found, based on Supreme Court precedent, that a new state law can be said to require "a new program or higher level of service" in two circumstances: first, if the law carries out a governmental function of providing services to the public; and second, if the law imposes unique requirements on local governments that do not apply generally to all persons in the state. But the Commission found neither description fits the requirement here. It reasoned that the Water Board's requirement neither carries out a governmental function of providing services to the public, because the provision of water is not a governmental function, nor imposes unique requirements on local governments, because the Water Board imposed its condition on both governmental and private actors. The trial court later found similarly after the City sought review of the Commission's decision.

On the City's appeal, we reverse. For reasons we will cover below, we conclude that the Water Board's new condition requires local governments to support "a new program" within the meaning of article XIII B, section 6. But because the City's showing that the Water Board's permit condition establishes a "new program" is a necessary, though not sufficient, showing for reimbursement, we stop short of holding that the state must reimburse the City for the costs of compliance. We leave it to the Commission to consider in the first instance whether reimbursement is appropriate on these facts following remand.

BACKGROUND

In 2015, the Legislature passed a bill, Senate Bill No. 334 (2015-2016 Reg. Sess.), intended in part to remediate lead in school water supplies. The bill required the State Department of Public Health to conduct a sample survey "to determine the likely extent and distribution of lead exposure to children from . . . drinking water at the tap," and, to the extent possible, to perform testing "to validate survey results." The bill further, among other things, required school districts to "close access" to "drinking water sources with drinking water that d[id] not meet [federal] drinking water standards for lead or any other contaminant" and, under certain circumstances, to also supply "alternative drinking water sources." But the Governor vetoed the bill, stating that it would "create[] a state mandate of uncertain but possibly very large magnitude." The Governor, however, expressed support for the bill's goals and "direct[ed] the State Water Resources Control Board to work with school districts and local public water systems to incorporate water quality testing in schools as part of their lead and copper rule." (Governor's veto message to Sen. Bill No. 334 (Oct. 9, 2015), available at <https://www.ca.gov/archive/gov39/wp-content/uploads/2017/09/SB_334_Veto_Message.pdf> [as of Apr. 26, 2022].)

A little over a year later, in early 2017, the Water Board did as the Governor directed—it required water quality testing in schools. Relying on its permitting authority over operators of "public water systems," the Water Board amended the permits of over 1,100 of these operators that serve K-12 schools. (See Health & Saf. Code, § 116525 [discussing Water Board's permitting authority]; see also *id.*, § 116275, subd. (h) [" 'Public water system' means a system for the provision of water for human consumption through pipes or other constructed conveyances that has 15 or more service connections or regularly serves at least 25 individuals daily at least 60 days out of the year."].) As amended, these permits require each of these operators, on the request of any K-12 school it serves, to sample and test drinking water at that school for the

presence of lead. In particular, after a school requests assistance with lead sampling, each operator must meet with school officials "to develop a sampling plan"; maintain records of the sampling plan and certain other information; collect one to five samples at the school "from regularly used drinking fountains, cafeteria/food preparation areas, or reusable bottle water filling stations"; submit the samples "to an ELAP certified laboratory for analysis of lead"; provide a copy of the results to the school; discuss the test results with the school; collect additional samples if initial results show high levels of lead; and "provide information regarding potential corrective actions if a school has confirmed lead levels" above a certain amount. Per the amended permits, operators are responsible for the costs associated with these requirements.

The City is one of the operators subject to the Water Board's new requirements. A year after the Water Board's changes, the City petitioned the Commission to find that the Water Board's requirements constitute a state-mandated program under article XIII B, section 6 of the California Constitution—a provision that serves " 'to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies.' [Citation.]" (*California School Boards Assn. v. State of California* (2019) 8 Cal.5th 713, 724; see also Gov. Code, § 17551, subd. (a) ["The commission, pursuant to the provisions of this chapter, shall hear and decide upon a claim by a local agency or school district that the local agency or school district is entitled to be reimbursed by the state for costs mandated by the state as required by Section 6 of Article XIII B of the California Constitution."].)

The City reasoned that the Water Board's requirements fell under article XIII B, section 6 for several reasons. It began by noting that, under California Supreme Court precedent, two types of state-mandated programs require reimbursement: " '[1] programs that carry out the governmental function of providing services to the public, [and] [2] laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.' " It then

asserted that the Water Board's new condition should be regarded as one of these two types of programs for three distinct reasons. First, focusing on "programs that carry out the governmental function of providing services to the public," it contended the Water Board's condition qualifies as such a program for two reasons: one, because water service is a "governmental function that provides services to the public"; and two, because "[t]he lead testing program in the Permit Amendment carries out a second governmental function of ensuring safe schools." Next, focusing on laws that "impose unique requirements on local governments," it contended the Water Board's condition is such a law because it "imposes a unique requirement on the City that does not apply to all residents and entities in the state."

The Commission denied the City's petition. Starting with the City's last argument, it found the Water Board's permit changes do not impose unique requirements on local governments. It reasoned that "a law that applies to a class of persons or entities whose members are both governmental and private cannot be said to apply *uniquely* to government," and, in this case, the Water Board imposed its changes on 1,128 operators of public water systems, "more than a third of which were issued to privately owned [public water systems]." Turning next to the City's remaining arguments, the Commission found the Water Board's changes "do[] not impose a program that carries out a governmental function of providing services to the public." It first found that "water service is not a *governmental* function of providing services to the public because providing water service is not required by state or federal law and is not a core function of government." It then found that, although ensuring safe schools is a governmental function, a public water system "has no duty to ensure safe schools, as alleged by the [City]; the schools maintain and exercise that duty with their request for lead testing."

The City afterward challenged the Commission's decision in a petition for writ of administrative mandamus, which named the Commission as the respondent and the Water Board and the Department of Finance as the real parties in interest. Although the City's

petition is not part of the record, the City appears to have raised the same three arguments it raised before the Commission. But the trial court, for reasons similar to the Commission's own, rejected the City's arguments. It later entered judgment against the City.

The City timely appealed.

DISCUSSION

Enacted by initiative in 1979, article XIII B, section 6 of the California Constitution requires the state to "provide a subvention of funds to reimburse" local agencies when it mandates their assistance in implementing a state program. It states: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service," with certain exceptions not relevant here. (Art. XIII B, § 6, subd. (a).) "Section 6 was intended to preclude the state from shifting to local agencies the financial responsibility for providing public services in view of the[] restrictions on the taxing and spending power of the local entities." (*Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).)

Our focus, in this case is on the meaning of the phrase "new program or higher level of service" as used in article XIII B, section 6. Our Supreme Court first interpreted this language several decades ago in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46 (*County of Los Angeles*). It explained that the phrase covers two types of state laws—those that establish a "new program" and those that require a "higher level of service" for an existing program. (*Id.* at p. 56.) The court then, turning to the meaning of the term "program," "conclude[d] that the drafters and the electorate had in mind the commonly understood meanings of the term—programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all

residents and entities in the state." (*Ibid.*; see also *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874 (*San Diego Unified*).)

In this appeal, as in the trial court, the City contends the Water Board's new permit condition requires establishment of a new or enhanced "program" under both tests described in *County of Los Angeles*. Starting with the first test concerning "programs that carry out the governmental function of providing services to the public," it contends the trial court should have found this test satisfied for two distinct reasons: first, "water service is a government function"; and second, testing for lead at schools is a "government function of ensuring safe schools." Turning next to the second test concerning laws that "impose unique requirements on local governments," the City contends the trial court also should have found this test satisfied because "water service is overwhelmingly engaged in by public agencies," with "81% of Californians get[ting] their water service from public entities."

I. The County of Los Angeles court's first test for the term "program"

We start with the City's contention that "water service is a government function" and thus satisfies the *County of Los Angeles* court's first test for the term "program."

Since the *County of Los Angeles* court first defined the term "program" over three decades ago, several courts have considered whether a new state law "carr[ies] out the governmental function of providing services to the public." (*County of Los Angeles, supra*, 43 Cal.3d at p. 56.) Considering these cases, we understand this test to require two inquiries. First, does the regulated conduct (here, the provision of water to schools) constitute a "governmental function"? And second, does the newly imposed requirement (here, lead testing of water at schools) provide a service to the public? (See *San Diego Unified, supra*, 33 Cal.4th at p. 870 [law requiring public schools to suspend students in certain circumstances carries out the governmental function of providing services to the public because "[p]roviding public schooling clearly constitutes a governmental function,

and enhancing the safety of those who attend such schools constitutes a service to the public"].)[1]

All parties, in this case, focus on the first question—that is, whether the provision of water constitutes a "governmental function." The City asserts it is. It principally supports its argument with several cases that have described water service as an important governmental function, though not in the context of article XIII B, section 6. It first cites the Supreme Court's decision in *Provident Inst. for Sav. v. City of Jersey City* (1885) 113 U.S. 506. The court there considered whether a city's property lien for unpaid water bills could have priority over a mortgage holder's later liens. (*Id.* at pp. 511-516.) In considering the question, the court in dicta stated: "The providing [of] a sufficient water supply for the inhabitants of a great and growing city is one of the highest functions of municipal government." (*Id.* at p. 516.) The City, as another example, also cites the California Supreme Court's decision in *Wilde v. City of Dunsmuir* (2020) 9 Cal.5th 1105. The court there considered whether "measures setting municipal water rates" are exempt from the voters' referendum power. (*Id.* at p. 1111.) It ultimately found they are, reasoning "that charges used to fund a city's provision of water, like other utility fees used to fund essential government services, are exempt from referendum." (*Id.* at p. 1124.) Based on these and similar cases, the City asserts that the provision of water is a "governmental function."

The Commission, the Water Board, and the Department of Finance, on the other hand, argue otherwise. They first characterize the City's offered cases as irrelevant because none concerned article XIII B, section 6. They then argue that the relevant consideration is not whether the provision of water is an important governmental function

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[1] Although we find this approach tracks the California Supreme Court's approach in *San Diego Unified*, we do not address whether this approach would be appropriate in all cases.

when the government provides it, but instead whether the provision of water is a "peculiarly governmental function." And focusing on this latter question, they contend the provision of water cannot be regarded as a peculiarly governmental function for three principal reasons. First, "the California Constitution permits, but does not require, local governments to become water providers." Second, "a significant proportion of water providers in the state are private." And third, unlike traditional governmental functions, "water service generally is provided only to paying customers, not the public at large."

We agree with all the parties in some respects. To start, we agree with the Commission, the Water Board, and the Department of Finance that the relevant inquiry focuses on functions peculiar to government. The general test for our purposes again, is whether the Water Board's new permit condition "carr[ies] out the governmental function of providing services to the public." (*County of Los Angeles, supra,* 43 Cal.3d at p. 56.) But when the *County of Los Angeles* court referred to a "governmental function," it did not mean any function that a governmental body happens to perform. It instead meant a function that is "peculiar to government." As the court explained, "the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities." (*Id.* at pp. 56-57.)

But although we agree with the Commission, the Water Board, and the Department of Finance in this respect, we ultimately find that the provision of water is peculiar to government. The phrase "peculiar to" means "exclusively or (formerly) particularly associated with, characteristic of, or belonging to." (Oxford English Dict. Online (3d ed. 2015) <https://www.oed.com/view/Entry/139494?redirectedFrom=peculiar+to#eid31421762> [as of Apr. 26, 2022]; see also Webster's 3d New Internat. Dict. (1993) p. 1663, col. 2 ["peculiar" means, among other things, "belonging exclusively or esp. to a person or

group"].) The Commission, the Water Board, and the Department of Finance appear to favor the first offering in this definition, "exclusively," arguing that "the provision of drinking water" is not peculiar to government because it "can be fulfilled by a private person or corporation." But that reading cannot be right. Our Supreme Court, for example, has found that "the education of handicapped children is clearly a governmental function providing a service to the public," even though the government is not the exclusive educator of these children. (*Lucia Mar, supra*, 44 Cal.3d at p. 835.) The court in *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521 (*Carmel Valley*), in similar fashion, concluded that "fire protection is a peculiarly governmental function," even though "there are private sector fire fighters." (*Id.* at p. 537.) And the court in *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546 (*Department of Finance*), as a last example, found that "the installation and maintenance of trash receptacles at transit stops" is a "governmental function that provides services to the public," even though it acknowledged that "collecting trash at transit stops" is "typically," but not exclusively, "within the purview of government agencies." (*Id.* at pp. 558, 560.)

All these cases, and others too, demonstrate that a function can be "peculiar to" government even if it is not exclusive to government. (See, e.g., *Long Beach Unified Sch. Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172 ["although numerous private schools exist, education in our society is considered to be a peculiarly governmental function"].) We are left, then, to consider the balance of the definition of "peculiar to," which again, is defined to mean "particularly associated with, characteristic of, or belonging to." (Oxford English Dict. Online (3d ed. 2015) <https://www.oed.com/view/Entry/139494?redirectedFrom=peculiar+to#eid31421762> [as of Apr. 26, 2022].) And considering the remainder of this definition, we find that water service is "peculiar to" local governments in that it is "particularly associated with" local governments. The Water Board's own data shows this to be true today, and over a

century's worth of case law and government publications indicate that the same has been true for many decades.

Before turning to the Water Board's current data, we start with historic practice. The history of municipal authorities in California supplying their residents with water is old—far older than the state itself. Municipal authorities in Los Angeles, for example, began doing so "as early as the year 1781" when "the Pueblo of Los Angeles was established by the Mexican Government." (*Feliz v. City of Los Angeles* (1881) 58 Cal. 73, 78-79.) Municipal authorities in San Diego, similarly, began supplying residents with water as early as 1834 when the Mexican government established the Pueblo of San Diego. (*City of San Diego v. Cuyamaca Water Co.* (1930) 209 Cal. 105, 111, 115 [" 'during the entire term of its existence,' " the " 'Pueblo of San Diego and the inhabitants thereof . . . enjoyed, asserted and exercised a preference or prior right to the use of the waters of [the] San Diego River for the benefit of said pueblo and the inhabitants thereof' "].) And many more local governments throughout California similarly began providing water to their residents many decades ago. (See, e.g., *City of Lodi v. East Bay Municipal Utility Dist.* (1936) 7 Cal.2d 316, 322 [East Bay Municipal Utility District has supplied water to residents in various cities in Alameda and Contra Costa Counties since 1923]; *id.* at p. 322 [the City of Lodi has operated a municipal water system since at least 1931]; *City and County of San Francisco v. Alameda County* (1936) 5 Cal.2d 243, 244 [the City and County of San Francisco has supplied its residents with water since 1930, when it purchased the rights and property of the private water company that had previously supplied water].)

Local governments, moreover, have continued to play a dominant role in supplying water since these early days in California history. In the years shortly before the enactment of article XIII B, section 6, for instance, residents in nearly all of California's largest cities received their water from municipal authorities. According to a 1962 water survey from the United States Department of the Interior, municipal

authorities supplied water to all but one of California's largest cities in that year. That included Los Angeles, San Diego, Fresno, Long Beach, Sacramento, Oakland, and San Francisco. (U.S. Dept. of Interior, Public Water Supplies of the 100 Largest Cities in the United States (1964), pp. 99-115, available at <https://pubs.usgs.gov/wsp/1812/report.pdf> [as of Apr. 26, 2022].) San Jose was the lone exception among the state's largest cities. (*Id.* at p. 117.)

Still today, Californians typically receive their water from municipal authorities. Although, according to the Water Board's data, most water systems in California are privately owned—5,313 of 6,970, or over 76 percent—these water systems serve only a small portion of California's total population—under 19 percent.[2] An overwhelming majority of Californians, on the other hand, around 80 percent, receive their water from publicly owned water systems. And although the Water Board evidently lacks data showing the percentage of K-12 schools that receive water from publicly and privately owned water systems, we have no reasons to suspect a lower percentage are receiving water from municipal authorities in this context. In fact, if anything, we have only reason to suspect a higher percentage in the school setting. After all, if municipal authorities

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[2] According to the Water Board's data, in 2018, 33,807,606 Californians received water from publicly owned water systems, 7,752,106 distinct Californians received water from privately owned water systems, and an unknown number of other Californians received water from private wells. For purposes here, we accept this data. We note, however, one peculiar detail with these figures: Per this data, and ignoring those served by private wells, California had a total population of 41,559,712 in 2018. But if that is true, then the Water Board's count of the state's population is around 2,000,000 higher than the Department of Finance's and the United States Census Bureau's own estimates. (Dept. of Finance, California Population Estimates, available at <https://dof.ca.gov/Forecasting/Demographics/Estimates/e-7/-1900-2021/> [as of Apr. 26, 2022] [39,476,000 in 2018 and 39,542,000 in 2020]; U.S. Census Bureau, California: 2020 Census, available at <https://www.census.gov/library/stories/state-by-state/california-population-change-between-census-decade.html> [as of Apr. 26, 2022] [39,538,223 in 2020].) Because none of the parties discuss this discrepancy, we decline to address it here.

supply water to around 80 percent of Californians when they operate less than 24 percent of all water systems, we would expect them to supply water to an even higher percentage in the school setting where they operate over 60 percent of the relevant water systems.

Considering these facts, we conclude that the Water Board's new condition establishes a "new program" within the meaning of article XIII B, section 6. The condition is "new," as all parties acknowledge, in that prior law did not require operators of public water systems to perform lead testing at schools. And it is a "program" in that it "carr[ies] out the governmental function of providing services to the public." (*County of Los Angeles, supra*, 43 Cal.3d at p. 56.) Again, the provision of drinking water to schools is a peculiarly governmental function and the mandated testing of this water for lead is plainly a service to the public. (See *Carmel Valley, supra*, 190 Cal.App.3d at p. 537 [finding fire protection peculiar to government because "the overwhelming number of fire fighters discharge a classical governmental function," even though some "private sector fire fighters" also exist]; cf. *San Diego Unified, supra*, 33 Cal.4th at p. 879 ["Providing public schooling clearly constitutes a governmental function, and enhancing the safety of those who attend such schools constitutes a service to the public."].)

Although the Commission, the Water Board, and the Department of Finance challenge this conclusion for several reasons, we find none of their arguments persuasive. First, as noted above, they argue that the provision of water is not peculiar to government, because "the California Constitution permits, but does not require, local governments to become water providers." Their premise is true—our Constitution does not require local governments to become water providers. (Cal. Const., art. XI, § 9.) But our Constitution also does not require local governments to provide firefighting services or trash services. And even so, courts have found both these services to be governmental functions. (*Department of Finance, supra*, 59 Cal.App.5th at p. 558 [trash service is a "governmental function"]; *Carmel Valley, supra*, 190 Cal.App.3d at p. 537 ["fire

protection is a peculiarly governmental function"].) We see no reason to find differently here.

Second, the Commission, the Water Board, and the Department of Finance also assert that the provision of water is not peculiar to government, because "a significant proportion of water providers in the state are private." Again, the premise is true—a significant proportion of water systems in California are privately owned. But as discussed, these water systems serve only a small portion of California's total population, under 19 percent, while publicly owned water systems serve an overwhelming majority of Californians, around 80 percent. We find the latter detail most relevant in considering whether water service is peculiar to (or particularly associated with) government. (See *Carmel Valley*, *supra*, 190 Cal.App.3d at p. 537 [finding fire protection peculiar to government because "the overwhelming number of fire fighters discharge a classical governmental function," even though some "private sector fire fighters" also exist].)

Third, the Commission, the Water Board, and the Department of Finance assert that the provision of water is not peculiar to government, because "water service generally is provided only to paying customers, not the public at large." But even if we accept their premise, their argument still falls short. Trash service, for instance, is generally provided only to paying customers. (See, e.g., Pub. Resources Code, § 40059, subd. (a)(1) ["each county, city, district, or other local governmental agency may determine" "[a]spects of solid waste handling which are of local concern, including, but not limited to, . . . charges and fees"].) But even so, trash service is still regarded as a "governmental function" (*Department of Finance*, *supra*, 59 Cal.App.5th at p. 558), and, once again, we see no reason to classify water service any differently.

Fourth, the Water Board and the Department of Finance contend the provision of water is not peculiar to government, because local governments must compensate private water providers when they encroach on these providers' territories. In their telling, "[i]f water service were a peculiarly government function, surely the Legislature would not

have created this disincentive to local governments to expand their water services." We find differently. It is true that, under California law, a political subdivision that extends its water service "to any service area of a private utility with the same type of service" has committed a taking of the property "to the extent that the private utility is injured. . . ." (Pub. Util. Code, § 1504.) But none of this shows that water service is not a function "peculiar" to government. It only shows that water service is not a function exclusive to government, with some private entities providing water service, and that the Legislature thought to protect the property rights of these private entities.

Lastly, the Commission asserts that even if the provision of water is peculiar to government, it is nonetheless not a "governmental function" because it is not "essential to local governments." But nothing in case law imposes this additional requirement. And were we nonetheless to accept the Commission's claim, we would be forced to question much of the existing case law on article XIII B, section 6. Trash service, for example, has been regarded as a governmental function. (*Department of Finance, supra*, 59 Cal.App.5th at p. 558.) But it is certainly not "essential to local governments." Firefighting service also has been regarded as a governmental function. (*Carmel Valley, supra*, 190 Cal.App.3d at p. 537.) But that too is not truly "essential to local governments." Many cities, indeed, rely on private fire departments, and yet these cities endure. (See *Ehart v. Odessa Fire Co.* (D. Del., Feb. 2, 2005, No. Civ.02-1618-SLR) 2005 WL 348311 at p. *4 ["outside the City of Wilmington, fire protection services in Delaware are provided by private volunteer fire companies"].) Rather than upend case precedent, we decline to endorse the Commission's new "essential to local governments" standard.

II. The County of Los Angeles court's second test for the term "program"

We turn next to the City's contention that the Water Board's new permit condition imposes "unique requirements" on local governments that do not apply generally to all

persons in the state—which ties to the *County of Los Angeles* court's second test for the term "program."

Two Courts of Appeal to date have found that a state law imposes "unique requirements" on local governments when it imposes its requirements in a field "overwhelmingly" or "typically" served by local governments. The court in *Carmel Valley, supra*, 190 Cal.App.3d 521 was the first. It considered an executive order requiring firefighters to be provided with protective clothing and safety equipment. (*Id.* at p. 530.) Applying the *County of Los Angeles* court's second test for the term "program," the court held that "[t]he requirements imposed on local governments are . . . unique because fire fighting is overwhelmingly engaged in by local agencies," even though "there are private sector fire fighters." (*Carmel Valley* at pp. 537-538.) It added that "the orders do not apply generally to all residents and entities in the State but only to those involved in fire fighting." (*Id.* at p. 538.)

The court in *Department of Finance, supra,* 59 Cal.App.5th 546 found similarly in a more recent decision. The court there considered a regional water quality control board permit that required certain parties to install and maintain trash receptacles at transit stops, among other things. (*Id.* at p. 552.) Applying the *County of Los Angeles* court's second test, the court found the "challenged requirements are unique to local governments in two ways." (*Department of Finance,* at p. 559.) Relevant here, it found the challenged requirements, including the requirement to "collect[] trash at transit stops," are unique to local governments because they "are, like the firefighting services in *Carmel Valley*, typically within the purview of government agencies." (*Id.* at p. 560.)

Both these cases favor a finding that the Water Board's new permit condition requires local governments to support a "program" under the second test described in *County of Los Angeles*. The Water Board's permit condition, again, only applies to operators of public water systems that supply water to K-12 schools. And the provision of water—both to the public generally and to K-12 schools specifically—is not only

"typically within the purview of government agencies" (*Department of Finance, supra*, 59 Cal.App.5th at p. 560); it is "overwhelmingly engaged in by local agencies" (*Carmel Valley, supra*, 190 Cal.App.3d at p. 538). Again, as discussed in more detail above, an overwhelming majority of Californians, around 80 percent, receive their water from publicly owned water systems.

Considering these facts, were we to follow the reasoning in *Carmel Valley* and *Department of Finance*, we would conclude that the Water Board's new condition establishes a "new program" under the second test described in *County of Los Angeles*. The condition is "new," again, in that prior law did not require operators of public water systems to perform lead testing at schools. And it is a "program" in the sense that the courts in *Carmel Valley* and *Department of Finance* construed the term—namely, borrowing language from the *Carmel Valley* court, it (1) imposes "unique" requirements on local governments "because [water service] is overwhelmingly engaged in by local agencies" and (2) "do[es] not apply generally to all persons in the State but only to those involved in [water service]." (*Carmel Valley, supra*, 190 Cal.App.3d at p. 538 [state mandate for fire fighters required a "new program" in that it (1) imposed "unique" requirements on local governments "because fire fighting is overwhelmingly engaged in by local agencies" and (2) "d[id] not apply generally to all residents and entities in the State but only to those involved in fire fighting"]; see also *Department of Finance, supra*, 59 Cal.App.5th at p. 560 [state mandate for trash collection imposed "unique" requirements on local governments because trash collection is "typically within the purview of government agencies"].)

We further find this true despite the Water Board's, the Department of Finance's, and the Commission's efforts to distinguish *Carmel Valley*. The Water Board and the Department of Finance first try to distinguish the case on the ground that *Carmel Valley* involved a rule that "was generally imposed only on public fire departments and not on 'private fire brigades.' " They cite a footnote in *Carmel Valley* to support their claim.

But all that footnote said was this: The "County suggests" that private fire brigades "customarily" consist of only part-time individuals, which, if true, would exclude these part-time individuals from the rule considered in the case. (*Carmel Valley, supra*, 190 Cal.App.3d at p. 537, fn. 11.) But none of this shows, as the Water Board and the Department of Finance assert, that the rule in *Carmel Valley* "was generally imposed only on public fire departments and not on 'private fire brigades.' " It only shows that the county in that case "suggest[ed]" an argument along those lines, which the court, for whatever reason, declined to fully address.

The Water Board and the Department of Finance, this time joined by the Commission, also argue that *Carmel Valley* is distinguishable because most water systems in California are privately owned, including many of those subject to the Water Board's new condition. But the relevant consideration under *Carmel Valley* is not simply that many private entities provide water service, including a substantial minority of those that are subject to the Water Board's new requirements. It is instead, as discussed, that local governments "overwhelmingly" provide water service in California. (See *Carmel Valley, supra*, 190 Cal.App.3d at p. 538; see also *Department of Finance, supra*, 59 Cal.App.5th at p. 560.) Again, according to the Water Board's own data, local governments supply an overwhelming majority of Californians, around 80 percent, with their water. And these local governments, as all parties appear to accept, will overwhelmingly shoulder the costs of complying with the Water Board's new requirements. Considering these facts, we find the Commission's, the Water Board's, and the Department of Finance's efforts to distinguish *Carmel Valley* fall short.

But that said, we stop short of applying the reasoning of *Carmel Valley* and *Department of Finance* to our facts. Both courts, again, found that a state law imposes "unique requirements" on local governments when it imposes its requirements in a field "overwhelmingly" or "typically" served by local governments. But that conclusion does not square with a literal reading of the term "unique," which, at least traditionally, has

meant "being the only one" or "being without a like or equal." (Webster's 3d New Internat. Dict. (1993) p. 2550, col. 2; see also *Solis v. Jasmine Hall Care Homes, Inc.* (9th Cir. 2010) 610 F.3d 541, 545 (*Solis*) [stating that " 'unique' " means " 'being the only one of its kind' "].) Applying this narrow definition, no requirement could be characterized as "unique" to local governments so long as a single private counterpart existed. And so, if that definition applied here, we could not say that the Water Board's requirement is truly "unique" to local government.

We acknowledge, however, that courts have often used the term "unique" to mean something other than "unique" in the traditional sense. In *Gordon v. Landau* (1958) 49 Cal.2d 690, for example, our Supreme Court discussed a business that had "unique" customers because "they are mostly persons in the low-income brackets." (*Id.* at p. 691.) But these customers were of course not "unique" in the sense that no other business had customers consisting of "mostly persons in the low-income brackets"; they were instead unusual customers for the typical business. In *People v. Archerd* (1970) 3 Cal.3d 615, 620, disapproved of on another ground in *People v. Nelson* (2008) 43 Cal.4th 1242, similarly, the court discussed several murders that were committed with a "unique [weapon], insulin." But the murders were surely not "unique" in the sense that no other murders had ever been committed in a similar fashion; they were instead highly unusual.

All these cases, and many more still, have used the term "unique" in a manner that exceeded its traditional definition. (See, e.g., *Solis, supra*, 610 F.3d at p. 545 [finding the Supreme Court used the term "unique" to "mean[] something like 'exceedingly rare' rather than literally 'unique' "].) And although some may believe these cases used the term in an inappropriate manner—a manner that equates "unique" with uncommon or unusual rather than one of a kind—it is nonetheless a usage that is "in extended use." (Oxford English Dict. Online (3d ed. 2015) <https://www.oed.com/view/Entry/214712?redirectedFrom=unique#eid> [as of Apr. 26, 2022] [noting that use of the term "unique" to mean "uncommon, unusual, remarkable" is

"in extended use"]; see also Merriam-Webster's Collegiate Dict. (11th ed. 2006) pp. 1368-1369 [noting that "unique" traditionally meant "being the only one" or "being without a like or equal," but "[w]ith popular use came a broadening of application" that now includes unusual].) Considering this common use of the term, perhaps the courts in *Carmel Valley* and *Department of Finance* appropriately construed the term "unique," as used in *County of Los Angeles*, in a similarly broad fashion. But because we find the Water Board's permit condition establishes a new "program" under the first test described in *County of Los Angeles*, we need not resolve whether it also establishes a new "program" under the court's second ("unique requirements") test. Nor, for similar reasons, need we address the City's alternative claim that testing for lead at schools is a "government function of ensuring safe schools."

III. Remedy

Although we conclude that the Water Board's new testing requirements establish "a new program" within the meaning article XIII B, section 6, none of this is to say that the City is necessarily entitled to reimbursement for the cost of compliance. The City, for instance, would not be entitled to reimbursement if it has authority to levy charges, fees, or assessments sufficient to cover the costs of complying with the Water Board's new condition—a topic the Commission never considered in the administrative proceedings below. (See, e.g., *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487 [no reimbursement required if "the local government 'has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service' "].) We leave it to the Commission to consider in the first instance whether reimbursement is appropriate under these circumstances. (See *Lucia Mar, supra*, 44 Cal.3d at p. 837 [finding remand to the Commission appropriate under similar circumstances; the Commission is "charged . . . with the duty to decide in the first instance whether a local agency is entitled to reimbursement under section 6 of article XIIIB"].)

DISPOSITION

The trial court's judgment is reversed, and the court is directed to remand the matter to the Commission for further proceedings consistent with this opinion. The City is entitled to recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

\s\,
BLEASE, Acting P. J.

We concur:

\s\,
DUARTE, J.

\s\,
KRAUSE, J.

Exhibit B

MARA W. ELLIOTT, City Attorney
MARK ANKCORN, Senior Chief Deputy City Attorney
KEVIN B. KING, Deputy City Attorney
California State Bar No. 309397
Office of the City Attorney
1200 Third Avenue, Suite 1100
San Diego, California 92101-4100
Telephone: (619) 533-5800
Facsimile: (619) 533-5856

Exempt from fees per Gov't Code § 6103
To the benefit of the City of San Diego

Attorneys for Petitioner
City of San Diego

SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

City of San Diego,

Petitioner,

v.

Commission on State Mandates,

Respondent.

State of California Department of Finance and State Water Resources Control Board,

Real Parties in Interest.

Case No. 34-2019-80003169-CU-WM-GDS

~~[Proposed]~~ **Judgment**

I/C Judge: Shelleyanne W.L. Chang
Complaint filed: June 20, 2019

BY FAX

On remittitur by the Third District Court of Appeal, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:**

1. The Petition for Writ of Administrative Mandamus is GRANTED.
2. The matter is remanded to the Commission on State Mandates for further proceedings consistent with the Court of Appeal's Opinion filed April 29, 2022 (attached at Exhibit A).
3. Each Party shall bear its own costs and attorneys' fees.

Dated: NOV 16 2022, ~~2022~~

Honorable Shelleyanne W.L. Chang
Superior Court of Sacramento County

MARA W. ELLIOTT, City Attorney
MARK ANKCORN, Senior Chief Deputy City Attorney
KEVIN B. KING, Deputy City Attorney
California State Bar No. 309397
Office of the City Attorney
1200 Third Avenue, Suite 1100
San Diego, California 92101-4100
Telephone: (619) 533-5800
Facsimile: (619) 533-5856

Attorneys for Petitioner,
City of San Diego

SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

City of San Diego,

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v.

Commission on State Mandates,

Respondent.

State of California Department of Finance and State Water Resources Control Board,

Real Parties in Interest.

Case No. 34-2019-80003169-CU-WM-GDS

~~[Proposed]~~ Peremptory Writ of Mandate

[Gov. Code, § 17559(b); Code Civ. Proc., § 1094.5]

I/C Judge: Shelleyanne W.L. Chang
Complaint filed: June 20, 2019

BY FAX

TO Respondent, COMMISSION ON STATE MANDATES:

Judgment having been entered by this court, Respondent Commission on State Mandates is commanded to set aside its March 22, 2019 decision denying the test claim in *Lead Sampling in Schools: Public Water System No. 3710020*, 17-TC-03, and to consider in the first instance whether reimbursement is required, consistent with the Third District Court of Appeal's Opinion filed April 29, 2022 (attached at Exhibit A). The Commission shall file a return on the writ with this

court, within 120 days of service of the writ, indicating what they have done to comply with the writ.

Dated: NOV 16 2022

LEE SEALE

Clerk of Court

Dated: NOV 16 2022

D. Lashley

Deputy Clerk D. Lashley

STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

Exhibit C

March 27, 2019

Ms. Erika Li
Department of Finance
915 L Street, 10th Floor
Sacramento, CA 95814

Mr. Raymond Palmucci
Office of the San Diego City Attorney
1200 Third Avenue, Suite 1100
San Diego, CA 92101

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

Re: Decision
Lead Sampling in Schools: Public Water System No. 3710020, 17-TC-03
Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017
City of San Diego, Claimant

Dear Ms. Li and Mr. Palmucci:

On March 22, 2019, the Commission on State Mandates adopted the Decision denying the Test Claim on the above-entitled matter.

Sincerely,

Heather Halsey
Executive Director

J:\MANDATES\2017\TC\17-TC-03 Lead Sampling in Schools PWS No. 3710020\Correspondence\decisiontrans.docx

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017 Filed on January 11, 2018 City of San Diego, Claimant	Case No.: 17-TC-03 *Lead Sampling in Schools: Public Water System No. 3710020* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted March 22, 2019*) (*Served March 27, 2019*)

DECISION

The Commission in State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on March 22, 2019. Raymond Palmucci and Tom Zeleny appeared on behalf of the City of San Diego (claimant). David Rice and Kurt Souza appeared on behalf of the State Water Resources Control Board (SWRCB). Chris Hill appeared on behalf of the Department of Finance (Finance).

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission adopted the Proposed Decision to deny the Test Claim by a vote of 6-1, as follows:

Member	**Vote**
Lee Adams, County Supervisor	Yes
Keely Bosler, Director of the Department of Finance, Chairperson	Yes
Mark Hariri, Representative of the State Treasurer	Yes
Jeannie Lee, Representative of the Director of the Office of Planning and Research	Yes
Sarah Olsen, Public Member	No
Carmen Ramirez, City Council Member	Yes
Yvette Stowers, Representative of the State Controller, Vice Chairperson	Yes

Summary of the Findings

This Test Claim alleges new state-mandated activities and costs arising from an amendment to the City of San Diego's (claimant's) public water system (PWS) permit adopted by the State Water Resources Control Board (SWRCB), Order No. 2017PA-SCHOOLS. The test claim order requires the claimant, as the operator of a "public water system"[1] that serves a number of K-12 schools, to perform lead sampling, upon request from a school it serves. A PWS may be a private company or a governmental entity.[2] Specifically, a PWS is defined as "a system for the provision *to the public* of water for human consumption" that has at least 15 service connections and serves at least 25 people per day for at least 60 days out of the year.[3] Under the order, upon request from a school, the PWS must take samples at one to five fixtures (e.g., drinking fountains or food preparation areas) on the school's property, process those results with a certified laboratory, maintain records of the requests and the results, and provide the results, and if necessary, information to the school regarding possible remediation or other solutions if lead is detected in the fixtures above 15 parts per billion (ppb).

The Commission finds that the Test Claim is timely filed.

The Commission further finds that the activities required by the order are new, as compared against prior state and federal law. However, the requirements of the test claim order do not impose a new program or higher level of service, within the meaning of article XIII B, section 6. The requirements are not uniquely imposed on local government, because the test claim order is one of over 1,100 PWS permits amended simultaneously with identical requirements, approximately 450 of which were issued to privately-owned and operated drinking water suppliers. Moreover, water service is not a *governmental* function of providing services to the public because providing water service is not required by state or federal law and is not a core function of government. The test claim order here relates to the provision of drinking water

[1] These systems are also known as "community water systems" which are PWSs that supply water to the same population year-round. (See Health and Safety Code section 116275(i).) The reader may find these two terms used interchangeably in some of the supporting documentation in the record.

[2] 42 United States Code, section 300f(4): "The term "public water system" means a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals." (Emphasis added.) Also, "the term "supplier of water" means any person who owns or operates a public water system." (42 United States Code, section 300f(5).) Further, "the term "person" means an individual, corporation, company, association, partnership, State, municipality, or Federal agency (and includes officers, employees, and agents of any corporation, company, association, State, municipality, or Federal agency)." (42 United States Code, section 300f(12).) California law is consistent: '"Public water system" means a system for the provision of water for human consumption through pipes or other constructed conveyances that has 15 or more service connections or regularly serves at least 25 individuals daily at least 60 days out of the year." (Health and Safety Code 116275(h).)

[3] Health and Safety Code section 116275(h).

through a PWS, which is fundamentally distinct from the essential and peculiarly governmental functions determined by the courts: providing water service for a fee – traditionally a proprietary function – to ratepayers is far different from a city or county providing police or fire protection, or school districts providing a free and appropriate public education, to all residents of the jurisdiction regardless of their ability to pay. For these reasons, the Commission finds that the test claim order does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution, and denies this Test Claim.

COMMISSION FINDINGS

I. Chronology

01/18/2017	Permit Amendment No. 2017PA-SCHOOLS for City of San Diego PWS 3710020 was adopted by SWRCB, Division of Drinking Water.[4]
01/11/2018	The claimant filed the Test Claim.[5]
04/13/2018	The Test Claim was deemed complete and issued for comment, along with a request that SWRCB provide a copy of its administrative record for the adoption of the permit amendment.
04/23/2018	SWRCB requested an extension of time to file comments and to provide its administrative record.
05/11/2018	The Department of Finance (Finance) requested an extension of time to comment.
06/11/2018	SWRCB requested a second extension of time to file comments and to provide its administrative record, and a postponement of the hearing.
06/25/2018	Finance requested a second extension of time to comment.
08/13/2018	SWRCB filed comments on the Test Claim and provided its administrative record.[6]
08/13/2018	Finance filed comments on the Test Claim.[7]
08/29/2018	The claimant requested an extension of time to file rebuttal comments.
10/18/2018	The claimant requested a second extension of time to file rebuttal comments.
11/09/2018	The claimant filed its rebuttal comments.[8]

[4] Exhibit A, Test Claim, page 14.

[5] Exhibit A, Test Claim.

[6] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS; Exhibit C, SWRCB's Comments on the Test Claim.

[7] Exhibit D, Finance's Comments on the Test Claim.

[8] Exhibit E, Claimant's Rebuttal Comments.

12/21/2018	Commission staff issued the Draft Proposed Decision.[9]
01/11/2019	SWRCB filed comments on the Draft Proposed Decision.[10]
01/11/2019	The claimant filed comments on the Draft Proposed Decision.[11]

II. Background

The test claim order is one of over 1,100 permit amendments simultaneously issued to privately and publicly owned "public water systems," (PWSs) requiring each to test for lead in the drinking water connections of every K-12 school that it serves and that requests testing at no charge to the school from January 11, 2017 until November 1, 2019.

A. Lead as an Environmental Health Risk

Lead is toxic and has "no known value to the human body."[12] Young children "are at particular risk for lead exposure because they have frequent hand-to-mouth activity and absorb lead more easily than do adults."[13] No safe blood lead level has been determined; lead damages almost every organ and system in the body, including and especially the brain and nervous system.[14] Low levels of lead exposure can lead to reduced IQ and attention span, learning disabilities, poor classroom performance, hyperactivity, behavioral problems, impaired growth and hearing loss.[15] Higher lead levels can cause severe neurological problems and ultimately death.[16]

Though a naturally occurring metal found all over the Earth, "[e]nvironmental levels of lead have increased more than 1,000-fold over the past three centuries as a result of human activity."[17] Because lead is "widespread, easy to extract and easy to work with, lead has been used in a wide variety of products," including paints, ceramics, plumbing, solder, gasoline,

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[9] Exhibit F, Draft Proposed Decision.

[10] Exhibit G, SWRCB's Comments on the Draft Proposed Decision.

[11] Exhibit H, Claimant's Comments on the Draft Proposed Decision.

[12] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6].

[13] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6].

[14] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6].

[15] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6].

[16] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6].

[17] Exhibit I, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, page 2.

batteries, and cosmetics.[18] In 1984, burning leaded gasoline was the largest source of lead emissions in the air, and so the Environmental Protection Agency (EPA) phased out and eventually banned leaded gasoline.[19] U.S. EPA and other agencies have "taken steps over the past several decades to dramatically reduce new sources of lead in the environment; according to the U.S. EPA, "[t]oday, the greatest contributions of lead to the environment stem from past human activities."[20] Sources include: lead-based paint; lead in the air from industrial emissions; lead in the soil around roadways and streets from past emissions by automobiles using leaded gasoline, and from deposits of lead dust from paints; industrial lead byproducts; consumer products, including imported dishes, toys, jewelry and plastics; and lead in drinking water leaching from corrosion of plumbing products containing lead.[21]

Lead exposure in drinking water results from either lead being present in the source water, such as from contaminated runoff; or through the interaction of water with plumbing materials containing lead.[22] Although "very little lead is found in lakes, rivers, or groundwater used to supply the public with drinking water," the drinking water in older houses and communities with lead service lines or lead plumbing can contain lead, "especially if the water is acidic or 'soft.'"[23] The concern with lead plumbing and fixtures is lead leaching into the water that runs through them, but "as buildings age, mineral deposits form a coating on the inside of the water pipes that insulates the water from lead in the pipe or solder, thus reducing the amount of lead that can leach into the water."[24] Those stabilizing mineral deposits, however, can be upset by acidity in the water supply: "Acidic water makes it easier for the lead found in pipes, leaded solder, and brass faucets to be dissolved and to enter the water we drink."[25] Accordingly, the primary regulatory approach, as discussed below, is to require water systems to prioritize monitoring, and to implement and maintain corrosion control treatment to minimize toxic metals leaching into water supplies.

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[18] Exhibit I, National Institutes of Health, Lead Information Home Page, page 1.

[19] Exhibit I, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, page 4.

[20] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6].

[21] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, pages 163-164 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, pp. 6-7].

[22] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 164 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 7].

[23] Exhibit I, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, pages 3-4.

[24] Exhibit I, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, page 4.

[25] Exhibit I, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, page 4.

To potentially close some of the gaps in lead exposure prevention, the California Legislature in 1992 enacted the Lead-Safe Schools Protection Act,[26] which acknowledged the potential dangers of lead exposure, especially in children, and required the State Department of Health Services to assess the risk factors of schools and "determine the likely extent and distribution of lead exposure to children from paint on the school, soil in play areas at the school, drinking water at the tap, and other potential sources identified by the department for this purpose.[27] The Act did not specifically require testing of drinking water, but only required the Department to assess risk factors, of which drinking water was one.

B. Prior Law on Drinking Water

1. Federal Law

In 1974 Congress passed the federal Safe Drinking Water Act (SDWA), authorizing U.S. EPA to set health-based standards for drinking water supplies, which U.S. EPA, the states, and drinking water systems work together to meet.[28] The Safe Drinking Water Act applies to all "public water systems," which may be privately owned or governmental and, which are defined as "a system for the provision to the public of water for human consumption" that has at least 15 service connections and serves at least 25 people per day for at least 60 days out of the year.[29] U.S. EPA states that there are over 170,000 public water systems providing drinking water to Americans, to which the Act applies.[30]

Under authority provided in the federal Act, U.S. EPA promulgated health-based standards for lead and copper in drinking water, known as the federal Lead and Copper Rule (LCR).[31] The federal action level "is exceeded if the concentration of lead in more than 10 percent of tap water samples collected during any monitoring period…is greater than 0.015 mg/L [15 ppb]."[32] The number of samples required depends on the size of the drinking water system, and any history of prior exceedances.[33] The primary mechanisms described in the LCR to control and minimize lead in drinking water are "optimal corrosion control treatment," which includes monitoring and adjusting the chemistry of drinking water supplies to prevent or minimize corrosion of lead or

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[26] Education Code section 32240 et seq.

[27] Education Code section 32242.

[28] Exhibit I, *Understanding the Safe Drinking Water Act*, EPA publication, June 2004, page 1 (available at https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf).

[29] 42 U.S.C. § 300f(4).

[30] Exhibit I, *Understanding the Safe Drinking Water Act*, EPA publication, June 2004, page 2 (available at https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf).

[31] Title 40, Code of Federal Regulations, section 141.80 et seq.

[32] Title 40, Code of Federal Regulations, section 141.80(c).

[33] See Exhibit I, Lead and Copper Rule: A Quick Reference Guide, U.S. EPA publication June 2008, page 1 [Chart showing the number of sample sites required under standard sampling or reduced sampling, according to the size of the drinking water system].

copper plumbing materials; source water treatment; replacement of lead service lines; and public education.[34] The LCR also includes monitoring and reporting requirements for public water systems.[35]

2. California Law

The California Safe Drinking Water Act addresses drinking water quality specifically and states the policy that "[e]very resident of California has the right to pure and safe drinking water," and that "[i]t is the policy of the state to reduce to the lowest level feasible all concentrations of toxic chemicals that, when present in drinking water, may cause cancer, birth defects, and other chronic diseases."[36] These provisions do not provide a right to the delivery of water, but merely provide that drinking water delivered by a PWS must be of a certain quality, and reasonably free of pollutants, to the extent feasible. The Act goes on to state:

> (e) This chapter is intended to ensure that the water delivered by public water systems of this state shall at all times be pure, wholesome, and potable. This chapter provides the means to accomplish this objective.
>
> (f) It is the intent of the Legislature to improve laws governing drinking water quality, to improve upon the minimum requirements of the federal Safe Drinking Water Act Amendments of 1996, to establish primary drinking water standards that are at least as stringent as those established under the federal Safe Drinking Water Act, and to establish a program under this chapter that is more protective of public health than the minimum federal requirements.
>
> (g) It is further the intent of the Legislature to establish a drinking water regulatory program within the state board to provide for the orderly and efficient delivery of safe drinking water within the state and to give the establishment of drinking water standards and public health goals greater emphasis and visibility within the state.[37]

Article XI, section 9 of the California Constitution makes clear that drinking water may be provided either by a municipal corporation, or by another person or corporate entity.[38] SWRCB

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[34] Exhibit C, SWRCB's Comments on the Test Claim, page 6; Title 40, Code of Federal Regulations, section 141.80(d-g).

[35] Title 40, Code of Federal Regulations, sections 141.86 – 141.91.

[36] Health and Safety Code section 116270.

[37] Health and Safety Code section 116270.

[38] California Constitution, article XI, section 9 [Article XI, section 9(a) provides that "[a] municipal corporation *may* establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication." Article XI, section 9(b) also provides that "[p]ersons or corporations may establish and operate works for supplying those services upon conditions and under regulations that the city may prescribe under its organic law." Article XII asserts government regulatory authority, via the Public Utilities Commission, over "private corporations or persons that own, operate, control, of

issues drinking water supply permits to all California "public water systems," which may be privately or government owned and which are defined the same as under the federal Act as "a system for the provision of water for human consumption through pipes or other constructed conveyances that has 15 or more service connections or regularly serves at least 25 individuals daily at least 60 days out of the year."[39]

The courts have called the California SDWA "a remedial act intended to protect the public from contamination of its drinking water."[40] Accordingly, the Act does not create affirmative rights, including rights to the delivery of water: the only mandatory duty on local government is to review on a monthly basis water quality monitoring data submitted to the local government by water suppliers within its jurisdiction in order to detect exceedances of water quality standards.[41] Nothing in the Act requires state or local government to assume responsibility to ensure that every resident of California receives water from a public water system, or to test or monitor the public water systems within its jurisdiction, or take corrective or enforcement actions when pollutants are detected. The focus of the Act is "to ensure that the water *delivered* by public water systems of this state shall at all times be pure, wholesome, and potable,"[42] and the monitoring and corrosion control requirements are aimed at the water systems themselves, whether publicly or privately owned.

The State has also adopted a Lead and Copper Rule, substantially similar to the federal rule, which requires all operators of drinking water systems to monitor and sample at a number of sample sites determined by the size of the system, primarily residential sample sites.[43] If lead levels above 0.015 mg/L (15 ppb) are detected, the water system is expected to take corrective action, beginning with corrosion control treatment measures, then source water treatment, lead service line replacement, and public education.[44] Approximately 500 schools within California are themselves permitted as a "public water system," because they have their own water supply,

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manage a line, plant, or system for …the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public…" However, nothing in article XI or XII creates or implies a right to the delivery of any such services, or any mandatory duty on local government to provide such services].

[39] Health and Safety Code sections 116525, 116271(k) [Before July 1, 2014, the Department of Public Health issued such permits; however, Statutes 2014, chapter 35 transferred those duties to the SWRCB, effective July 1, 2014];"Public Water Systems" are defined in Health and Safety Code section 116275(h) and 42 U.S.C. § 300f(4).

[40] *Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 704.

[41] *Guzman v. County of Monterey* (2009) 178 Cal.App.4th 983, 989.

[42] Health and Safety Code section 116270(e) (emphasis added).

[43] See California Code of Regulations, title 22, section 64670 et seq.; Exhibit C, SWRCB's Comments on the Test Claim, pages 5-6; California Code of Regulations, title 22, section 64676 [Sample Site Selection].

[44] See, e.g., California Code of Regulations, title 22, section 64673 [Describing monitoring and corrosion control measures to be taken if an elevated lead level is detected].

such as a well.[45] Those entities also are required to test their taps for lead and copper under the LCR; however, most schools are served by community water systems that are not required to test for lead specifically at the school's taps.[46]

C. The Test Claim Permit Amendment

Both the federal and state law and regulations have long required drinking water systems to monitor a sample of their customers' water supplies for exceedances and to take corrective action as necessary. However, that monitoring has been mostly limited to residential service connections, as a proxy for the presence of lead within the greater drinking water system.[47]

In September 2015, the Legislature passed SB 334 as a potential solution to the gap in regulation, which would have, had it been enacted, required school districts with water sources or drinking water supplies that do not meet U.S. EPA standards to close access to those drinking water sources; provide alternative drinking water sources if the school did not have the minimum number of drinking fountains required by law; and provide access to free, fresh, and clean drinking water during meal times in the food service areas of the schools under its jurisdiction.[48] SB 334 was vetoed by then-Governor Brown, whose veto message expressed concern that the bill could create a very expensive reimbursable state mandate.[49] The veto message instead directed the SWRCB to examine the scope of the potential problem by incorporating water quality testing in schools as part of the state's LCR.[50]

Accordingly, SWRCB adopted the Permit Amendment (the test claim order) at issue here, as well as over 1,100 nearly identical (but for the individual PWS information) permit amendments for other drinking water systems serving K-12 schools. Specifically, the test claim order requires the claimant to submit to the Division of Drinking Water (DDW) a list of all K-12 schools served water through a utility meter; and then, if requested by any school within its service area, the drinking water system shall:

- Respond in writing within 60 days and schedule a meeting;

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[45] Exhibit I, *Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*, California Water Boards, March 30, 3018, page 2.

[46] Exhibit I, *Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*, California Water Boards, March 30, 3018, page 2.

[47] Exhibit C, SWRCB's Comments on the Test Claim, page 6 ["Together, the sampling sites provide an overall picture of lead levels in the water customers are consuming – the assumption being that the houses and other facilities near sampling sites will have similar plumbing characteristics and, therefore, similar amounts of lead in tap water"].

[48] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 148 [SB 334, Legislative Counsel's Digest].

[49] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 145 [Governor's Veto Message].

[50] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 145 [Governor's Veto Message].

- Finalize a sampling plan and complete initial sampling within 90 days, or develop an alternative time schedule if necessary;
- Collect one to five samples from drinking fountains, cafeteria/food preparation areas, or reusable bottle filling stations;
- Collect samples on a Tuesday, Wednesday, Thursday, or Friday on a day when school is in session;
- Submit samples to an ELAP certified laboratory;
- Within two business days of a result that shows an exceedance of 15 parts per billion (ppb), notify the school of the sample result;
- If an initial sample shows an exceedance of 15 ppb:
    - Collect an additional sample within 10 business days, unless the sample site is removed from service by the school;
    - Collect a third sample within 10 business days if the resample is less than or equal to 15 ppb;
    - Collect at least one more sample at a site where the school has completed some corrective action;
- Ensure the water system receives the results of repeat samples no more than 10 business days after the date of collection;
- Do not release lead sampling data to the public for 60 days, unless in compliance with a Public Records Act request;
- Discuss the results with the school prior to releasing the results to the public.[51]

Finally, the order states that the water system may not use any lead samples collected under the order to satisfy federal or state LCR requirements; the water system must keep records of all schools requesting testing or lead-related assistance and provide those records to DDW upon request; and the water system's annual Consumer Confidence Report shall include a statement summarizing the number of schools requesting lead sampling.[52]

III. Positions of the Parties

A. City of San Diego

The claimant alleges that the test claim order required the claimant to perform lead testing, at no charge, on the property of all schools that receive water from the claimant's public water system, upon request.[53]

[51] Exhibit A, Test Claim, pages 105-107 [Permit Amendment No. 2017-PASCHOOLS, pp. 2-4].

[52] Exhibit A, Test Claim, pages 108 [Permit Amendment No. 2017-PASCHOOLS, p. 5].

[53] Exhibit A, Test Claim, page 14.

Specifically, the claimant alleges initial costs to develop a plan and begin responding to testing requests from schools;[54] as well as costs to compile a list of schools within the claimant's service area;[55] and costs and activities surrounding the actual response to testing requests.[56] The claimant further alleges for each sampling request received, it was required to:

(a) Prepare and send a response to the request;

(b) Submit a copy of the request to the state;

(c) Communicate with the school to schedule training meetings;

(d) Communicate school request status with the water system's management;

(e) Create and maintain a tracking spreadsheet; and

(f) Create sampling plans for each school (the claimant alleges 25 plans per week were required to be completed in order to meet the deadline in the order).[57]

The claimant also states that for each sampling request, and to complete each sampling plan, the claimant was required to collect one to five samples at each school from "regularly used drinking fountains, cafeteria/food preparation areas, or reusable bottle water filling stations selected according to the lead sampling plan…"[58] The claimant asserts that this sampling could only be done before the start of the school day, because the order required sampling after water had been sitting in plumbing and fixtures for at least six hours; and, the claimant asserts that sampling was only permitted to be conducted Tuesday through Friday, or on Saturdays in specific cases with approval from SWRCB.[59] The claimant states that 1,115 samples were taken and analyzed by the claimant in fiscal year 2017, excluding quality control samples.[60] The claimant further states that it developed a reporting template for tracking samples and the schools and fixtures from which they originated; and, based on the requirements of the order, the claimant consulted with schools after testing, aiding in the interpretation of results.[61] For school fixtures with lead sampling results over 15 ppb, schools had the option to resample, remediate, or remove the fixture. In cases where the school chose remediation, follow-up samples were taken and new reports provided to the school.[62]

[54] Exhibit A, Test Claim, page 21.

[55] Exhibit A, Test Claim, pages 22-23.

[56] Exhibit A, Test Claim, pages 26-27.

[57] Exhibit A, Test Claim, pages 28-30.

[58] Exhibit A, Test Claim, page 30.

[59] Exhibit A, Test Claim, pages 31-32.

[60] Exhibit A, Test Claim, page 32.

[61] Exhibit A, Test Claim, page 32.

[62] Exhibit A, Test Claim, pages 32-33.

The claimant states that it used its own laboratory, which contains a mass spectrometer, to analyze the samples. The samples were analyzed independently, and not combined with other regulatory or special project samples, by a trained chemist.[63] The results of the sampling were required to be uploaded to DDW's database, which, the claimant asserts, required the claimant to develop a method to convert and upload the information all at once, rather than generate and upload 1,115 separate reports.[64]

The claimant further states that it was required to provide the results to the school representative, and in the case of an exceedance of 15 ppb, notify the school within two business days.[65] Also in the case of an exceedance, claimant states that it was required to collect and additional sample within 10 days, and a third sample within 10 days if the resample is less than or equal to 15 ppb.[66] An additional sample is also required after remediation.[67]

Though the order prohibits releasing the sampling results to the public for 60 days unless the water system releases the data in compliance with the Public Records Act, the claimant asserts that the Environmental Committee of the City Council also requested updates on the progress of lead testing on May 25, 2017 and June 20, 2017, for which the claimant prepared a presentation.[68] And, the order required the claimant to discuss lead sampling results with the school prior to release to the public, and to discuss results within 10 business days of receiving laboratory results.[69]

Finally, the claimant states that the order required the claimant to keep records of all requests from schools for lead sampling, and provide those records to DDW, upon request.[70]

The claimant asserts that no prior federal or state law requires the activities described, and that the claimant does not receive any dedicated state or federal funds, or any other non-local agency funds dedicated to this program.[71]

The claimant's rebuttal comments also assert that the test claim order imposes a new program or higher level of service. The claimant argues that the lead sampling requirements are a statewide policy or program;[72] which "furthers two governmental functions of providing services to the

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[63] Exhibit A, Test Claim, pages 36-37.

[64] Exhibit A, Test Claim, page 38.

[65] Exhibit A, Test Claim, pages 39-41.

[66] Exhibit A, Test Claim, page 42.

[67] Exhibit A, Test Claim, page 43.

[68] Exhibit A, Test Claim, pages 44-45.

[69] Exhibit A, Test Claim, page 46.

[70] Exhibit A, Test Claim, page 49.

[71] Exhibit A, Test Claim, pages 16-17; 52-53.

[72] Exhibit E, Claimant's Rebuttal Comments, page 2.

public," namely providing water service, and ensuring a safe environment for school children;[73] and that the Permit Amendment "applies uniquely to the City as a local water agency."[74] The claimant also notes that the case law, beginning with *County of Los Angeles*, articulates and applies two alternative tests.[75] The California Supreme Court decision in *County of Los Angeles* states that:

> The concern which prompted the inclusion of section 6 in article XIIIB was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public.[76]

The claimant argues: "This is precisely what the Permit Amendment is doing: creating a new lead testing program for schools and transferring the cost and administration of the program to the City."[77] The claimant states that it has "approximately 281,000 retail water connections," and the city council approves rates and charges for water service.[78] The claimant also argues that the City's charter "imposes a legal obligation and responsibility on the City to provide water service."[79] Accordingly, the claimant argues that providing water service is a function of the City's government. In addition, the claimant argues that the provision of water service is a governmental function "because it is predominantly provided by public agencies," and in particular, "[l]ead testing of drinking water at schools is a service to the public."[80] The claimant reasons, therefore that the test claim order is a new program eligible for reimbursement under *County of Los Angeles*.[81]

Alternatively, the claimant argues that the test claim order constitutes a local program subject to mandate reimbursement because the lead sampling requirements carry out a governmental

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[73] Exhibit E, Claimant's Rebuttal Comments, page 3.

[74] Exhibit E, Claimant's Rebuttal Comments, page 3.

[75] Exhibit E, Claimant's Rebuttal Comments, page 3 [Citing *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537 ("In [*County of Los Angeles v.*] *State of California*, the Court concluded that the term 'program' has two alternative meanings…")]. See also, *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876 [Citing and discussing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51 ("We again applied the alternative tests set forth in *County of Los Angeles*…"].

[76] Exhibit E, Claimant's Rebuttal Comments, page 6 [quoting *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56].

[77] Exhibit E, Claimant's Rebuttal Comments, page 6.

[78] Exhibit E, Claimant's Rebuttal Comments, page 4.

[79] Exhibit E, Claimant's Rebuttal Comments, page 4.

[80] Exhibit E, Claimant's Rebuttal Comments, page 6.

[81] Exhibit E, Claimant's Rebuttal Comments, page 6.

function related to the safety of schools: "Schools are obligated to provide free drinking water to students, or to adopt a resolution explaining why fiscal constraints or health and safety concerns prevent it."[82] The claimant argues that the "history of the Permit Amendment demonstrates its purpose is to provide safe schools, a governmental function, while shifting financial responsibility to local water agencies."[83] The claimant references failed SB 334, vetoed in October 2015: "Instead of signing the bill, the Governor directed SWRCB to implement lead testing at schools through local water agencies as part of the Lead and Copper Rule."[84] The claimant argues that the reason SB 334 was vetoed was to avoid a reimbursable state mandate, but "[l]ead testing at schools does not lose its characterization as a 'governmental function of providing services to the public' under the Supreme Court's test, merely because the obligation is transferred from schools to water agencies."[85]

The claimant also argues that the test claim order imposes a unique requirement on the claimant that does not apply generally to all residents and entities in the State:

> The Permit Amendment applies specifically to the City. It does not apply generally to all residents and entities in the State. Even collectively considering all 1,100 permit amendments issued by SWRCB, they only apply to local water agencies with schools in their service areas, not to everyone in the State. The Permit Amendment does not require lead testing be performed for all state residents and entities either, only for schools. Collectively, the permit amendments apply uniquely to water agencies in the same way the Court found the requirement for fire protective gear applied uniquely to public and private fire protection agencies. The permit amendments do not need to exclusively apply to publicly-owned water agencies to satisfy the uniqueness element of the second test.
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> Under the second test, examples of laws that apply generally to all residents and entities in the state include requirements to provide employees with unemployment insurance coverage, worker's compensation benefits, or to upgrade public buildings to comply with statewide elevator safety regulations. Subvention was denied in these cases because the requirements applied to everyone, not just to local government. Unlike these examples, though, the Permit Amendment only applies to the City. Those in the State who do not provide water service do not have to comply with the Permit Amendment.[86]

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[82] Exhibit E, Claimant's Rebuttal Comments, page 6 [citing Educ. Code § 38086].

[83] Exhibit E, Claimant's Rebuttal Comments, page 7.

[84] Exhibit E, Claimant's Rebuttal Comments, page 7.

[85] Exhibit E, Claimant's Rebuttal Comments, page 7.

[86] Exhibit E, Claimant's Rebuttal Comments, page 8.

The claimant therefore concludes that the test claim order implements a state policy, and imposes unique requirements on the claimant that do not apply generally to all persons and entities in the state.[87]

The claimant also disputes the arguments of the SWRCB and the Department of Finance. First, the claimant argues that the SWRCB's reliance on the concept of a service "peculiar" to government is not supported in the case law:

> SWRCB argues that the City is ineligible for reimbursement because water service is not a function "peculiar" to government, and therefore not a governmental function. But the first test established by the California Supreme Court does not require that the function be "peculiar" to government, only that the program "carry out the governmental function of providing services to the public." The word "peculiar" is not in the test. The Supreme Court used the term "peculiar" only to distinguish programs that are forced on local government from laws that apply generally to all state residents and entities. The opinion of *Carmel Valley Fire Protection District v. State of California* cited by SWRCB, certainly found that "fire protection is a peculiarly governmental function" in satisfying the first test, despite the fact that private sector fire fighters provide the same service. The opinion does not say, however, that the first test can only be satisfied if the governmental function is peculiar to government, as SWRCB suggests.
>
> The first test only requires that the governmental function be that "of providing services to the public." SWRCB does not cite a published opinion where the government was providing a public service, but subvention was denied because the government function was not peculiar to government. Instead, instances where the first test was not satisfied involved situations where the new requirements did not increase the level of service provided to the public, such as requirements to provide employees with unemployment insurance coverage, worker's compensation benefits, or to upgrade public buildings to comply with statewide elevator safety regulations. These requirements only increased the government's incidental cost of providing existing public services rather than requiring new services or programs.[88]

The claimant also argues that SWRCB's reliance on "a 100-year-old line of cases on sovereign immunity" is inapplicable, and irrelevant. The claimant argues that more recently "Courts have determined '[t]he labels "governmental function" and "proprietary function" are of dubious value in terms of legal analysis in any context.'"[89] The claimant argues that Proposition 218 weakens the analogy to corporate or proprietary activities: "Water service provided by public

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[87] Exhibit E, Claimant's Rebuttal Comments, page 8.

[88] Exhibit E, Claimant's Rebuttal Comments, page 4.

[89] Exhibit E, Claimant's Rebuttal Comments, page 5 [citing *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands*, (1977) 75 Cal. App.3d 957, 968].

agencies no longer carries the indicia of a proprietary function or private enterprise due to Proposition 218 (discussed below), which eliminates profit from water service charges."[90]

And, the claimant argues that "SWRCB's reliance on the Service Duplication Law is confusing."[91] The claimant asserts that the Service Duplication Law, which was adopted in 1965, "recognizes that water service was transitioning from a private to a predominantly governmental function by providing compensation to private utilities for lost business."[92] The claimant maintains that "[n]ow, over 50 years later, that transition is substantially complete."[93]

Further, the claimant disputes the characterization by SWRCB and Finance that water service is largely a private enterprise. The claimant notes that even though SWRCB provides evidence that approximately 75 percent of drinking water systems are private entities, "the same tables show that 81% of the population served by drinking water systems statewide, or 33.8 million of 41.6 million people, receive their water service from public entities."[94] The claimant argues that "[s]uch a large percentage of the State population receiving water service from public entities is strong evidence that water service is a governmental function, more persuasive than the fact that small, privately owned water systems outnumber large, publicly owned systems."[95]

The claimant also asserts that it has incurred increased costs mandated by the state, and that the exceptions in Government Code section 17556 do not apply. The claimant alleges its total costs for fiscal year 2016-2017 to be $351,577.26, and for fiscal year 2017-2018, $47,815.67.[96] The order expressly provides that the claimant must conduct the lead sampling at no charge to the schools in its service area. The claimant concludes on this basis, and pursuant to article XIII C of the California Constitution, which prohibits a fee or charge that exceeds the proportional cost of service attributable to a parcel, that the claimant is unable to recoup the costs of the alleged mandate through fees for water service, because it cannot impose or increase fees on the schools

[90] Exhibit E, Claimant's Rebuttal Comments, page 5 [Proposition 218 added articles XIII C and XIII D to the California Constitution, which generally require assessments, as well as fees or charges for property-related services, to be proportional to the benefit received by the payor, and to be limited to the amount necessary to provide the service or special benefit. As a general rule, any revenues received in excess of the proportional benefit or burden are deemed to be taxes, and thus are illegally collected absent a two-thirds voter approval].

[91] Exhibit E, Claimant's Rebuttal Comments, page 5.

[92] Exhibit E, Claimant's Rebuttal Comments, page 5.

[93] Exhibit E, Claimant's Rebuttal Comments, page 5.

[94] Exhibit E, Claimant's Rebuttal Comments, page 5 [citing Exhibit C, SWRCB's Comments on the Test Claim, Attachment 101, pp. 406-409].

[95] Exhibit E, Claimant's Rebuttal Comments, page 5.

[96] Exhibit A, Test Claim, page 58.

in which it conducts lead testing, and it is legally proscribed from imposing or increasing fees on other water users.[97]

The claimant states in its rebuttal comments that the test claim order results in increased costs mandated by the state: "By mandating that the City perform lead testing for free, the Permit Amendment has ensnared the City in [a] constitutional web of fees and charges, where the only ways out are to spend local tax revenue or to seek reimbursement through this Commission."[98] The claimant argues that because the express language of the test claim order prohibits charging schools for the costs of sampling, "the cost of the new service is being absorbed by all City ratepayers."[99] The "constitutional web" the claimant is referring to is the substantive limitations on new fees or charges imposed by Proposition 218; article XIII D imposes a proportionality requirement, a prohibition on excessive fees, and a prohibition on new fees or charges for any service "unless that service is actually used by, or immediately available to, the owner of the property in question."[100] And although the "SWRCB believes that the Permit Amendment confers a direct benefit on all water ratepayers, not just the schools, in the form of increased property values and ensuring the City's water does not contain lead,"[101] the claimant argues that the benefits are not sufficiently direct:

> First, raising water rates to cover the cost of the Permit Amendment would ultimately violate the Permit Amendment itself. The City is legally obligated by Proposition 218 to apportion the cost of service based on the relative benefits received by its customers. Proposition 218 further prohibits the City from charging customers for services that are not immediately available to them. The schools, as the exclusive and direct recipients of lead testing under the Permit Amendment, benefit the most in that the testing assesses school pipes and fixtures for sources of lead. Lead testing is not available to the rest of the City's water ratepayers under the Permit Amendment, so they do not receive the benefit of having their own properties evaluated. The benefits of higher property values and testing of City water that SWRCB says are direct benefits to all ratepayers, are really collateral or incidental benefits. Any water rate increase apportioning the cost of lead testing among City ratepayers would fall primarily on schools, the direct and primary beneficiary of the lead testing. The Permit Amendment, however, prohibits charging a school for lead testing. A school is being charged for lead testing whether the City sends the school an invoice when the testing is done, or passes on the cost of lead testing to a school through a water rate increase.

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[97] Exhibit A, Test Claim, page 54.

[98] Exhibit E, Claimant's Rebuttal Comments, page 9.

[99] Exhibit E, Claimant's Rebuttal Comments, page 9.

[100] Exhibit E, Claimant's Rebuttal Comments, page 10 [citing Cal. Const. art. XIII D, § 6].

[101] Exhibit E, Claimant's Rebuttal Comments, page 10.

> Second, even assuming there is a plausible connection between lead testing at schools and higher property values in the surrounding neighborhoods, higher property values do not benefit all water ratepayers. Water ratepayers are both homeowners and renters. While a homeowner may benefit from a higher resale value of a home, a tenant will not. Higher property values cannot justify charging all water ratepayers for a service they are not receiving.[102]

Moreover, the claimant argues that any fees that might be imposed for lead testing are not imposed as an incident of property ownership, on an ongoing basis.[103] Accordingly, the claimant argues that Proposition 26 controls:

> Proposition 26 further tightened the restrictions on local government revenue imposed by Propositions 13 and 218 by defining a tax as "any levy, charge, or exaction of any kind imposed by a local government, except the following:"
>
> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
>
> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
>
> (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
>
> (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
>
> (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
>
> (6) A charge imposed as a condition of property development.
>
> (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.
>
> A fee or charge is a tax that must be approved by the voters unless the fee or charge meets one of these seven exceptions. [Citing to Cal. Const., art. XIII C, § 2.] The last of the seven exceptions is for property-related fees and charges under Proposition 218, but because lead testing performed under the Permit Amendment is not provided as an incident of property ownership (discussed above), the City

[102] Exhibit E, Claimant's Rebuttal Comments, page 11.

[103] Exhibit E, Claimant's Rebuttal Comments, page 12.

> cannot avail itself of that exception to raise water rates without voter approval. The third through sixth exceptions are inapplicable to a fee for lead testing because the City is not acting as a regulator in performing the service, the City is not charging the schools to enter City property, the City is not fining the schools for violating the law, and the City is not imposing a development fee, respectively. The first exception for "a specific benefit conferred or privilege granted directly to the payor" does not apply either, because the City is not issuing a school a permit or a license to engage in any activity.
>
> This leaves only the second exception, which would ordinarily give the City sufficient fee authority in situations like this: "[a] charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." [Citing to Cal. Const., art. XIII C, § 1(e)(2).] The City is providing lead testing services on school property at the request of each school, for which the City could ordinarily charge each school an amount equivalent to the cost of providing the service. The problem is the Permit Amendment prohibits the City from charging the schools, even though the schools are receiving the government service. The school is not the "payor," so the second exception does not apply. Therefore, by default, the City's water ratepayers become the "payor" even though they are not requesting or receiving the service. Without any applicable exceptions, charging water ratepayers for lead testing provided to schools for free is a tax subject to voter approval under Proposition 26.[104]

Accordingly, the claimant asserts that the test claim order imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

In response to the Draft Proposed Decision, the claimant provides additional argument and evidence that the City's operation of a PWS is not discretionary, in large part due to its long history of doing so, and because of the substantial investment that would be lost and substantial bond liability that would immediately come due if the City elected to discontinue such service.[105] The claimant asserts that these facts constitute practical compulsion within the meaning of *Department of Finance v. Commission* (*Kern*).[106]

In addition, the claimant continues to assert that the test claim order imposes a new program or higher level of service, in that water service is an essential function of government, and that even if providing water service is not a governmental function and a public service, providing free lead testing in schools is a service to the public.[107]

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[104] Exhibit E, Claimant's Rebuttal Comments, pages 12-13.

[105] Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 8-11.

[106] (2003) 30 Cal.4th 727.

[107] Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 2-8.

B. Department of Finance

Finance argues that "[w]hile water service is a local governmental function in some jurisdictions, it is not a function unique to local governments."[108] Finance bases this conclusion on SWRCB's statement that 450 of the 1,100 "public water systems" affected by permit amendments identical to the test claim order are privately owned and operated.[109]

Finance also argues that "claimants do have fee authority undiminished by Propositions 218 or 26."[110] Finance states that "Proposition 26 specifically excludes assessments and property-related fees imposed in accordance with Proposition 218 from the definition of taxes."[111] Finance maintains that the alleged mandate "involves the provision of water services and the fee authority is subject at most to the majority protest provision under article XIII D, section 6(a)."[112] Finance further asserts that "as the State Board makes clear in its comments on this test claim, lead testing in K-12 schools provides a direct benefit to all water systems and each ratepayer, and the City may therefore set water rates sufficient to pay for the costs of compliance with the permit amendment."[113]

C. State Water Resources Control Board

SWRCB asserts that the test claim order is not subject to state mandate reimbursement because the order does not constitute a "new program or higher level of service" since it does not provide a peculiarly governmental service and is not unique to government. Additionally, and in the alternative, the claimant has fee authority sufficient to cover the costs of any required activities despite Proposition 218.

Specifically, SWRCB argues that the claimant's operation of a PWS subject to the order "is not a function of service peculiar to government because public water systems are operated by both private and governmental entities."[114] And, SWRCB argues that the order "imposes no unique requirements on the City because the State Water Board imposed the exact same lead testing in school requirements on over 1,100 publicly and privately owned water systems."[115]

SWRCB acknowledges that the Safe Drinking Water Act, which SWRCB is responsible for implementing, makes it the policy of the state to reduce to the lowest level feasible all concentrations of toxic chemicals that may cause cancer, birth defects, or other chronic illness. And, SWRCB recognizes that it is the policy of the state to establish standards at least as

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[108] Exhibit D, Finance's Comments on the Test Claim, page 2.

[109] Exhibit D, Finance's Comments on the Test Claim, page 2.

[110] Exhibit D, Finance's Comments on the Test Claim, page 2.

[111] Exhibit D, Finance's Comments on the Test Claim, page 2.

[112] Exhibit D, Finance's Comments on the Test Claim, page 2.

[113] Exhibit D, Finance's Comments on the Test Claim, page 2.

[114] Exhibit C, SWRCB's Comments on the Test Claim, page 8.

[115] Exhibit C, SWRCB's Comments on the Test Claim, pages 8-9.

stringent as the federal Safe Drinking Water Act, and to protect public health and "establish a drinking water regulatory program that provides for the orderly and efficient delivery of safe drinking water throughout the state."[116]

However, in doing so, SWRCB argues that this order, one of 1,100 simultaneously adopted permit amendments, does not impose a state-mandated new program or higher level of service because the requirements of sampling for lead in K-12 schools apply to a variety of public and private entities, the only common characteristic of which is that the subject water systems are all PWSs that serve at least one K-12 school. SWRCB argues that the alleged mandate "relates to the City's provision of drinking water as a public water system."[117] SWRCB argues that the provision of drinking water, in this context, is not a service that is "peculiar to government," in the sense discussed in *County of Los Angeles v. State of California*.[118]

The term "public water system," SWRCB explains, does not mean only those drinking water systems that are publicly owned; instead, "[a] public water system is defined as a system that provides water for human consumption to at least 15 or more connections or that regularly serves 25 or more people daily."[119] And, SWRCB notes, "[o]f the 6,970 water systems currently operating in California, 5,314 are private entities and 1,656 are public entities."[120] More importantly, SWRCB argues that the courts have found that reimbursement is only required for "programs" that are essential and basic to government, "peculiar" to government, or "traditional" governmental services.[121] SWRCB argues that the provision of water, though sometimes a service provided by a governmental entity is not a traditional or essential service of government.

SWRCB argues that the rules developed by the courts are also consistent with a line of cases involving tort claims against local governments, prior to the adoption of the Government Claims Act. A threshold issue in each of those tort claims was whether sovereign immunity barred an action against the local government, and the courts distinguished cases in which sovereign immunity was available or not by characterizing the activity giving rise to the action as either "governmental" or "public," or more in the nature of "corporate" or "private."[122] SWRCB asserts that municipal activities providing utilities or other "facilities of urban life," are generally

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[116] Exhibit C, SWRCB's Comments on the Test Claim, page 4.

[117] Exhibit C, SWRCB's Comments on the Test Claim, page 10.

[118] Exhibit C, SWRCB's Comments on the Test Claim, pages 9-10 [citing *County of Los Angeles v. State* (1987) 43 Cal.3d 46].

[119] Exhibit C, SWRCB's Comments on the Test Claim, page 3 [citing Health and Safety Code § 116275(h)].

[120] Exhibit C, SWRCB's Comments on the Test Claim, page 2 [citing May 2018 Water System Report, Attachment 101 (Exhibit C, p. 455)].

[121] Exhibit C, SWRCB's Comments on the Test Claim, pages 10-11.

[122] Exhibit C, SWRCB's Comments on the Test Claim, page 12 [citing *Chafor v. City of Long Beach* (1917) 174 Cal. 478; *Plaza v. City of San Mateo* (1954) 123 Cal.App.2d 103; *City of Concord v. Tony Freitas* (1956) 144 Cal.App.2d 822].

considered more in the nature of "corporate" services, rather than "government" services.[123] SWRCB concludes "[a]lthough for the purposes of sovereign immunity, the distinction between the corporate and governmental functions of government is no longer relevant, this line of cases remains appropriate and persuasive authority for defining what constitutes a service peculiar to government."[124]

SWRCB also argues that this interpretation "is underscored by the Service Duplication Law, which requires a local government to compensate a private water supplier when the local government extends service into the service area of the private supplier.[125] SWRCB states that "[t]his statutory requirement for compensation…amounts to a legislative determination that water service is not a service that is or should be peculiar to local governments."[126]

SWRCB concludes on this issue that "simply put, the provision of drinking water is not a function or service which is peculiar to local government."[127] SWRCB states that "statewide, the overwhelming majority (over 75 percent) of drinking water systems are privately owned."[128] SWRCB asserts that no state or federal law requires a city or county to operate a drinking water system, and "[i]ndeed, many cities and counties do not provide potable water to their residents and, instead, rely on private companies to provide drinking water to city and county residents."[129] SWRCB argues that unlike the services at issue in *Carmel Valley* and *City of Sacramento*, "operating a public water system is not an 'essential,' 'basic,' 'classical' or 'traditional' governmental function."[130]

With respect to the alternative test, requirements "uniquely" imposed on local government, and not applicable generally to all residents or entities, SWRCB argues that the order must be considered in the context of the SWRCB's other permit amendments adopted simultaneously: "[w]hen viewed within this larger programmatic context, the Permit Amendment imposes no unique requirements on the City and is not a new program subject to subvention…"[131] SWRCB explains:

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[123] Exhibit C, SWRCB's Comments on the Test Claim, page 12 [citing *In re Bonds of Orosi Public Utility District v. McHuiag* (1925) 196 Cal. 43].

[124] Exhibit C, SWRCB's Comments on the Test Claim, page 12 [citing Muskopf v. Corning Hospital Dist. (1961) 55 Cal.2d 211, 219-220].

[125] Exhibit C, SWRCB's Comments on the Test Claim, page 13 [citing Public Utilities Code § 1501 et seq.].

[126] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

[127] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

[128] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

[129] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

[130] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

[131] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

> [T]he City was one of more than 1,100 public water systems that received permit amendments substantially identical to the City's Permit Amendment. The State Water Board issued these permit amendments within a few days of each other. Collectively, these permit amendments, including the Permit Amendment at issue in this Test Claim, effectuate the statewide lead testing of drinking water in schools program. Of the over 1,100 public water systems that received the permit amendments, approximately 450 water systems are privately owned. Accordingly, the Permit Amendment, as part of the State Water Board's lead testing in schools program, imposed no unique requirements on the City that were not imposed on the privately owned water systems.[132]

SWRCB also notes that "[v]iewing each individual drinking water permit in a vacuum, and not relative to other similarly situated water systems, could result in a determination that each requirement was unique to that particular water system because the drinking water permit only applies to that entity."[133] SWRCB concludes that "[t]his cannot be the result the voters intended…"[134]

Finally, SWRCB argues that Proposition 218 does not prevent the claimant from imposing or increasing water rates to recoup the costs of the alleged mandate. SWRCB argues that the claimant interprets its authority post-Proposition 218 too narrowly. Broadly, Proposition 218 requires new or increased fees to be proportional to the benefit received or the burden imposed on the local government related to the governmental service at issue. However, SWRCB argues that the lead testing required under the Order confers a direct benefit on all water system users as a whole.[135] Additionally, SWRCB states that "[b]y requiring additional lead testing in schools, the Permit Amendment functionally extends the Lead and Copper rule by providing additional testing points which can inform the City about how the water chemistry in its distribution network may be impacting not only particular schools, but residences who obtain water from a common source or through a common delivery system."[136] SWRCB thus argues that "just as the testing of private residences under the Lead and Copper rule benefits the water system as a whole…the lead testing in K-12 schools provides a similar direct benefit to each ratepayer by providing additional testing inputs the City can use to optimize its water chemistry and quality…"[137]

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[132] Exhibit C, SWRCB's Comments on the Test Claim, page 14.

[133] Exhibit C, SWRCB's Comments on the Test Claim, page 14.

[134] Exhibit C, SWRCB's Comments on the Test Claim, page 14.

[135] Exhibit C, SWRCB's Comments on the Test Claim, page 15.

[136] Exhibit C, SWRCB's Comments on the Test Claim, page 16.

[137] Exhibit C, SWRCB's Comments on the Test Claim, page 16.

In addition, SWRCB argues that lead testing in schools will help to maintain and possibly improve property values; and that school facilities are often used for community meetings and generally provide a benefit to the entire community.[138]

Based on these arguments, SWRCB concludes that the activities alleged in the test claim order are not reimbursable.

In response to the Draft Proposed Decision, SWRCB states that it agrees that the permit amendment does not impose a reimbursable new program or higher level of service.[139] In addition, SWRCB asserts that if the Commission determines that the permit amendment constitutes a new program or higher level of service, "there are alternative grounds to find that the City has sufficient fee authority to comply with the Permit Amendment."[140]

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service…

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[141] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[142]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[143]
2. The mandated activity either:
   a. Carries out the governmental function of providing a service to the public; or

[138] Exhibit C, SWRCB's Comments on the Test Claim, page 16.

[139] Exhibit G, SWRCB's Comments on the Draft Proposed Decision, page 1.

[140] Exhibit G, SWRCB's Comments on the Draft Proposed Decision, page 1.

[141] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[142] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[143] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[144]

3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order.[145]

4. The mandated activity results in the local agency or school district incurring increased costs mandated by the state within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[146]

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[147] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[148] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[149]

A. This Test Claim Is Timely Filed Pursuant to Government Code Section 17551.

Government Code section 17551(c) states that 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."[150]

[144] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

[145] *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal3d 830, 835.

[146] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[147] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

[148] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[149] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1280 [citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817].

[150] Government Code section 17551(c).

The effective date of the order is January 18, 2017.[151] The claimant filed the Test Claim on January 11, 2018, less than 12 months after the effective date of the order.[152] Therefore, the Test Claim is timely filed.

B. The Test Claim Order Does Not Impose a New Program or Higher Level of Service.

This Test Claim alleges new state-mandated activities and costs arising from an amendment to the claimant's public water system permit adopted by SWRCB, Order No. 2017PA-SCHOOLS for the City of San Diego PWS No. 3710020, which requires the claimant, as the operator of a "public water system" that serves a number of K-12 schools, to perform lead sampling upon request of a school. A PWS may be a private company or a governmental entity and is defined as "a system for the provision to the public of water for human consumption" that has at least 15 service connections and serves at least 25 people per day for at least 60 days out of the year.[153] Under the order, upon request, the PWS must take samples to perform lead sampling, at one to five fixtures (e.g., drinking fountains or food preparation areas) on the school's property, process those results at a certified laboratory, maintain records of the requests and the results, and provide the results, and if necessary, information to the school regarding possible remediation or other solutions if lead is detected in the fixtures above 15 parts per billion (ppb).

The activities required by the order are new, as compared against prior state and federal law. However, as described below, the activities alleged do not constitute a new program or higher level of service subject to reimbursement under article XIII B, section 6 of the California Constitution.

1. The test claim order imposes new requirements on operators of public water systems.

The plain language of the test claim order requires the claimant, as a PWS, to:

- Submit to SWRCB's Division of Drinking Water a comprehensive list of the names and addresses of all K-12 schools served water through a utility meter [by the claimant];[154]
- If a school representative requests lead sampling assistance in writing:
    - Respond in writing within 60 days and schedule a meeting with school officials to develop a sampling plan;[155]

[151] Exhibit A, Test Claim, page 104 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 1].

[152] Exhibit A, Test Claim, page 1.

[153] 42 United States Code, section 300f(4).

[154] Exhibit A, Test Claim, page 105 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 2].

[155] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

- Finalize a sampling plan and complete initial sampling within 90 days [or an alternative time schedule approved by DDW];[156]
- Collect one to five samples at each school, from regularly used drinking fountains, cafeteria or food preparation areas, or reusable bottle filling stations, selected according to the sampling plan, and using the sampling guidance provided in Appendix A;[157]
- Collect lead samples during the school year, on a Tuesday, Wednesday, Thursday, or Friday on a day that school is in session and has been in session for at least one day prior to the day of sampling;[158]
- Ensure samples are collected by an adequately trained water system representative;[159]
- Submit the samples to an ELAP certified laboratory for analysis;[160]
- Require the laboratory to submit the data electronically to DDW;[161]
- Provide a copy of the results to the school representative;[162]
- Within two business days of a result that shows an exceedance of 15 ppb, notify the school of the sample result;[163]

- If an initial sample shows an exceedance of 15 ppb:

[156] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

[157] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

[158] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

[159] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

[160] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

[161] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

[162] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

[163] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

    - Collect an additional sample within 10 days if the sample site remains in service;[164]
    - Collect a third sample within 10 business days after notification that a resample result is less than or equal to 15 ppb;[165]
    - Collect at least one more lead sample at a sample site where the school has completed some corrective action following an initial lead sample result over 15 ppb;[166]
- Ensure that the water system receives the results of repeat lead samples from the laboratory in no more than 10 business days;[167]
- Do not release the lead sampling data to the public for 60 days following receipt of the initial lead sampling results unless in compliance with a Public Records Act request for specific results;[168]
- Discuss the lead sample results with the school prior to releasing the sample results to the public, and within 10 days of receiving the results from the laboratory;[169]
- Communicate with the school after lead sampling and assist the school with the interpretation of laboratory results and provide information regarding potential corrective actions if the results confirm lead levels above 15 ppb;[170]
    - The water system is not responsible for the costs of any corrective action or maintenance;[171]

[164] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

[165] Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

[166] Exhibit A, Test Claim, page 107 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 4].

[167] Exhibit A, Test Claim, page 107 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 4].

[168] Exhibit A, Test Claim, page 107 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 4].

[169] Exhibit A, Test Claim, page 107 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 4].

[170] Exhibit A, Test Claim, page 108 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 5].

[171] Exhibit A, Test Claim, page 108 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 5].

- Keep records of all requests for lead related assistance and provide the records to DDW, upon request;[172]
- Include in the annual Consumer Confidence Report a statement summarizing the number of schools requesting lead sampling.[173]

Both the claimant and SWRCB agree that these requirements are new, as compared against prior law.[174]

The Commission finds that the requirements imposed by the test claim order are new. Prior law, under the federal Safe Drinking Water Act, the California SDWA, and the federal and state Lead and Copper Rule, all address, in some manner, the existence of lead in drinking water. But none of those provisions specifically requires local government to assist schools with lead sampling at drinking water fountains and other fixtures. As noted, schools that operate their own water systems or that receive water from groundwater wells were already subject to some mixture of lead sampling requirements and control measures under existing law, but the requirements of this order, for PWSs that supply water to K-12 schools to sample one to five drinking water fixtures on school property, upon request of the school, are new.

2. The new requirements of the test claim order do not constitute a new program or higher level of service, within the meaning of article XIII B, section 6 of the California Constitution.

State mandate reimbursement is not required for any and all costs that might be incurred by local government incident to a change in law. Mandate reimbursement is required only when all elements of article XIII B, section 6 are met: the statute or executive order must impose a state mandated program, must provide "new program or higher level of service," and must result in increased costs mandated by the state.[175] If any of these elements is not satisfied, then reimbursement is not required and the test claim must be denied.

[172] Exhibit A, Test Claim, page 108 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 5].

[173] Exhibit A, Test Claim, page 108 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 5].

[174] See Exhibit A, Test Claim, pages 16-17 ["The City's existing Permit and its prior amendments do not require [the claimant] to perform lead testing at K-12 schools."]; Exhibit C, SWRCB's Comments on the Test Claim, pages 5-7 [Explaining that under prior federal and state regulations community water systems, such as operated by the claimant, were required to monitor and sample for lead throughout their systems, but mostly by sampling private residences.].

[175] California Constitution, article XIII B, section 6; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81 and 109; Government Code sections 17514, 17556.

The Draft Proposed Decision relied on the *City of Merced* and *Department of Finance (Kern High School Dist., and POBRA)* cases,[176] to find that local government is not mandated by state or federal law to provide drinking water through operation of a PWS and, thus, is not mandated by the state to comply with the test claim order.[177] The analysis turned largely on the absence of any requirement in the California Constitution for local government to own or operate a PWS, and the express authority for private and public entities to do so.[178] The Draft Proposed Decision also noted that there was no evidence in the record that the claimant is practically compelled and would suffer "certain and severe penalties" or other draconian measures if the claimant decided to no longer provide water services to its residents or operate as a PWS.[179]

In its response to the Draft Proposed Decision, the claimant has provided additional argument and evidence that the City is practically compelled to continue providing water service as a PWS, both because of the long history of doing so, and because of the substantial bond liability it has incurred, which would immediately come due if it ceased operation of the PWS.[180] Specifically, the claimant asserts that it incorporated its municipal water "agency" on July 21, 1901, when the voters approved the issuance of bonds to purchase the distribution system from a private water company.[181] Subsequent "bonds and other financing secured over the years to maintain the water system in good working order," totaling approximately $890 million as of November 2018, would immediately come due if the claimant sought to discontinue service.[182] For these reasons, the claimant argues that it is practically compelled to continue to operate as a PWS.

The Commission, does not need to resolve the state-mandate issue to determine this case because, as explained below, the Commission finds that test claim order does not constitute a new program or higher level of service and, thus, reimbursement under article XIII B, section 6 is not required.

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[176] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777; *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355.

[177] Exhibit F, Draft Proposed Decision, pages 49-55.

[178] See Exhibit F, Draft Proposed Decision, pages 49-50 [citing California Constitution, article XI, section 9; *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274].

[179] Exhibit F, Draft Proposed Decision, page 55. See also, *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 753-754. *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1368.

[180] Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 8-11; 56-59 [Declaration of Raymond C. Palmucci, Deputy City Attorney designated to review and approve information pertaining to the City's Water Fund].

[181] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 9 [The claimant also points out that its six largest customers are federal, state, and local agencies, including the City itself, and that these agencies could not function if the City elected to discontinue water service].

[182] Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 10-11; 112 [Financial Statement regarding Subordinated Water Revenue Bonds, Series 2018A].

a. The courts have defined a "new program or higher level of service" as a "program that carries out the governmental function of providing services to the public or laws, which, to implement a state policy, impose unique requirements on local government."

The California Supreme Court explained in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, that a new program or higher level of service means a program that carries out of the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local government and do not apply generally to all residents and entities in the state," as follows:

> Looking at the language of section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs." But the term "program" itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term – *programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state*.[183]

The Court further held that "the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions *peculiar to government*, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities."[184] The law at issue in the *County of Los Angeles* case addressed increased worker's compensation benefits for government employees, and the Court concluded that:

> …section 6 has no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in worker's compensation benefits that employees of private individuals or organizations receive. Workers' compensation is *not* a program administered by local agencies to *provide service to the public*.[185]

The Court also concluded that the statute did not impose unique requirements on local government:

> Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers. In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services

[183] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (emphasis added).

[184] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56-57 (emphasis added).

[185] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58 (emphasis added).

> incidental to administration of the program. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. [Citation omitted.] Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.[186]

In *City of Sacramento*, the Court considered whether a state law extending mandatory unemployment insurance coverage to include local government employees imposed a reimbursable state mandate.[187] The Court followed *County of Los Angeles*, holding that "[b]y requiring local governments to provide unemployment compensation protection to their own employees, the state has not compelled provision of new or increased 'service to the public' at the local level…[nor] imposed a state policy 'uniquely' on local governments."[188] Rather, the Court observed that most employers were already required to provide unemployment protection to their employers, and "[e]xtension of this requirement to local governments, together with the state government and nonprofit corporations, merely makes the local agencies 'indistinguishable in this respect from private employers.'"[189]

A few other examples are instructive. In *Carmel Valley*, the claimants sought reimbursement from the state for protective clothing and equipment required by regulation, and the State argued that private sector firefighters were also subject to the regulations, and thus the regulations were not unique to government.[190] The court rejected that argument, finding that "police and fire protection are two of the most essential and basic functions of local government."[191] And since there was no evidence on that point in the trial court, the court held "we have no difficulty in concluding as a matter of judicial notice that the overwhelming number of fire fighters discharge a classic governmental function."[192] Thus, the court found that the regulations requiring local agencies to provide protective clothing and equipment to firefighters carried out the

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[186] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56, 58.

[187] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

[188] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67.

[189] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67. See also, *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190 [Finding that statute eliminating local government exemption from liability for worker's compensation death benefits for public safety employees "simply puts local government employers on the same footing as all other nonexempt employers"].

[190] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521.

[191] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537 [quoting *Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107].

[192] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537.

governmental function of providing services to the public. The court also found that the requirements were uniquely imposed on government because:

> The executive orders manifest a state policy to provide updated equipment to all fire fighters. Indeed, compliance with the executive orders is compulsory. The requirements imposed on local governments are also unique because fire fighting is overwhelmingly engaged in by local agencies. Finally, the orders do not generally apply to all residents and entities in the State but only to those involved in fire fighting.[193]

Later, in *County of Los Angeles II*, counties sought reimbursement for elevator fire and earthquake safety regulations that applied to all elevators, not just those that were publicly owned.[194] The court found that the regulations were plainly not unique to government.[195] The court also found that the regulations did not carry out the governmental function of providing a service to the public, despite declarations by the county that without those elevators, "no peculiarly governmental functions and no purposes mandated on County by State law could be performed in those County buildings . . . ."[196] The court held that the regulations did not constitute an increased or higher level of service, because "[t]he regulations at issue do not mandate elevator service; they simply establish safety measures."[197] The court continued:

> In determining whether these regulations are a program, the critical question is whether the mandated program carries out the governmental function of providing services to the public, not whether the elevators can be used to obtain these services. Providing elevators equipped with fire and earthquake safety features simply is not "a governmental function of providing services to the public." [FN 5 This case is therefore unlike *Lucia Mar, supra*, 44 Cal.3d 830, in which the court found the education of handicapped children to be a governmental function (44 Cal.3d at p. 835) and *Carmel Valley, supra*, where the court reached a similar conclusion regarding fire protection services. (190 Cal.App.3d at p. 537.)[198]

As analyzed herein, the test claim order does not impose unique requirements on local government and does not impose a program that carries out the governmental function of providing services to the public.

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[193] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 538.

[194] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538.

[195] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[196] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[197] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1546.

[198] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1546, Footnote 5.

b. The requirements of the test claim order are not uniquely imposed on government.

The claimant contends that the test claim order imposes unique requirements on the claimant that do not apply generally to all residents and entities in the State and, therefore constitutes a new program or higher level of service:

> The Permit Amendment applies specifically to the City. It does not apply generally to all residents and entities in the State. Even collectively considering all 1,100 permit amendments issued by SWRCB, they only apply to local water agencies with schools in their service areas, not to everyone in the State. The Permit Amendment does not require lead testing be performed for all state residents and entities either, only for schools. Collectively, the permit amendments apply uniquely to water agencies in the same way the Court found the requirement for fire protective gear applied uniquely to public and private fire protection agencies. The permit amendments do not need to exclusively apply to publicly-owned water agencies to satisfy the uniqueness element of the second test.
>
> Under the second test, examples of laws that apply generally to all residents and entities in the state include requirements to provide employees with unemployment insurance coverage, worker's compensation benefits, or to upgrade public buildings to comply with statewide elevator safety regulations. Subvention was denied in these cases because the requirements applied to everyone, not just to local government. Unlike these examples, though, the Permit Amendment only applies to the City. Those in the State who do not provide water service do not have to comply with the Permit Amendment.
>
> The Permit Amendment satisfies all the elements of the second test. The Permit Amendment is implementing a State policy of providing safe drinking water to school students. The policy is implemented by obligating local water agencies to test for lead on school property. The obligation to test for lead does not apply generally to all residents and entities in the State, but uniquely to local water agencies. Therefore, the Permit Amendment is a new program eligible for reimbursement under the second test established by the Supreme Court.[199]

In response to the Draft Proposed Decision, the claimant continues to argue that "[t]he Permit Amendments do not generally apply to all residents and entities in the State, but only to those providing water service to schools, in the same manner that the requirements in Carmel Valley only applied to firefighting services."[200]

The Commission disagrees with the claimant and finds that the requirements of the test claim order are not uniquely imposed on local government.

First, it is correct that the test claim order pled is uniquely addressed to *a* local government entity (the City of San Diego, in its capacity as the operator of a PWS in this instance). However, it is but one of 1,128 permit amendments adopted near-simultaneously, more than a third of which

[199] Exhibit E, Claimant's Rebuttal Comments, page 8.

[200] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 8.

were issued to privately owned PWS's, with the same requirements to perform lead sampling upon request of a school within the service area. As instructed by the courts interpreting article XIII B, section 6 of the California Constitution, this test claim order cannot be considered in isolation; it must be construed in context with other similar permits issued by SWRCB to PWSs.[201] The test claim statute in *City of Sacramento* expressly extended unemployment insurance to public sector employees without altering the law applicable to private sector employees.[202] The California Supreme Court, however, considered the statute in context and held that the statute did not impose requirements unique to local government and, thus, did not impose a new program or higher level of service: "Extension of this requirement to local governments, together with the state government and nonprofit corporations, merely makes the local agencies 'indistinguishable in this respect from private employers.'"[203] The Court also observed that it would "have an anomalous result" if the State could "avoid subvention under *County of Los Angeles* standards by imposing new obligations on the public and private sectors at the same time," while "if it chose to proceed by stages, extending such obligations first to private entities, and only later to local governments, it would have to pay."[204] Similarly, the test claim statute in *City of Richmond v. Commission on State Mandates* eliminated a statutory exemption from providing workers' compensation death benefits to local safety members, which put local government employers on the same footing as all other nonexempt employers, requiring that they provide the workers' compensation death benefit.[205] The court found that the statute did not impose a new program or higher level of service, even though the statute itself, considered in isolation, affected only local government.[206] Accordingly, here, the Commission must consider the permit amendment in context, and although the permit amendment pled in this test claim is directed to only one local government, it is one of many permits issued to PWS' and is therefore not *uniquely* imposed on the claimant.

The claimant, however, asserts that "[t]he obligation to test for lead does not apply generally to all residents and entities in the State, but uniquely to local water agencies,"[207] and therefore the test claim order is eligible for reimbursement under article XIII B, section 6. The claimant's statement is factually incorrect, and misuses and misapplies the words "generally" and "uniquely." The factual error inherent in the claimant's argument is that lead testing

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[201] See *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190 [Elimination of a previous statutory exemption from part of worker's compensation law was not a new program, uniquely imposed on government, even though the statute itself, considered in isolation, affected only local government].

[202] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

[203] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67 [quoting *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 58].

[204] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 69.

[205] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197.

[206] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197-1198.

[207] Exhibit E, Claimant's Rebuttal Comments, page 8.

requirements do not apply only to "local water agencies," a phrase which implies a group of *local government* entities,. The permit amendments issued apply "to *each public water system* that serves drinking water to at least one or more of grades [K-12]"[208] which is significantly more broad than "local water agencies" and includes both governmental and privately owed systems. Similarly, the SWRCB media release accompanying the permit amendments stated "[t]he Board is requiring *all community water systems* to test school drinking water upon request by the school's officials."[209]

As noted above, the term "public water system" does not mean a water system owned or operated by a governmental entity; California's SDWA defines a PWS as "a system for the provision to the public of water for human consumption" that has at least 15 service connections and serves at least 25 people per day for at least 60 days out of the year.[210] In addition, the Act defines several other water systems that might deliver drinking water and would be regulated under the Act, including, but not limited to, a "community water system," defined as a public water system that serves yearlong residents; and a "state small water system," defined as a system that serves at least five but not more than 14 service connections and does not regularly serve at least 25 persons for more than 60 days out of the year.[211] The record indicates that permit amendments were issued to privately owned PWS's including mutual water companies organized under the Corporations Code;[212] and investor-owned utilities regulated under the Public Utilities Code.[213] Describing such entities as "local water agencies," or implying that the

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[208] Exhibit E, Claimant's Rebuttal Comments, page 21 [Permit Amendment No. 2017PA-SCHOOLS].

[209] Exhibit E, Claimant's Rebuttal Comments, page 34 [SWRCB Media Release, Jan. 17, 2017].

[210] Health and Safety Code 116275(h).

[211] See Health and Safety Code section 116275(h-k; n-o).

[212] Corporations Code section 14300 et seq.. See, e.g., Exhibit C, SWRCB's Comments on the Test Claim, Permit Amendments issued to entities described as "mutual water company" or "mutual water association": pages 897 [Ali Mutual Water Co.]; 1053 [Aromas Hills Mutual Water Association]; 1092 [Arrowhead Villas Mutual Service Co.]; 1139 [Atascadero Mutual Water Co.]; 1153 [Averydale Mutual Water Co.]; 1340 [Bedel Mutual Water Co.]; 1392 [Bellflower-Somerset MWC]; 1414 [Best Road Mutual Water Co.]; 1427 [Beverly Grand Mutual Water]; 1623 [Box Springs Mutual Water Co.].

[213] See, Exhibit I, List of Regulated Water and Sewer Utilities, California Public Utilities Commission, August 17, 2018. See, e.g., Exhibit C, SWRCB's Comments on the Test Claim, Permit Amendments issued to investor-owned utilities regulated by PUC: pages 1265 [Bakman Water Co.]; 1292 [Bass Lake Water Co.]; 1455 [Big Basin Water Co.]; 1862-1939 [California Water Service Company: King City, Las Lomas, Oak Hills, Salinas Hills, Salinas, Stockton]; 1940 [California American Water, Coronado]; 2105 [California Water Service, Bear Gulch]; 2133-2177 [California Water Service: East Los Angeles, Hermosa/Redondo; Palos Verdes]; 2193-2220 [California Water Service: Westlake, Los Altos Suburban]; 2240 [California Water Service, South San Francisco]; 2380-2414 [Cal-Water Service Co.: Chico, Hamilton City, Marysville, Oroville, Willows]; 2508 [Canada Woods Water Co.]; 2661 [Cazadero Water Co.];

requirements of the test claim order apply only to "local water agencies" is misleading and factually inaccurate.

Moreover, as indicated above, the provision of water through a public water system, to a school or any other customer, is not an activity or service unique to government, and therefore additional requirements or costs imposed on that service are also not unique. Article XI, section 9 of the California Constitution provides that a municipal corporation, or a private person or corporation, may be established to operate public works to furnish water.[214] This provision was adopted by voter initiative to make clear that cities or other local entities had authority to organize to provide such services, which had previously been provided primarily by private entities.[215] SWRCB provides evidence that there are 6,970 water systems of various types currently operating in California, 5,314 of which (approximately 76 percent) are privately owned and operated, and 1,656 of which are public entities.[216]

More importantly, the claimant's assertion that the lead sampling requirements of the test claim order "do not apply generally to all residents and entities in the State, but uniquely to local water

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5956 [CWS Bakersfield]; 6034 [CWS Selma]; 6060-6098 [CWS: Visalia, Dixon, Livermore]; 6194-6214 [Del Oro Water Co.: Magalia, Paradise Pines, Stirling Bluffs]; 6481 [East Pasadena Water Co.]; 6541 [Easton Estates Water Co.]; 6725 [Erskine Creek Water Co.]; 7077 [Fruitridge Vista Water Co.]; 7192 [Golden State Water Co., Clearlake]; 7315 [Golden State Water Co., Wrightwood]; 7395 [Great Oaks Water Co.]; 7408 [Green Acres Mobile Home Estates]; 7880 [Havasu Water Co.]; 8078 [Hillview Water Co., Oakhurst/Sierra Lakes]; 8524 [Kenwood Village Water Co.]; 8866 [Lake Alpine Water Co.]; 9021 [Las Flores Water Co.]; 9270 Little Bear Water Co.]; 9426 Lukins Brothers Water Co.]; 9768 [Mesa Crest Water Co.]; 10082 [Mountain Mesa Water Co.]; 10217 Nacimiento Water Co.]; 10871 Penngrove Water Co.]; 10925 [Pierpoint Springs Water Co.]; 11066 [Point Arena Water Works]; 11478 [Rio Plaza Water Co.]; 11542 [Rolling Green Utilities]; 11803-11845 [San Gabriel Valley Water Co., El Monte, Montebello, Fontana]; 11915 [San Jose Water Co.]; 12959 [Southern California Edison Co., Santa Catalina]; 12975 [Spreckels Water Co.]; 13163-13213 [Suburban Water Systems, Covina, Glendora, La Mirada]; 14361 [Warring Water Service, Inc.]; 14411 [Weimar Water Co.]; 14426 [West San Martin Water Works, Inc.]; 14649 [Yerba Buena Water Co.].

[214] California Constitution, article XI, section 9(a-b).

[215] *In re Bonds of Orosi Public Utility Dist*. (1925) 196 Cal. 43, 55 ["The adoption of the amendment definitely settled and removed all doubt from the question of the right of cities and towns to own and operate the kind of public utilities designated by the Constitution"].

[216] Exhibit C, SWRCB's Comments on the Test Claim, pages 2; 455-457. However, the claimant argues, and SWRCB concedes, that the largest water systems are publicly owned, and therefore the majority of Californians are served by a publicly owned water system. (Exhibit C, SWRCB's Comments on the Test Claim, p. 2; Exhibit E, Claimant's Rebuttal Comments, p. 5.)

agencies,"[217] misconstrues the test.[218] The Court in *County of Los Angeles* reasoned that the "drafters and the electorate" that shaped and adopted article XIII B, section 6, intended to require mandate reimbursement for "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local government and do not apply generally to all residents and entities in the state."[219] The claimant's underlying argument is that because the test claim order applies only to PWSs, and not to "all residents and entities in the State," it should be considered "uniquely" imposed on local government.[220] This reasoning misinterprets and misapplies the words "generally" and "uniquely," which the Court used to illustrate the difference between a law that results indirectly, or incidentally, in costs to local government; and a law that specifically and directly imposes new "unique" requirements on local government.[221]

First, *general* does not mean *universal*: "The rule need not, however, apply universally; a rule applies generally so long as it declares *how a certain class of cases will be decided*."[222] Accordingly, the idea that a law would "apply generally to all residents and entities in the State" should not be taken to mean that a law must apply broadly to *all* persons and entities without limitation or caveat; laws may apply to a *class* of persons or entities, or to a defined set of *circumstances*, and still be considered to apply *generally*.[223] The permit amendment applies to the claimant because the claimant operates a PWS, which has K-12 schools within its service area.[224] These are the circumstances and class of entities upon which SWRCB *generally* imposed the lead testing requirements, and those circumstances are shared by a number of privately owned entities, in addition to governmental entities.

Moreover, a law that applies to a class of persons or entities whose members are both governmental and private cannot be said to apply *uniquely* to government, as the claimant asserts. Rather, the requirements of the test claim order are applicable to all PWS's that serve at

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[217] Exhibit E, Claimant's Rebuttal Comments, pages 8-9; Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 7-8.

[218] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[219] *County of Los Angeles v. State* (1987) 43 Cal.3d 46, 56.

[220] Exhibit E, Claimant's Rebuttal Comments, pages 8-9; Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 7-8.

[221] *County of Los Angeles v. State* (1987) 43 Cal.3d 46, 56-57.

[222] *Tidewater Marine Western v. Bradshaw* (1996) 14 Cal.4th 557, 571.

[223] *Ex parte Weisberg* (1932) 215 Cal. 624, 629 ["A law is general and uniform and affords equal protection in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided that such class is founded upon some natural or intrinsic or constitutional distinction between the persons composing it and others not embraced in it"].

[224] See Exhibit E, Claimant's Rebuttal Comments, page 34 [SWRCB Media Release, January 17, 2017].

least one K-12 school, and there is evidence in the record, absent in *Carmel Valley*,[225] that there are a substantial number of PWS's affected by the policy that are privately owned, as noted above. Thus, the requirements are not *unique* to government at all; rather, they apply to the claimant and similarly-situated local agencies by virtue of their decision to own or operate a PWS, but they also apply to PWSs that are *not* local government agencies: approximately 450 privately owned PWSs are subject to the same requirements.[226]

The claimant notes that in *City of Sacramento*,[227] *County of Los Angeles*,[228] and *County of Los Angeles II*,[229] "[s]ubvention was denied in these cases because the requirements applied to everyone, not just to local government."[230] And in its comments on the Draft Proposed Decision, the claimant insists that the permit amendments are analogous to "the requirements in *Carmel Valley* [that] only applied to firefighting agencies."[231] Again, this misconstrues the meaning of "generally" and "uniquely" and the effect of the test articulated by the courts: in each case the requirements applied based on a given set of limitations or circumstances. In *City of Sacramento* and *County of Los Angeles*, the requirements applied to the class of *employers*, which included both public and private entities.[232] In *County of Los Angeles II* the requirements applied to the owners or operators of both public and private buildings containing elevators.[233] Thus, the assertion that the test claim statutes in those cases applied to "everyone" is simply not accurate. In *Carmel Valley*, which the claimant asserts is controlling, the requirements applied only to firefighting organizations, but the court found those requirements *unique to government* because "fire fighting is overwhelmingly engaged in by local agencies."[234] In this case, however, the evidence in the record shows that that class includes a substantial population of private entities.[235]

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[225] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537 ["Our record on this point is incomplete because the issue was not presented below. Nonetheless, we have no difficulty in concluding as a matter of judicial notice that the overwhelming number of fire fighters discharge a classical governmental function."]

[226] Exhibit C, SWRCB's Comments on the Test Claim, page 6.

[227] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

[228] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[229] *County of Los Angeles v. Dept. of Industrial Relations* (1989) 214 Cal.App.3d 1538.

[230] Exhibit E, Claimant's Rebuttal Comments, page 8.

[231] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 8.

[232] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

[233] *County of Los Angeles v. Dept. of Industrial Relations* (1989) 214 Cal.App.3d 1538.

[234] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 538.

[235] See Exhibit C, SWRCB's Comments on the Test Claim, pages 819 and following [Permit Amendments 2017PA-SCHOOLS, issued to all subject PWS's].

Therefore, this Test Claim is distinguishable from *Carmel Valley*, in which the court noted that it did not have evidence in the record of the existence or prevalence of private fire-fighting teams or private fire personnel, but accepted it as a matter of judicial notice that the overwhelming majority of fire fighters discharge a governmental service.[236] Here, the evidence shows that the test claim order is one permit of more than 1,100 issued to drinking water suppliers that serve at least one K-12 school, a substantial number of which are non-governmental entities.

This Test Claim most closely resembles *County of Los Angeles II*.[237] In that case, earthquake safety regulations applied to the owners or operators of buildings containing elevators, and affected the local government only insofar as the County operated buildings that contained working elevators.[238] Here, the test claim order affects the claimant *only because* the claimant provides drinking water through a PWS to K-12 schools within its service area, and those schools have requested testing, but it also affects a substantial number of private entities that meet the same criteria.

Accordingly, the requirements of the test claim order are not uniquely imposed on local government.

c. <u>The test claim order does not impose a program that carries out a governmental function of providing a service to the public within the meaning of article XIII B, section 6.</u>

The alternative test articulated by the Court to determine if a statute or executive order imposes a new program or higher level of service is whether the requirements of the statute or executive order constitute a "program[] that carr[ies] out the governmental function of providing services to the public."

The claimant asserts that the test claim order imposes a new program or higher level of service because *County of Los Angeles* and the cases following only require that a governmental function be a function of providing services to the public, not that the function at issue must be "peculiar" to government.[239] The claimant argues, based on a number of authorities cited that employ some variation of the phrase "governmental function," that anything a local government does pursuant to legal authority is a government function.[240] In comments on the Draft Proposed Decision, the claimant argues that the Draft Proposed Decision relies too heavily on the prevalence of privately owned PWS's, and ignores both United States Supreme Court and California Supreme Court authorities that describe water service as a governmental function.[241] The claimant states the following:

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[236] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

[237] *County of Los Angeles v. Dept. of Industrial Relations* (1989) 214 Cal.App.3d 1538.

[238] *County of Los Angeles v. Dept. of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[239] Exhibit E, Claimant's Rebuttal Comments, page 4.

[240] Exhibit E, Claimant's Rebuttal Comments, page 5.

[241] Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 2-4.

> The Draft Proposed Decision determines the Permit Amendment does not impose unique requirements on local government because private companies received similar orders, and then concludes water service is not a peculiarly governmental function because private companies also provide water service. In other words, the fact that private companies provide water service defeats both tests. What this analysis fails to recognize is that private companies can perform governmental functions without turning the function into a proprietary one. For example, operating prisons is a governmental function even though both public entities and private companies perform the service. [Citation omitted.] Trash collection is also a governmental function even though public agencies and private firms both provide the service. [Citation omitted.] Governmental functions are not limited to functions performed *exclusively* by government. [Citation omitted.][242]

The claimant further asserts that even if providing water service through a PWS is not a governmental function, testing for lead in schools is a governmental function. The claimant alternatively argues that the "program" at issue is not providing water, but ensuring safe schools, which the courts have found to be a program within the meaning of article XIII B, section 6.[243]

In this case, the Commission finds that the provision of drinking water through the operation of a PWS is not an essential or peculiarly government function. Thus, the activities required of all PWSs to test for the presence of lead at drinking fountains and in food preparation areas at the request of any K-12 school in their service area does not impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution. The Commission further finds that the examples and analogies raised by both the claimant and SWRCB do not support an interpretion of "governmental function" that is more broad than relevant mandate case authorities suggest. And finally, the Commission finds that ensuring safe schools is the purview of schools, and not of a PWS.

i. A "governmental function" within the meaning of article XIII B, section 6 is limited to activities peculiar and essential to local governments such as providing police and fire protection, and public education.

The Court in *County of Los Angeles* elaborated upon its two part test for a "program" subject to article XIII B, section 6, referencing the ballot arguments that declared that section 6 "[w]ill not allow the state government to force programs on local governments without the state paying for them." The Court explained that "the phrase 'to force programs on local governments' confirms that the intent underlying section 6 was to require reimbursement to local agencies for the *costs involved in carrying out functions peculiar to government*, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities."[244] On that basis, the Court reasoned that workers compensation was not a local governmental

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[242] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 2.

[243] Exhibit E, Claimant's Rebuttal Comments, page 6 [citing *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 879].

[244] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57.

program at all, both because it is not administered by local government (it is administered by the State), and because, following enactment of the test claim statute, private and public employers have the same obligations under the law.[245]

In the years since, the courts have applied and interpreted this test to *confirm* the existence of a *governmental* program within the meaning of article XIII B, section 6 to include the following: protective clothing and equipment for firefighters;[246] education of "handicapped" children;[247] reducing racial or ethnic segregation in public schools;[248] providing due process in expulsion proceedings in public schools;[249] and providing due process in disciplinary proceedings for peace officers employed by cities and counties.[250] In *Carmel Valley*, addressing fire protective clothing and equipment, the court observed that the underlying government service at issue is a "peculiarly governmental function," and that police and fire protection are "two of the most essential and basic functions of local government."[251] The same was echoed in *POBRA*, relative to the due process procedures for city and county peace officer disciplinary proceedings.[252] *Lucia Mar*, *Long Beach*, and *San Diego Unified* all addressed alleged reimbursable mandates in the realm of education,[253] for which the governmental duty of a school district is clearly expressed in the California Constitution,[254] and for which the court in *Long Beach* expressly recognized that education is a "peculiarly governmental function," notwithstanding the existence of private schools.[255]

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[245] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58.

[246] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521.

[247] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830.

[248] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155.

[249] *San Diego Unified School Dist. v. Commission* (2004) 33 Cal.4th 859.

[250] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355.

[251] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537 [citing *County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481; *Verreros v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107].

[252] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1367 [An "ordinary, principal and mandatory duty" for cities and counties and some special districts to provide "policing services within their territorial jurisdiction."].

[253] *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830; *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155; *San Diego Unified School Dist. v. Commission* (2004) 33 Cal.4th 859.

[254] California Constitution, article IX, sections 2 [providing for a State Superintendent of Public Instruction]; 3 [providing for a Superintendent of Schools in each county]; 5 ["The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year."].

[255] See *Long Beach Unified School Dist.* v. *State of California* (1990) 225 Cal.App.3d 155, 172.

At the same time the courts have *rejected* mandate reimbursement in the following cases, finding that they did *not* involve a governmental function of providing a service to the public (and also were not uniquely imposed on local government): fire and earthquake safety features for elevators in buildings open to the public;[256] elimination of a government and nonprofit employer exemption from contributing to unemployment insurance;[257] awarding attorneys' fees against a local government under Code of Civil Procedure section 1021.5;[258] and the elimination of an exemption for local governments employing public safety workers from requirements to pay workers' compensation death benefits.[259] The cases disapproving reimbursement therefore involved either costs and activities related to local governments' capacity as an employer;[260] or generally-applicable laws that impacted local government by virtue of some other circumstance not relating to any identifiable *governmental* service (i.e., the award of attorneys' fees for litigants successful against local govenrment, and the applicability of elevator safety regulations in public buildings).[261]

Unlike *Carmel Valley*, *Lucia Mar*, *Long Beach*, *San Diego Unified*, and *POBRA*, the test claim order in this case does not involve an essential and *peculiarly governmental* function identified by the courts of this State.[262] The test claim order here relates to the provision of drinking water through a PWS, which is fundamentally distinct from the other examples discussed above: providing water service for a fee to ratepayers/customers, is far different from providing police or fire protection, or free and appropriate public education, to all residents of the jurisdiction regardless of their ability to pay, which are core, mandatory governmental functions, according to the case law discussed above. Water service, on the other hand, is not a mandatory duty of local government and can be, and often is, provided by a private entity. As noted in the Background, there is no legal requirement for local agencies to be involved in providing water, and historically the authority of local agencies to do so was in question. Article XI, section 9(a) of the California Constitution provides that a municipal corporation *may* be established to operate public works to furnish light, water, power, heat, transportation, or means of

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[256] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538.

[257] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

[258] *County of Fresno v. Lehman* (1991) 229 Cal.App.3d 340.

[259] *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

[260] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51; *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190. See also, *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

[261] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538; *County of Fresno v. Lehman* (1991) 229 Cal.App.3d 340.

[262] See, e.g., *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1367; *Long Beach Unified School Dist.* v. *State of California* (1990) 225 Cal.App.3d 155, 172.

communication.[263] However, section 9(b) provides that *private persons or corporations* may also establish and operate works for those same purposes "upon conditions and under regulations that the city may prescribe…"[264] The courts have interpreted article XI, section 9 to provide *authority* to provide public utilities, but not a *duty*.[265]

Accordingly, SWRCB provides evidence that there are 6,970 water systems currently operating in California, 5,314 of which are privately owned and operated, and 1,656 of which are public entities.[266] And, as many as two million Californians "are served either by the estimated 250,000 to 600,000 private domestic wells, or by water systems serving fewer than 15 service connections.[267] Thus, the provision of drinking water through a PWS is not only not necessary in all cases and in all parts of the State, it is also an activity and function that, where necessary or expedient, can be fulfilled by a private person or corporation.[268] It bears repeating that the term "public water system" does not mean a water system owned or operated by a governmental entity; a "public water system" is defined only by the number of connections,[269] and is distinguished from a "community water system," a "noncommunity water system," a "nontransient noncommunity water system," a "state small water system," and a "transient noncommunity water system," by the size of each system.[270] Neither the California SDWA, nor the federal LCR, defines these entities any differently whether owned and operated by a public entity or by a private person or corporation.

The claimant challenges SWRCB's evidence that approximately 75 percent of water systems throughout the state, or 5,314 of 6,970, are privately owned or operated. The claimant states that while it "has no means to verify the accuracy of this data," the same data provided by SWRCB "demonstrate that public agencies serve 81% of people in the State who have drinking water service."[271] The claimant argues that the number of people statewide receiving drinking water from a publicly owned utility "is strong evidence that water service is a governmental function,

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[263] California Constitution, article XI, section 9(a).

[264] California Constitution, article XI, section 9(b).

[265] *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 275.

[266] Exhibit C, SWRCB's Comments on the Test Claim, page 2. See also, Exhibit C, SWRCB's Comments on the Test Claim, pages 455; 457 [Listing the number of public and private water systems, respectively, governed by each county and water district].

[267] Exhibit I, *A Guide for Private Domestic Well Owners,* California State Water Resources Control Board Groundwater Ambient Monitoring and Assessment (GAMA) Program, March 2015, page 6.

[268] See California Constitution, article XI, section 9(b); Corporations Code section 14300 et seq.

[269] A public water system is defined as having 15 or more service connections, serving 25 or more persons at least 60 days out of the year.

[270] Health and Safety Code section 116275(h-k; n-o).

[271] Exhibit E, Claimant's Rebuttal Comments, page 5.

more persuasive than the fact that small, privately owned water systems outnumber large, publicly owned systems."[272]

However, the relative number of *persons* served by privately or publicly owned water systems is not persuasive evidence that water service is a governmental function; the majority of persons served by publicly owned water systems is merely a function of the size and capacity of the publicly owned systems, and presumably also a more dense and urbanized ratepayer/customer base.[273] In addition, as many as two million California residents still rely on private domestic wells or water systems with fewer than 15 service connections for their drinking water, rather than a PWS.[274] The specific requirements of this test claim order apply beyond local government entities; the requirements apply to any and every PWS that decides to supply water and serves at least one K-12 school. Subtantial evidence has been presented that as many as one-third of affected entities are privately held or operated.[275]

Thus, the Commission finds that the case law interpreting the *new program or higher level of service* requirement of article XIII B, section 6 does not support a finding that the provision of drinking water through the operation of a PWS is an essential or peculiarly governmental function.

The cases discussed above make findings on what activities of local government are or are not "governmental functions," within the meaning of article XIII B, section 6, but do not necessarily provide further guidance or definition to be applied in other circumstances. Accordingly, the dearth of case authority directly *defining* the concept of a "governmental function" specifically within the meaning of article XIII B, section 6 has led both the claimant and SWRCB to borrow from and analogize to other concepts in the law, and specifically has led the claimant to search for examples of courts using some variation of the phrase "governmental function," and to argue that those cases are binding on the Commission as statements of mandates law. As the analysis herein demonstrates, SWRCB's analogies and reasoning support the above findings, and are consistent with prior mandates cases, while the claimant's examples and analogies are not sufficient to support a finding that provision of drinking water through a PWS is a core and essential function of government, similar to police and fire protection, and education.

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[272] Exhibit E, Claimant's Rebuttal Comments, page 5.

[273] Exhibit C, SWRCB's Comments on the Test Claim, page 2.

[274] Exhibit C, SWRCB's Comments on the Test Claim, page 2; Exhibit I, *A Guide for Private Domestic Well Owners*, California State Water Resources Control Board Groundwater Ambient Monitoring and Assessment (GAMA) Program, March 2015, page 6.

[275] See Exhibit E, Claimant's Rebuttal Comments, pages 34-35 [SWRCB Media Release, January 17, 2017 ("The Board is requiring all community water systems to test school drinking water upon request by the school's officials.")]; Exhibit C, SWRCB's Comments on the Test Claim, page 2. See also, Exhibit C, SWRCB's Comments on the Test Claim, pages 455; 457 [Listing the number of public and private water systems, respectively, governed by each county and water district].

SWCRB asserts that a "line of cases decided prior to California's adoption of the Government Claims Act, and which involved tort claims for damages against local governments," is consistent with and reinforces the distinction between "governmental" functions or programs that may be the subject of mandate reimbursement, and those functions that are not "governmental" and are not subject to mandate reimbursement. Specifically, SWRCB asserts that local entities act in either a "governmental" or "public" capacity, or a "corporate" or "private" capacity, and that the same distinction used to determine whether sovereign immunity attached to a particular action is consistent with, and provides an analogy to, the concept of a governmental function or "program" in the mandates context.[276]

The "proprietary" versus "governmental" distinction traces back to the common law jurisprudence on the scope of sovereign immunity, prior to the adoption of the Government Claims Act. In order to resolve questions of government liability the courts were forced to draw a distinction between activities that are *governmental* in nature, and thus entitled to immunity, and those that are more "corporate" or "proprietary" and not so entitled.[277] The Court described a local government providing water, light, heat, or power as "not acting in its governmental capacity as a sovereign, but…in a proprietary capacity."[278] The Court later explained that it was "now a generally accepted proposition that," when a local government "undertakes to supply…utilities and facilities of urban life…it is, in fact, *engaging in business* upon municipal capital and for municipal purposes."[279]

The claimant argues, to the contrary, that essentially any service that a local government has authority to provide, or any activity that local government may engage in under its police power, is a local government function, and that the distinction between governmental and "proprietary" or "corporate" activity is no longer a useful determinant: "Water service provided by public agencies no longer carries the indicia of a proprietary function or private enterprise due to Proposition 218…, which eliminates profit from water service charges."[280] The claimant cites *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands*, where the court held that "[t]he labels 'governmental function' and 'proprietary function' are of

[276] Exhibit C, SWRCB's Comments on the Test Claim, page 12.

[277] Exhibit C, SWRCB's Comments on the Test Claim, page 12.

[278] Exhibit C, SWRCB's Comments on the Test Claim, page 12 [quoting *City of Pasadena v. Railroad Commission of California* (1920) 183 Cal. 526 (disapproved of on other grounds by *County of Inyo v. Public Utilities Commission* (1980) 26 Cal.3d 154)].

[279] Exhibit C, SWRCB's Comments on the Test Claim, page 12 [quoting *In re Bonds of Orosi Public Utility District v. McHuaig* (1925) 196 Cal. 43]. See also, *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 275 ["In supplying water to its inhabitants, a municipality acts in the same capacity as a private corporation engaged in a similar business, and not in its sovereign role."].

[280] Exhibit E, Claimant's Rebuttal Comments, page 5.

dubious value in terms of legal analysis in any context."[281] The court went on to say that the distinction, developed for and applied in government tort claims, was "manifestly unsatisfactory" and "operated both 'illogically' and 'inequitably.'"[282] In *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County*, also cited by the claimant, the court stated broadly that anything local government is authorized to do "constitutes a function of government, and when a municipality acts pursuant to granted authority it acts as government and not as a private entrepreneur."[283]

The Commission disagrees that Proposition 218 has any bearing on whether water service is a "governmental" function. The claimant argues that the existence of Proposition 218 demonstrates that utility services such as water are "governmental," not "proprietary" functions, because a local government engaging in utility services does not have the ability to set its rates at a level that will maintain profitability. The claimant assumes, without analysis or evidence, that a private utility would be able to do so. However, the comparison is poor: a private utility entity is required by law to charge only rates that are just and reasonable, subject to the regulation and control of the Public Utilities Commission.[284] Thus, the limitations of Proposition 218 applicable to a publicly owned PWS, even to the extent they may be more stringent than the limitations applicable to a privately owned utility, do not alter the fundamental nature of the service or function being provided – in this case a function that the city is not required by law to perform– to provide water service.[285]

More importantly, while the cases cited by the claimant discount the value of the distinction between *governmental* and *proprietary* or *corporate* functions,[286] they do so on grounds other than the nature of the service provided, and therefore are not persuasive. In both cases cited, the court is weighing the rights of a utility to maintain its service lines along or under a public

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[281] *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968.

[282] *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968.

[283] *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325.

[284] See Public Utilities Code 451; 454; 728 ["Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules, practices, or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix, by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force."].

[285] See California Constitution, article XI, section 9.

[286] *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968; *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325.

roadway, against the power of a public agency to force relocation of those service lines at the utility's expense.[287] This makes the applicability of the cited language to the mandates context suspect, at best. And, in each case, the claimant has selectively quoted language that undermines the *governmental* versus *proprietary* distinction, despite contrary language in the same opinion.[288] In addition, *neither* court finds the distinction to be dispositive of the issues in any event, and therefore the quoted language is dicta.[289]

In *Pacific Telephone and Telegraph Co.*, the company sought compensation from the City and the Redevelopment Agency for expenses resulting from the abandonment of a street that carried its service lines, which in turn necessitated relocation of the lines, under two theories including that "the city and the agency were acting in a proprietary capacity."[290] But the court held that "'[a] utility's right to compensation should depend, not on whether municipal activity is 'governmental' or 'proprietary,' but on whether compensation has been required by the Legislature [such as under the Community Redevelopment Law], or whether there has been a constitutionally compensable taking or damaging of a valuable property right."[291] The court also noted, in declining to consider *City of Los Angeles v. Los Angeles Gas & Electric Corp*.[292] and

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[287] *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 961-961; *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 318.

[288] *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 969 ["Under traditional tests, such enterprises were uniformly treated as being proprietary in nature."]; *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325 ["…as we have seen a district furnishing a domestic water supply is said to be performing a proprietary act."].

[289] *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968 ["A utility's right to compensation should depend, not on whether municipal activity is 'governmental' or 'proprietary,' but on whether compensation has been required by the Legislature, or whether there has been a constitutionally compensable taking or damaging of a valuable property right."]; 970 ["PT&T's contention that it is entitled to compensation on the theory that the city and the agency were acting in a proprietary capacity is without merit."]; *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325 [To maintain the 'governmental versus proprietary function' as a test in the determination of relocation cost allocation is no less specious."].

[290] *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968.

[291] *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968.

[292] 251 U.S. 32.

Postal-Tel.Co. v. San Francisco,[293] both of which addressed utilities compelled to relocate service lines to accommodate another utility, that "[u]nder traditional tests," utility businesses carried on by a municipality "*were uniformly treated as being proprietary in nature*."[294]

Northeast Sacramento County Sanitation Dist. addressed a dispute between a county water district and a county sanitation district, wherein the sanitation district constructed sewers in and under the same roads where water lines had already been laid, which required relocation of the water mains. Each asserted a "governmental" status granting them sovereign immunity against the other's merely "proprietary" interest: the sanitation district argued that it stood in the shoes of the County because the County Board of Supervisors also served as its Board of Directors; while the water district, the court observed, not only held a "favorable position in the area of eminent domain," but also had been given certain rights and privileges under the Water Code usually held by municipalities.[295] However, the court found that the language that the claimant cites, that "whatever local government is authorized to do constitutes a function of government…"[296] is, in context, an observation that between a water district and a sanitation district, "no statute gives a sanitation district superior rights over a water district *in the matter of relocation*."[297] The court concluded that "each district when performing the identical type of function – the laying of pipe lines in a public street – should pay its own way," and therefore since the water district's lines were first in time and the expansion benefited only the rate payers of the sanitation district, the sanitation district must pay for the necessary relocation.[298]

And, in 1967, the year after *Northeast Sacramento*, the Fourth District Court of Appeal decided *Glenbrook Development Co*.[299] As discussed above, the court in *Glenbrook Development Co.* found that cities have no legal duty to provide water to their citizens, and reiterated and again

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[293] 53 Cal.App. 188.

[294] *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 969 [Declining to consider *City of Los Angeles v. Los Angeles Gas & Electric Corp.*, 251 U.S. 32 and *Postal Tel.-Cable Co. v. San Francisco*, 53 Cal.App. 188, because both involve utility relocations to accommodate another utility].

[295] *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 322.

[296] *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325.

[297] *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 322.

[298] *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325-326.

[299] *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267.

endorsed the view that "service of water by a city is a proprietary function."[300] Therefore, even though the case law on the "governmental" versus "proprietary" distinction is not directly on point with regard to state mandates, the weight of authority supports the finding above that providing water service is not a governmental function, unlike police or fire protection, or public education, which the courts have acknowledged are overwhelmingly governmental in nature.

In response to the Draft Proposed Decision, the claimant cites additional authority that it suggests supports a broad interpretation of "governmental function" as including water service. Specifically, the claimant cites *Brush v. Commissioner of Internal Revenue*,[301] and *City of San Diego v. Cuyamaca Water Company*.[302] In *Brush*, the United States Supreme Court was called upon to determine whether the City of New York's publicly owned water system was subject to federal taxes. The claimant cites a passage in which the Court observes that the City has made a determination its interests are best served by providing for its own water supply:

> We conclude that the acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental functions, and this conclusion is fortified by a consideration of the public uses to which the water is put. Without such a supply, public schools, public sewers so necessary to preserve health, fire departments, street sprinkling and cleaning, public buildings, parks, playgrounds, and public baths could not exist… It may be, as it is suggested, that private corporations would be able and willing to undertake to provide a supply of water for all purposes; but if the state and city of New York be of opinion, as they evidently are, that the service should not be intrusted [sic] to private hands, but should be rendered by the city itself as an appropriate means of discharging its duty to protect the health, safety, and lives of its inhabitants, we do not doubt that it may do so in the exercise of its essential governmental functions.[303]

In *City of San Diego v. Cuyamaca Water Company*,[304]the Court sought to resolve a dispute over the priority of water rights in the San Diego River, as between the City and upstream riparian users. From *City of San Diego*, the claimant relies on the following:

> It should at the outset be understood and stated that the pueblo rights, and hence the rights of its successor, the city of San Diego, to whatever of the waters of the San Diego river were from time to time required for the needs of the pueblo and of the city and of the inhabitants of each, were rights which were essentially 'governmental' in character, as much so in fact as were the rights of the ancient

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[300] *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 275 ["In supplying water to its inhabitants, a municipality acts in the same capacity as a private corporation engaged in a similar business, and not in its sovereign role."].

[301] (1936) 300 U.S. 352.

[302] (1930) 209 Cal. 105.

[303] *Brush v. Commissioner of Internal Revenue* (1936) 300 U.S. 352, 370-371.

[304] (1930) 209 Cal. 105.

> pueblo and modern city to the public squares or streets, and that the term 'proprietary,' as employed with reference to certain commercialized uses made by municipalities and other public bodies, of water, light, and power, for example, has no application to the fundamental rights of the plaintiff herein to its ownership of its foregoing classes of property dedicated and devoted to public uses.[305]

Neither of these authorities is directly on point, and neither makes any express finding regarding the nature of water service as a municipal undertaking. *Brush* employs the phrase "essential governmental functions," but the analysis and findings turn on the City's exercise of its local authority, and ultimately the question to be resolved is only whether the municipal water system should be exempt from federal taxation: "The answer depends upon whether the water system of the city was created and is conducted in the *exercise of the city's governmental functions*."[306] The Court acknowledges that private corporations may be willing and able to provide water to the city, and that in the City's history, private entities had indeed done so.[307] But, the Court concludes, "if the state and city of New York be of opinion, as they evidently are, that [water] service should not be intrusted to private hands…*we do not doubt that it may do so in the exercise of its essential governmental functions*."[308]

City of San Diego, likewise, does not make any findings on the nature of the City's activities in providing water to its citizens; rather, the case seeks to resolve an issue of *priority of water rights*.[309] The Court finds that the City is the successor in priority of its water rights to the *pueblo* of San Diego, a political entity that predates the State of California itself.[310] The Court states that these rights "were essentially 'governmental' in character," and compares the water rights to the City's claim over the "public squares or streets."[311] Nevertheless, the Court finds that it is irrelevant to the question of that priority whether the City's use and distribution of those waters is considered a "proprietary" function, rather than a governmental one.[312] This is not a finding that the City's municipal utilities are engaged in a "governmental" service or function within the meaning of article XIII B, section 6, rather it is a finding that the successor government, City of San Diego, was successor to the water rights of the preceeding government, Pueblo of San Diego.[313]

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[305] *City of San Diego v. Cuyamaca Water Company*, (1930) 209 Cal. 105, 130.

[306] *Brush v. Commissioner of Internal Revenue* (1936) 300 U.S. 352, 360.

[307] *Brush v. Commissioner of Internal Revenue* (1936) 300 U.S. 352, 360; 371.

[308] *Brush v. Commissioner of Internal Revenue* (1936) 300 U.S. 352, 371.

[309] *City of San Diego v. Cuyamaca Water Company*, (1930) 209 Cal. 105, 131 ["[T]he subject matter of the action is the establishment of the priority of right…"].

[310] *City of San Diego v. Cuyamaca Water Company*, (1930) 209 Cal. 105, 130-131.

[311] *City of San Diego v. Cuyamaca Water Company*, (1930) 209 Cal. 105, 130.

[312] *City of San Diego v. Cuyamaca Water Company*, (1930) 209 Cal. 105, 131.

[313] *City of San Diego v. Cuyamaca Water Company*, (1930) 209 Cal. 105, 130-131.

Next, the claimant compares providing water service to "operating prisons" and "trash collection," both of which it asserts are considered governmental functions that may be performed by private entities.[314] The claimant cites to case law describing those services as governmental in nature, but those authorities are no more on point than the cases discussed above: the courts use some variation of the phrase "governmental function," but there is nothing so unique and powerful about that phrase that it expands the scope of activities previously found to be essential and peculiarly governmental in nature for purposes of article XIII B, section 6.[315] The two cases cited that address garbage collection are cumulative to the reasoning already discussed with respect to water service: the courts acknowledge that trash collection is *within the police power* of municipalities, but also that such services may be provided by private entities under contract with the municipality, or in private contract with a group of residents.[316] Similarly, of the two cases addressing the operation of prisons, neither turns on the nature of operating a prison as a governmental function. *Pennsylvania Dept. of Corrections v. Yeskey* (1998) holds only that the Americans with Disabilities Act applies to the Department as a state entity,[317] while *Richardson v. McKnight* holds that employees of a private prison do not enjoy the qualified immunity from suit under federal civil rights statutes enjoyed by their publicly employed counterparts,[318] despite discharging what the claimant characterizes as a governmental function.[319] The Court in fact says that when deciding questions of immunity a "purely functional" test "bristles with difficulty, particularly since, in many areas, government and

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[314] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 2.

[315] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 2 [citing *Richardson v. McKnight* (1997) 521 U.S. 399; *Pennsylvania Dept. of Corrections v. Yeskey* (1998) 524 U.S. 206; *Davis v. City of Santa Ana* (1952) 108 Cal.App.2d 669; *Glass v. City of Fresno* (1936) 17 Cal.App.2d 555].

[316] *Davis v. City of Santa Ana* (1952) 108 Cal.App.2d 669, 676-677 ["The collection and disposal of garbage and trash by the city constitutes a valid exercise of police power and a governmental function which the city may exercise in all reasonable ways to guard the public health. It may elect to collect and dispose of the garbage itself or it may grant exclusive collection and disposal privileges to one or more persons by contract, or it may permit private collectors to make private contracts with private citizens. The gathering of garbage and trash is considered to be a matter which public agencies are authorized to pursue by the best means in their possession to protect the public health."]; *Glass v. City of Fresno* (1936) 17 Cal.App.2d 555, 558 ["[C]ollection and disposal of garbage are matters so intimately connected with the preservation of public health that the regulation thereof is the proper exercise of police power, and it would naturally follow as a corollary thereto that [the city] would have the right to dispose of garbage itself, and it has been so held."].

[317] *Pennsylvania Dept. of Corrections v. Yeskey* (1998) 524 U.S. 206, 209.

[318] *Richardson v. McKnight* (1997) 521 U.S. 399, 412 ["[W]e must conclude that private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a § 1983 case."].

[319] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 2.

private industry may engage in fundamentally similar activities, ranging from electricity production, to waste disposal, to even mail delivery."[320] In other words, both of the cases cited turn on the nature of the entity and how the law applies to that entity, rather than the nature of the function being performed by the entity. Here, there is no argument that the City is not a governmental entity; the issue is whether the test claim order applies because the claimant is engaged in a governmental function.

The claimant also compares lead testing on school property to "the governmental function of building inspections on private property, where the City inspects private facilities that it neither owns nor operates, to confirm compliance with pre-established standards."[321] This analogy is not convincing, not least because building inspections are *exclusively* within the power of government, unlike the provision of utilities, which the above analysis establishes can be conducted by private entities.

Finally, the claimant argues that a finding that water service is a proprietary and not a governmental function categorically excludes municipal water agencies from state mandate reimbursement, and "[i]f there was legislative intent to make proprietary functions or municipal water service categorically ineligible for reimbursement, it would be found in the statutes that created this very Commission."[322] Setting aside for the moment the claimant's unfounded supposition that a categorical exclusion, if intended, would be expressly stated in Government Code section 17500 et seq., nothing in the above analysis categorically excludes municipal agencies from mandate reimbursement. This decision finds only that the requirements of the permit amendment are not reimbursable because they apply to the claimant as a result of its operation as a PWS, and as a result the requirements are neither uniquely imposed on local government, nor a "governmental function" within the meaning of article XIII B, section 6. Indeed, the above analysis makes no findings on any other program or statutory requirement that might be alleged to impose a mandate on the claimant based on its *existence* as a governmental entity.

Thus, the cases distinguishing between proprietary and governmental functions support the finding that the test claim order does not impose a governmental function of providing a service to the public within the meaning of article XIII B, section 6, and the cases and examples cited by the claimant are not relevant to the issue here.

In addition, the "Service Duplication Law," relied on by the SWRCB, supports (but is not essential to) the finding that the test claim order does not impose a governmental function of providing a service to the public within the meaning of article XIII B, section 6. The parties dispute the import of the Public Utilities Code provision known as the "Service Duplication Law," which requires a local government to compensate a privately owned drinking water

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[320] *Richardson v. McKnight* (1997) 521 U.S. 399, 409.

[321] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 5.

[322] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 6.

supplier if the local entity extends service into the service area of the private supplier.[323] SWRCB argues that this compensation requirement "amounts to a legislative determination that water service is not a service that is or should be peculiar to local governments."[324] The claimant argues instead that "[i]f anything, the Service Duplication Law recognizes that water service was transitioning from a private to a predominantly governmental function by providing compensation to private utilities for lost business."[325] The claimant asserts that "[n]ow, over 50 years later, that transition is substantially complete."[326]

The the Service Duplication Law weighs against finding that water service is a governmental function. Public Utilities Code section 1501 provides as follows:

> The Legislature recognizes the substantial obligation undertaken by a privately owned public utility which is franchised under the Constitution or by a certificate of public convenience and necessity to provide water service in that the utility must provide facilities to meet the present and prospective needs of those in its service area who may request service. At the same time, the rates that may be charged for water service by a regulated utility are fixed by the Public Utilities Commission at levels which assume that the facilities so installed will remain used and useful in the operation of the utility for a period of time measured by the physical life of such facilities.
>
> The Legislature finds and declares that the potential loss of value of such facilities which may result from the construction and operation by a political subdivision of similar or duplicating facilities in the service area of such a private utility often deters such private utility from obtaining a certificate or extending its facilities to provide in many areas a water supply essential to the health and safety of the citizens thereof.
>
> The Legislature further finds and declares that it is necessary for the public health, safety, and welfare that privately owned public utilities regulated by the state be compensated for damages that they may suffer by reason of political subdivisions extending their facilities into the service areas of such privately owned public utilities.[327]

Sections 1503 and 1504 contain the operative provisions. In section 1503, the Legislature "finds and declares that whenever a political subdivision constructs facilities to provide or extend water service, or provides or extends such service, to any service area of a private utility with the same type of service, such an act constitutes a taking of the property of the private utility for a public

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[323] Exhibit C, SWRCB's Comments on the Test Claim, page 13 [citing Pub. Util. Code § 1501 et seq.].

[324] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

[325] Exhibit E, Claimant's Rebuttal Comments, page 5.

[326] Exhibit E, Claimant's Rebuttal Comments, page 5.

[327] Public Utilities Code section 1501.

purpose to the extent that the private utility is injured by reason of any of its property employed in providing water service being made inoperative, reduced in value or rendered useless…"[328] Section 1504 requires the "political subdivision" to compensate for the taking: "Just compensation for the property so taken for public purposes shall be as may be mutually agreed by the political subdivision and the private utility or as ascertained and fixed by a court…"[329] Section 1504 further provides that if the compensation required is equal to the just compensation value of all the property of the private utility, the political subdivision may provide for the acquisition of all such property (i.e., condemn the property in eminent domain).[330]

As the Legislative intent language in section 1501 states, the Legislature "recognize[d] the substantial obligation undertaken by a privately owned public utility…" including facilities and equipment, and that the Public Utilities Commission limits the rates that may be charged by such utilities "at levels which assume that the facilities so installed will remain used and useful…" for the life of the equipment or facilities.[331] In addition, the Legislature recognized that "the potential loss of value of such facilities…often deters such private utility from…extending its facilities to provide in many areas a water supply essential to the health and safety of the citizens thereof."[332]

The intent language shows that the purpose of the Service Duplication Law was to provide a remedy to protect the investment of privately owned utilities providing water service, and to mitigate the chilling effect of local government potentially encroaching upon a private water supplier's service area and customers. And, while sections 1503 and 1504 of the Public Utilities Code may have become necessary due to a pattern of municipalities extending duplicative service in certain areas and thus undermining the value of privately owned facilities or equipment, there is no indication that the Legislature intended to convert the provision of water service to a governmental function, as the claimant seems to imply. And indeed the acknowledgement of a deterrent effect and the statutory requirement of compensation suggests that the Legislature believed that private utility companies serving water in areas of the State would continue to be necessary into the future, and for that reason their investments should be protected, lest private entities choose not to offer such services in the first instance. The courts have observed that this is especially important with respect to water utilities.[333] Without the Service Duplication Law, infringement on the service area of a private water utility, and the

[328] Public Utilities Code section 1503.

[329] Public Utilities Code section 1504.

[330] Public Utilities Code section 1504.

[331] Public Utilities Code section 1501.

[332] Public Utilities Code section 1501.

[333] *Cucamonga County Water Dist. v. Southwest Water Co.* (1971) 22 Cal.App.3d 245, 259 ["The special importance attached to efficient and economical use and distribution of water in the arid western states, and the provision of the California Constitution that the use of all water is subject to regulation by the State (Cal.Const. Art. XIV) justifies the classification under consideration here."].

potential loss of business, might not be compensable at all, unless the facilities and equipment were fully acquired by eminent domain.[334] The Service Duplication Law, in short, is a Legislative innovation designed to protect the viability of private water utilities, in recognition of their long term necessity to provide water in certain areas of the State.

Accordingly, the "Service Duplication Law," supports (but is not essential to) the finding that the test claim order does not impose a *governmental* function of providing a service to the public within the meaning of article XIII B, section 6.

ii. The test claim order does not impose a governmental function to ensure safe schools on PWSs, as asserted by the claimant; that governmental function remains with the schools who contact the PWS for lead testing.

Finally, the claimant argues that the "program" at issue in this Test Claim is not providing water through a PWS at all; rather "[t]he lead testing program in the Permit Amendment carries out a…governmental function of ensuring safe schools."[335] The claimant asserts that the history of the test claim order, including failed SB 334 and the associated veto message, "demonstrates [the order's] purpose is to provide safe schools, a governmental function, while shifting financial responsibility to local water agencies."[336] The claimant argues that "[h]ad SB 334 become law and schools had to test water for lead to confirm their students had safe, clean drinking water, the schools would have been performing a governmental function subject to reimbursement from the state."[337] The claimant concludes that the required testing "does not lose its characterization as a 'governmental function of providing services to the public' under the Supreme Court's test, merely because the obligation is transferred from schools to water agencies."[338]

The Commission disagrees. As noted in the Background, SB 334 proposed to amend the "Lead-Safe Schools Protection Act" in the Education Code to require school districts with water sources or drinking water supplies that do not meet U.S. EPA standards to close access to those drinking water sources, provide alternative drinking water sources if the school did not have the minimum number of drinking fountains required by law, and to provide access to free, fresh, and clean drinking water during meal times in the food service areas of the schools under its jurisdiction.[339] Then Governor Brown vetoed SB 334, believing that it would impose a reimbursable mandate of "uncertain but possibly very large magnitude."[340]

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[334] *Cucamonga County Water Dist. v. Southwest Water Co.* (1971) 22 Cal.App.3d 245, 259.

[335] Exhibit E, Claimant's Rebuttal Comments, page 6.

[336] Exhibit E, Claimant's Rebuttal Comments, page 7.

[337] Exhibit E, Claimant's Rebuttal Comments, page 7.

[338] Exhibit E, Claimant's Rebuttal Comments, page 7.

[339] Senate Bill 334 sought to amend Education Code sections 32242 and 38086, and add sections 32241.5, 32246, and 32249 to the Education Code. Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 148 [SB 334, Legislative Counsel's Digest].

[340] Exhibit E, Claimant's Rebuttal Comments, page 7 [quoting Governor's Veto Message, SB 334 (Oct. 9, 2015)].

There is no dispute that school districts, as part of the educational services they provide to students, have an existing affirmative duty to protect students and to keep the school premises safe and welcoming. The courts have found that:

> A special relationship is formed between a school district and its students resulting in the imposition of an affirmative duty on the school district to take all reasonable steps to protect its students. This affirmative duty arises, in part, based on the compulsory nature of education. (*Rodriguez v. Inglewood Unified School Dist.* (1986) 186 Cal.App.3d 707, 714-715; … see also Cal.Const., art. 1, § 28, subd. (c) [students have inalienable right to attend safe, secure, and peaceful campuses]; Ed. Code, § 48200 [children between 6 and 18 years subject to compulsory full-time education].) "The right of all students to a school environment fit for learning cannot be questioned. Attendance is mandatory and the aim of all schools is to teach. Teaching and learning cannot take place without the physical and mental well-being of the students. The school premises, in short, must be safe and welcoming." (*In re William G.* (1985) 40 Cal.3d 550, 563 …)[341]

In addition, existing law requires school districts to furnish and repair school property and to "keep the schoolhouses in repair during the time school is taught therein . . . ."[342]

The test claim order, and similar orders issued by the SWRCB, require a PWS to test for the presence of lead in drinking water fixtures on school property *upon request of a school in its service area*. A PWS has no duty to ensure safe schools, as alleged by the claimant; the schools maintain and exercise that duty with their request for lead testing. The claimant, and other public entities operating water systems that serve K-12 schools, are subject to the test claim order by virtue of their decision to provide water. Like maintaining elevators, providing water is not a *governmental* function, as explained in the above analysis.

Therefore, the test claim order does not impose a *governmental* function of providing a service to the public within the meaning of article XIII B, section 6 of the California Constitution.

V. Conclusion

Based on the foregoing analysis, the Commission denies this Test Claim and finds that the test claim order does not impose a new program or higher level of service and, thus, does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

Accordingly, no findings are made on the issue of whether the test claim order results in increased costs mandated by the state within the meaning of Government Code sections 17514 and 17556.

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[341] *M.W. v. Panama Buena Vista Union School Dist.* (2003) 110 Cal.App.4th 508, 517. (Exhibit D, Finance's Comments on the Test Claim.)

[342] Education Code sections 17565 and 17593.

RE: **Decision**

Lead Sampling in Schools: Public Water System No. 370020, 17-TC-03
Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017
City of San Diego, Claimant

On March 22, 2019, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

Dated: March 27, 2019

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 March 27, 2019, I served the:

- **Decision adopted March 22, 2019**
- **Claimant's PowerPoint Presentation Presented at the Commission Hearing on March 22, 2019 filed March 21, 2019**

  Lead Sampling in Schools: Public Water System No. 3710020, 17-TC-03
  Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017
  City of San Diego, 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 March 27, 2019 at Sacramento, California.

Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 3/25/19

Claim Number: 17-TC-03

Matter: Lead Sampling in Schools: Public Water System No. 3710020

Claimant: City of San Diego

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, Finance Director, *City of Citrus Heights*
Finance Department, 6237 Fountain Square Dr, Citrus Heights , CA 95621
Phone: (916) 725-2448
Finance@citrusheights.net

Steven Adams, City Manager, *City of King City*
212 South Vanderhurst Avenue, King City, CA 93930
Phone: (831) 386-5925
sadams@kingcity.com

Joe Aguilar, Finance Director, *City of Live Oak*
Finance, 9955 Live Oak Blvd, Live Oak, CA 95953
Phone: (530) 695-2112
jaguilar@liveoakcity.org

Ron Ahlers, Finance Director / City Treasurer, *City of Moorpark*
Finance Department, 799 Moorpark Ave. , Moorpark, CA 93021
Phone: (805) 517-6249
RAhlers@MoorparkCA.gov

Jason Al-Imam, Director of Finance, *City of Fountain Valley*
10200 Slater Avenue, Fountain Valley, CA 92708
Phone: (714) 593-4418
jason.alimam@fountainvalley.org

Douglas Alessio, Administrative Services Director, *City of Livermore*
Finance Department, 1052 South Livermore Avenue, Livermore, CA 94550
Phone: (925) 960-4300
finance@cityoflivermore.net

Tiffany Allen, Treasury Manager, *City of Chula Vista*

Finance Department, 276 Fourth Avenue, Chula Vista, CA 91910
Phone: (619) 691-5250
tallen@chulavistaca.gov

Mark Alvarado, *City of Monrovia*
415 S. Ivy Avenue, Monrovia, CA 91016
Phone: N/A
malvarado@ci.monrovia.ca.us

Kofi Antobam, Finance Director, *Town of Apple Valley*
14955 Dale Evans Parkway, Apple Valley, CA 92307
Phone: (760) 240-7000
kantobam@applevalley.org

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

Rosanna Arguelles, *City of Del Mar*
1050 Camino Del Mar, Del Mar, CA 92014
Phone: (888) 704-3658
rarguelles@delmar.ca.us

Carol Augustine, *City of Burlingame*
501 Primrose Road, Burlingame, CA 94010
Phone: (650) 558-7210
caugustine@burlingame.org

Harmeet Barkschat, *Mandate Resource Services,LLC*
5325 Elkhorn Blvd. #307, Sacramento, CA 95842
Phone: (916) 727-1350
harmeet@calsdrc.com

Robert Barron III, Finance Director, *City of Atherton*
Finance Department, 91 Ashfield Rd, Atherton, CA 94027
Phone: (650) 752-0552
rbarron@ci.atherton.ca.us

David Baum, Finance Director, *City of San Leandro*
835 East 14th St., San Leandro, CA 94577
Phone: (510) 577-3376
dbaum@sanleandro.org

Lacey Baysinger, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
lbaysinger@sco.ca.gov

Ray Beeman, Chief Fiscal Officer, *City of Gardena*
1700 West 162nd Street, Gardena, CA 90247
Phone: (310) 217-9516
rbeeman@cityofgardena.org

Jason Behrmann, Interim City Manager, *City of Elk Grove*
8401 Laguna Palms Way, Elk Grove, CA 95758
Phone: (916) 478-2201
jbehrmann@elkgrovecity.org

Maria Bemis, *City of Porterville*
291 North Main Street, Porterville, CA 93257
Phone: N/A
mbemis@ci.porterville.ca.us

Paul Benoit, City Administrator, *City of Piedmont*
120 Vista Avenue, Piedmont, CA 94611
Phone: (510) 420-3042
pbenoit@ci.piedmont.ca.us

Nils Bentsen, City Manager, *City of Hesperia*
9700 Seventh Ave, Hesperia, CA 92345
Phone: (760) 947-1025
nbentsen@cityofhesperia.us

Marron Berkuti, Finance Manager, *City of Solana Beach*
City Hall 635 S. HWY 101, Solana Beach, CA 92075
Phone: (858) 720-2460
mberkuti@cosb.org

Robin Bertagna, *City of Yuba City*
1201 Civic Center Blvd, Yuba City, CA 95993
Phone: N/A
rbertagn@yubacity.net

Josh Betta, Finance Director, *City of San Marino*
2200 Huntington Drive, San Marino, CA 91108
Phone: (626) 300-0708
jbetta@cityofsanmarino.org

Heidi Bigall, Director of Admin Services, *City of Tiburon*
Administration, 1505 Tiburon Blvd., Tiburon, CA 94920
Phone: (415) 435-7373
hbigall@townoftiburon.org

Teresa Binkley, Director of Finance, *City of Taft*
Finance Department, 209 E. Kern St. , Taft, CA 93268
Phone: (661) 763-1350
tbinkley@cityoftaft.org

Barbara Bishop, Finance Manager, *City of San Dimas*
Finance Division, 245 East Bonita Avenue, San Dimas, CA 91773
Phone: (909) 394-6220
administration@ci.san-dimas.ca.us

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

Dalacie Blankenship, Finance Manager, *City of Jackson*
Administration / Finance, 33 Broadway, Sacramento, CA 95818
Phone: (209) 223-1646
dblankenship@ci.jackson.ca.us

Jaime Boscarino, Interim Finance Director, *City of Thousand Oaks*
2100 Thousand Oaks Boulevard, Thousand Oaks, CA 91362

Phone: (805) 449-2200
jboscarino@toaks.org

Carol Bouchard, Interim Finance Director, *City of Monterey*
735 Pacific Street, Suite A, Monterey, CA 93940
Phone: (831) 646-3940
bouchard@monterey.org

David Brandt, City Manager, *City of Cupertino*
10300 Torre Avenue, Cupertino, CA 95014-3202
Phone: 408.777.3212
manager@cupertino.org

Robert Bravo, Finance Director , *City of Port Hueneme*
Finance Department, 250 N. Ventura Road, Port Hueneme, CA 93041
Phone: (805) 986-6524
rbravo@cityofporthueneme.org

Molly Brennan, Finance Manager, *City of Lemon Grove*
3232 Main Street, Lemon Grove, CA 91945
Phone: (619) 825-3803
mbrennan@lemongrove.ca.gov

Dawn Brooks, *City of Fontana*
8353 Sierra Way, Fontana, CA 92335
Phone: N/A
dbrooks@fontana.org

Ken Brown, Acting Director of Administrative Services, *City of Irvine*
One Civic Center Plaza, Irvine, CA 92606
Phone: (949) 724-6255
Kbrown@cityofirvine.org

Christa Buhagiar, Director of Finance/Treasurer, *City of Chino Hills*
14000 City Center Drive, Chino Hills, CA 91709
Phone: (909) 364-2460
finance@chinohills.org

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

J. Bradley Burgess, *MGT of America*
895 La Sierra Drive, Sacramento, CA 95864
Phone: (916)595-2646
Bburgess@mgtamer.com

Rob Burns, *City of Chino*
13220 Central Avenue, Chino, CA 91710
Phone: N/A
rburns@cityofchino.org

Regan M Cadelario, City Manager, *City of Fortuna*
Finance Department, 621 11th Street, Fortuna, CA 95540
Phone: (707) 725-1409
rc@ci.fortuna.ca.us

Evelyn Calderon-Yee, Bureau Chief, *State Controller's Office*

Local Government Programs and Services, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-5919
ECalderonYee@sco.ca.gov

Jennifer Callaway, Finance Director, *CIty of Morro Bay*
595 Harbor Street, Morro Bay, CA 93442
Phone: (805) 772-6201
jcallaway@morrobayca.gov

Joy Canfield, *City of Murrieta*
1 Town Square, Murreita, CA 92562
Phone: N/A
jcanfield@murrieta.org

Gwendolyn Carlos, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-0706
gcarlos@sco.ca.gov

Pete Carr, City Manager/Finance Director, *City of Orland*
PO Box 547, Orland, CA 95963
Phone: (530) 865-1602
CityManager@cityoforland.com

Daniel Carrigg, Deputy Executive Director/Legislative Director, *League of California Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8222
Dcarrigg@cacities.org

Daria Carrillo, Director of Finance / Town Treasurer, *Town of Corte Madera*
300 Tamalpais Drive, Corte Madera, CA 94925
Phone: (415) 927-5050
dcarrillo@tcmmail.org

Roger Carroll, Finance Director/Treasurer, *Town of Loomis*
Finance Department, 3665 Taylor Road, Loomis, CA 95650
Phone: (916) 652-1840
rcarroll@loomis.ca.gov

Jack Castro, Director of Finance, *City of Huron*
Finance Department, 36311 Lassen Avenue, PO Box 339, Huron, CA 93234
Phone: (559) 945-3020
findir@cityofhuron.com

Rolando Charvel, City Comptroller, *City of San Diego*
202 C Street, MS-6A, San Diego, CA 92101
Phone: (619) 236-6060
DoF@sandiego.gov

Misty Cheng, Finance Director, *City of Adelanto*
11600 Air Expressway, Adelanto, CA 92301
Phone: (760) 246-2300
mcheng@ci.adelanto.ca.us

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

John Chinn, Town Manager, *Town of Ross*
P.O. Box 320, Ross, CA 94957
Phone: (415) 453-4153
jchinn@townofross.org

Lawrence Chiu, Director of Finance & Administrative Services, *City of Daly City*
Finance and Administrative Services, 333 90th Street, Daly City, CA 94015
Phone: (650) 991-8049
lchiu@dalycity.org

DeAnna Christensen, Director of Finance, *City of Modesto*
1010 10th Street, Suite 5200, Modesto, CA 95354
Phone: (209) 577-5371
dachristensen@modestogov.com

Carmen Chu, Assessor-Recorder, *City and County of San Francisco*
1 Dr. Carlton B. Goodlett Place, City Hall, Room 190, San Francisco, CA 94102-4698
Phone: (415) 554-5596
assessor@sfgov.org

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

Hannah Chung, Finance Director, *City of Tehachapi*
Finance Department, 115 S. Robinson St., Tehachapi, CA 93561
Phone: (661) 822-2200
hchung@tehachapicityhall.com

Mario Cifuentez, Deputy City Manager, *City of Visalia*
707 West Acequia Avenue, Visalia, CA 93291
Phone: (559) 713-4474
Mario.Cifuentez@visalia.city

Tony Clark, Finance Manager, *City of Novato*
75 Rowland Place Northwest, Novato, CA 94945
Phone: (415) 899-8912
TClark@novato.org

Rochelle Clayton, Administrative Services Director, *City of Banning*
99 East Ramsey Street, Banning, CA 92220
Phone: (951) 922-3105
rclayton@ci.banning.ca.us

Geoffrey Cobbett, Treasurer, *City of Covina*
Finance Department, 125 E. College Street, Covina, CA 91723
Phone: (626) 384-5506
gcobbett@covinaca.gov

Brian Cochran, Finance Director, *City of Napa*
P.O. Box 660, Napa, CA 94559-0660
Phone: (707) 257-9510
bcochran@cityofnapa.org

Michael Coleman, *Coleman Advisory Services*
2217 Isle Royale Lane, Davis, CA 95616

Phone: (530) 758-3952
coleman@muni1.com

Shannon Collins, Finance Manager, *City of El Cerrito*
10890 San Pablo Avenue, El Cerrito, CA 94530-2392
Phone: N/A
scollins@ci.el-cerrito.ca.us

Harriet Commons, *City of Fremont*
P.O. Box 5006, Fremont, CA 94537
Phone: N/A
hcommons@fremont.gov

Stephen Conway, *City of Los Gatos*
110 E. Main Street, Los Gatos, CA 95031
Phone: N/A
sconway@losgatosca.gov

Julia Cooper, *City of San Jose*
Finance, 200 East Santa Clara Street, San Jose, CA 95113
Phone: (408) 535-7000
Finance@sanjoseca.gov

Viki Copeland, *City of Hermosa Beach*
1315 Valley Drive, Hermosa Beach, CA 90254
Phone: N/A
vcopeland@hermosabch.org

Drew Corbett, Finance Director, *City of San Mateo*
330 West 20th Avenue, San Mateo, CA 94403-1388
Phone: (650) 522-7102
dcorbett@cityofsanmateo.org

Erika Cortez, *City of Imperial Beach*
825 Imperial Beach Boulevard, Imperial Beach, CA 91932
Phone: (619) 423-8303
ecortez@imperialbeachca.gov

Lis Cottrell, Finance Director, *City of Anderson*
Finance Department, 1887 Howard Street, Anderson , CA 96007
Phone: (530) 378-6626
lcottrell@ci.anderson.ca.us

Jeremy Craig, Finance Director, *City of Vacaville*
Finance Department, 650 Merchant Street, Vacaville, CA 95688
Phone: (707) 449-5128
jcraig@cityofvacaville.com

Christine Crosby, Interim Finance Director, *City of South San Francisco*
P.O. Box 711, South San Francisco, CA 94083
Phone: (650) 877-8500
christina.crosby@ssf.net

Gavin Curran, *City of Laguna Beach*
505 Forest Avenue, Laguna Beach, CA 92651
Phone: N/A
gcurran@lagunabeachcity.net

Cindy Czerwin, Director of Administrative Services, *City of Watsonville*

250 Main Street, Watsonville, CA 95076
Phone: (831) 768-3450
cindy.czerwin@cityofwatsonville.org

Anita Dagan, Manager, Local Reimbursement Section, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 324-4112
Adagan@sco.ca.gov

Chuck Dantuono, Director of Administrative Services, *City of Highland*
Administrative Services , 27215 Base Line , Highland, CA 92346
Phone: (909) 864-6861
cdantuono@cityofhighland.org

Fran David, City Manager, *City of Hayward*
Finance Department, 777 B Street, Hayward, CA 94541
Phone: (510) 583-4000
citymanager@hayward-ca.gov

Daniel Dawson, City Manager, *City of Del Rey Oaks*
Finance Department, 650 Canyon Del Rey Rd, Del Rey Oaks, CA 93940
Phone: (831) 394-8511
ddawson@delreyoaks.org

Victoria Day, Office Specialist, *City of Canyon Lake*
31516 Railroad Canyon Road, Canyon Lake, CA 92587
Phone: (951) 244-2955
vday@cityofcanyonlake.com

Dilu DeAlwis, *City of Colton*
650 North La Cadena Drive, Colton, CA 92324
Phone: (909) 370-5036
financedept@coltonca.gov

Suzanne Dean, Deputy Finance Director, *City of Ceres*
Finance Department, 2220 Magnolia Street, Ceres, CA 95307
Phone: (209) 538-5757
Suzanne.Dean@ci.ceres.ca.us

Gigi Decavalles-Hughes, Director of Finance, *City of Santa Monica*
Finance, 1717 4th Street, Suite 250, Santa Monica, CA 90401
Phone: (310) 458-8281
gigi.decavalles@smgov.net

Sharon Del Rosario, Finance Director, *City of Palos Verdes Estates*
340 Palos Verdes Dr West, Palos Verdes Estates, CA 90274
Phone: (310) 378-0383
Sdelrosario@Pvestates.Org

Steve Diels, City Treasurer, *City of Redondo Beach*
City Treasurer's Department, 415 Diamond Street, Redondo Beach, CA 90277
Phone: (310) 318-0652
steven.diels@redondo.org

Richard Digre, *City of Union City*
34009 Alvarado-Niles Road, Union City, CA 94587

Phone: N/A
rdigre@ci.union-city.ca.us

Steven Dobrenen, Finance Director, *City of Cudahy*
5220 Santa Ana Street, Cudahy, CA 90201
Phone: (831) 386-5925
sdobrenen@cityofcudahyca.gov

Kathryn Downs, Finance Director, *City of Santa Ana*
20 Civic Center Plaza, Santa Ana, CA 92701
Phone: (714) 647-5420
kdowns@santa-ana.org

Richard Doyle, City Attorney, *City of San Jose*
200 E. Santa Clara Street, 16th Floor, San Jose, CA 95113
Phone: (408) 535-1900
richard.doyle@sanjoseca.gov

Randall L. Dunn, City Manager, *City of Colusa*
Finance Department, 425 Webster St. , Colusa, CA 95932
Phone: (530) 458-4740
citymanager@cityofcolusa.com

Cheryl Dyas, *City of Mission Viejo*
200 Civic Center, Mission Viejo, CA 92691
Phone: N/A
cdyas@cityofmissionviejo.org

Kerry Eden, *City of Corona*
400 S. Vicentia Avenue. Suite 320, Corona, CA 92882
Phone: (951) 817-5740
kerry.eden@ci.corona.ca.us

Pamela Ehler, *City of Brentwood*
150 City Park Way, Brentwood, CA 94513
Phone: N/A
pehler@brentwoodca.gov

Bob Elliot, *City of Glendale*
141 North Glendale Ave, Ste. 346, Glendale, CA 91206-4998
Phone: N/A
belliot@ci.glendale.ca.us

Kelly Ent, Director of Admin Services, *City of Big Bear Lake*
Finance Department, 39707 Big Bear Blvd, Big Bear Lake, CA 92315
Phone: (909) 866-5831
kent@citybigbearlake.com

Tina Envia, Finance Manager, *City of Waterford*
Finance Department, 101 E Street, Waterford, CA 95386
Phone: (209) 874-2328
finance@cityofwaterford.org

Vic Erganian, Deputy Finance Director, *City of Pasadena*
Finance Department, 100 N. Garfield Ave, Room S348, Pasadena, CA 91109-7215
Phone: (626) 744-4355
verganian@cityofpasadena.net

Eric Erickson, Director of Finance and Human Resources , *City of Mill Valley*

Department of Finance and Human Resources , 26 Corte Madera Avenue , Mill Valley, CA 94941
Phone: (415) 388-4033
finance@cityofmillvalley.org

Steve Erlandson, Finance Director/City Treasurer, *City of Laguna Niquel*
Finance Director/City Treasurer, 30111 Crown Valley Parkway, Laguna Niguel, CA 92677
Phone: (949) 362-4300
serlandson@cityoflagunaniguel.org

Jennifer Erwin, Assistant Finance Director , *City of Perris*
Finance Department, 101 N. D Street, Perris, CA 92570
Phone: (951) 943-4610
jerwin@cityofperris.org

Sam Escobar, City Manager, *City of Parlier*
1100 East Parlier Avenue, Parlier, CA 93648
Phone: (559) 646-3545
sescobar@parlier.ca.us

Paul Espinoza, *City of Alhambra*
111 South First Street, Alhambra, CA 91801
Phone: N/A
pespinoza@cityofalhambra.org

Sharif Etman, Administrative Services Director, *City of Los Altos*
1 North San Antonio Road, Los Altos, CA 94022
Phone: (650) 947-2700
setman@losaltosca.gov

Marshall Eyerman, Chief Financial Officer, *City of Moreno Valley*
14177 Frederick Street, Moreno Valley, CA 92552-0805
Phone: (951) 413-3021
marshalle@moval.org

Brad Farmer, Director of Finance, *City of Pittsburg*
65 Civic Avenue, Pittsburg, CA 94565
Phone: (925) 252-4848
bfarmer@ci.pittsburg.ca.us

Lori Ann Farrell, Finance Director, *City of Huntington Beach*
2000 Main St., Huntington Beach, CA 92648
Phone: (714) 536-5630
loriann.farrell@surfcity-hb.org

Sandra Featherson, Administrative Services Director, *City of Solvang*
Finance, 1644 Oak Street, Solvang, CA 93463
Phone: (805) 688-5575
sandraf@cityofsolvang.com

Donna Ferebee, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
donna.ferebee@dof.ca.gov

Matthew Fertal, City Manager, *City of Garden Grove*
Finance Department, 11222 Acacia Parkway, Garden Grove, CA 92840
Phone: (714) 741-5000
CityManager@ci.garden-grove.ca.us

Alan Flora, Finance Director, *City of Clearlake*
14050 Olympic Drive, Clearlake, CA 95422
Phone: (707) 994-8201
aflora@clearlake.ca.us

Lisa Fowler, Finance Director, *City of San Marcos*
1 Civic Center Drive, San Marcos, CA 92069
Phone: (760) 744-1050
lfowler@san-marcos.net

James Francis, *City of Folsom*
50 Natoma Street, Folsom, CA 95630
Phone: N/A
jfrancis@folsom.ca.us

Charles Francis, Administrative Services Director/Treasurer, *City of Sausalito*
Finance, 420 Litho Street, Sausalito, CA 94965
Phone: (415) 289-4105
cfrancis@ci.sausalito.ca.us

Eric Frost, Interim Finance Director, *City of Marina*
211 Hillcrest Ave, Marina, CA 93933
Phone: (831) 884-1221
efrost@cityofmarina.org

Will Fuentes, Director of Financial Services, *City of Milpitas*
455 East Calaveras Boulevard, Milpitas, CA 95035
Phone: (408) 586-3111
wfuentes@ci.milpitas.ca.gov

Harold Fujita, *City of Los Angeles*
Department of Recreation and Parks, 211 N. Figueroa Street, 7th Floor, Los Angeles, CA 90012
Phone: (213) 202-3222
harold.fujita@lacity.org

Mary Furey, *City of Saratoga*
13777 Fruitvale Avenue, Saratoga, CA 95070
Phone: N/A
mfurey@saratoga.ca.us

Carolyn Galloway-Cooper, Finance Director, *City of Buellton*
Finance Department, 107 West Highway 246, Buellton, CA 93427
Phone: (805) 688-5177
carolync@cityofbuellton.com

Rebecca Garcia, *City of San Bernardino*
300 North , San Bernardino, CA 92418-0001
Phone: (909) 384-7272
garcia_re@sbcity.org

Marisela Garcia, Finance Director, *City of Riverbank*
Finance Department, 6707 Third Street , Riverbank, CA 95367
Phone: (209) 863-7109
mhgarcia@riverbank.org

Danielle Garcia, Director of Finance, *City of Redlands*
PO Box 3005, Redlands, CA 92373

Phone: (909) 798-7510
dgarcia@cityofredlands.org

Jeffry Gardner, City Manager & Finance Director, *City of Plymouth*
P.O. Box 429, Plymouth, CA 95669
Phone: (209) 245-6941
jgardner@cityofplymouth.org

George Gascon, District Attorney, *City and County of San Francisco*
850 Bryant Street, Room 322, San Francisco, CA 94103
Phone: (415) 553-1751
robyn.burke@sfgov.org

Susan Geanacou, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-3274
susan.geanacou@dof.ca.gov

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

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

Jeri Gilley, Finance Director, *City of Turlock*
156 S. Broadway, Ste 230, Turlock, CA 95380
Phone: (209) 668-5570
jgilley@turlock.ca.us

Cindy Giraldo, *City of Burbank*
301 E. Olive Avenue, Financial Services Department, Burbank, CA 91502
Phone: N/A
cgiraldo@ci.burbank.ca.us

David Glasser, Finance Director, *City of Martinez*
525 Henrietta Street, Martinez, CA 94553
Phone: (925) 372-3579
dglasser@cityofmartinez.org

Donna Goldsmith, Director of Finance, *City of Poway*
PO Box 789, Poway, CA 92074
Phone: (858) 668-4411
dgoldsmith@poway.org

Jose Gomez, Director of Finance and Administrative Services, *City of Lakewood*
5050 Clark Avenue, Lakewood, CA 90712
Phone: (562) 866-9771
jgomez@lakewoodcity.org

Jesus Gomez, City Manager, *City of El Monte*
Finance Department, 11333 Valley Blvd, El Monte, CA 91731-3293
Phone: (626) 580-2001
citymanager@elmonteca.gov

Ana Gonzalez, City Clerk, *City of Woodland*

300 First Street, Woodland, CA 95695
Phone: (530) 661-5830
ana.gonzalez@cityofwoodland.org

Gabe Gonzalez, City Administrator, *City of Gilroy*
7351 Rosanna Street, Gilroy, CA 95020
Phone: (408) 846-0202
Gabe.Gonzalez@ci.gilroy.ca.us

Jim Goodwin, City Manager, *City of Live Oak*
9955 Live Oak Blvd., Live Oak, CA 95953
Phone: (530) 695-2112
liveoak@liveoakcity.org

Michelle Greene, City Manager, *City of Goleta*
130 Cremona Drive, Suite B, Goleta, CA 93117
Phone: (805) 961-7500
mgreene@cityofgoleta.org

John Gross, *City of Long Beach*
333 W. Ocean Blvd., 6th Floor, Long Beach, CA 90802
Phone: N/A
john.gross@longbeach.gov

Troy Grunklee, Finance Manager, *City of La Puente*
15900 East Main Street, La Puente, CA 91744
Phone: (626) 855-1500
tgrunklee@lapuente.org

Shelly Gunby, Director of Financial Management, *City of Winters*
Finance, 318 First Street, Winters, CA 95694
Phone: (530) 795-4910
shelly.gunby@cityofwinters.org

Lani Ha, Finance Manager/Treasurer, *City of Danville*
510 La Gonda Way, Danville, CA 94526
Phone: (925) 314-3311
lha@danville.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, Project Manager, *City of Huntington Beach*
2000 Main Street, Huntington Beach, CA 92648
Phone: (714) 536-5907
Sunny.han@surfcity-hb.org

Toni Hannah, Director of Finance, *City of Pacific Grove*
300 Forest Avenue, Pacific Grove, CA 93950

Phone: (831) 648-3100
thannah@cityofpacificgrove.org

Anne Haraksin, *City of La Mirada*
13700 La Mirada Blvd., La Mirada, CA 90638
Phone: N/A
aharaksin@cityoflamirada.org

Jenny Haruyama, City Manager, *City of Scotts Valley*
1 Civic Center Drive, Scotts Valley, CA 95066
Phone: (831) 440-5600
jharuyama@scottsvalley.org

Jim Heller, City Treasurer, *City of Atwater*
Finance Department, 750 Bellevue Rd, Atwater, CA 95301
Phone: (209) 357-6310
finance@atwater.org

Jennifer Hennessy, *City of Temecula*
41000 Main St., Temecula, CA 92590
Phone: N/A
Jennifer.Hennessy@cityoftemecula.org

Darren Hernandez, *City of Santa Clarita*
23920 Valencia Blvd., Suite 295, Santa Clarita, CA 91355
Phone: N/A
dhernandez@santa-clarita.com

Dennis Herrera, City Attorney, *City and County of San Francisco*
Office of the City Attorney, 1 Dr. Carton B. Goodlett Place, Rm. 234, San Francisco, CA 94102
Phone: (415) 554-4700
brittany.feitelberg@sfgov.org

Travis Hickey, Director of Finance and Administrative Services, *City of Santa Fe Springs*
11710 East Telegraph Road, Santa Fe Springs, CA 90670
Phone: (562) 868-0511
travishickey@santafesprings.org

Robert Hicks, *City of Berkeley*
2180 Milvia Street, Berkeley, CA 94704
Phone: N/A
finance@ci.berkeley.ca.us

Rod Hill, *City of Whittier*
13230 Penn Street, Whittier, CA 90602
Phone: N/A
rhill@cityofwhittier.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

Lorenzo Hines Jr. , Assistant City Manager, *City of Pacifica*
170 Santa Maria Avenue, Pacifica, CA 94044
Phone: (650) 738-7409
lhines@ci.pacifica.ca.us

Daphne Hodgson, *City of Seaside*

440 Harcourt Avenue, Seaside, CA 93955
Phone: N/A
dhodgson@ci.seaside.ca.us

S. Rhetta Hogan, Finance Director, *City of Yreka*
Finance Department, 701 Fourth Street, Yreka, CA 96097
Phone: (530) 841-2386
rhetta@ci.yreka.ca.us

Linda Hollinsworth, Finance Director/Treasurer, *City of Hawaiian Gardens*
21815 Pioneer Blvd, Hawaiian Gardens, CA 90716
Phone: (562) 420-2641
lindah@hgcity.org

Betsy Howze, Finance Director, *City of Rohnert Park*
130 Avram Avenue, Rohnert Park, CA 94928-1180
Phone: (707) 585-6717
bhowze@rpcity.org

Susan Hsieh, Finance Director, *City of Emeryville*
1333 Park Avenue, Emeryville, CA 94608
Phone: (510) 596-4352
shsieh@emeryville.org

Shannon Huang, *City of Arcadia*
240 West Huntington Drive, Arcadia, CA 91007
Phone: N/A
shuang@ci.arcadia.ca.us

Lewis Humphries, Finance Director, *City of Newman*
Finance Department, 938 Fresno Street, Newman, CA 95360
Phone: (209) 862-3725
lhumphries@cityofnewman.com

Heather Ippoliti, Administrative Services Director, *City of Healdsburg*
401 Grove Street, Healdsburg, CA 95448
Phone: (707) 431-3307
hippoliti@ci.healdsburg.ca.us

Edward Jewik, *County of Los Angeles*
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012
Phone: (213) 974-8564
ejewik@auditor.lacounty.gov

Talika Johnson, Director, *City of Azusa*
213 E Foothill Blvd, Azusa, CA 91702
Phone: (626) 812-5203
tjohnson@ci.azusa.ca.us

Susan Jones, Finance Manager, *City of Pismo Beach*
Finance, 760 Mattie Road, Pismo Beach, CA 93449
Phone: (805) 773-7012
swjones@pismobeach.org

Matt Jones, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
matt.jones@csm.ca.gov

Toni Jones, Finance Director , *City of Kerman*
Finance Department, 850 S. Madera Avenue, Kerman, CA 93630
Phone: (559) 846-4682
tjones@cityofkerman.org

Kim Juran Karageorgiou, Administrative Services Director, *City of Rancho Cordova*
2729 Prospect Park Drive , Rancho Cordova, CA 95670
Phone: (916) 851-8731
kjuran@cityofranchocordova.org

Will Kaholokula, *City of Bell Gardens*
7100 S. Garfield Avenue, Bell Gardens, CA 90201
Phone: (562) 806-7700
wkaholokula@bellgardens.org

Dennis Kauffman, Finance Director, *City of Roseville*
311 Vernon Street, Roseville, CA 95678
Phone: (916) 774-5313
dkauffman@roseville.ca.us

Naomi Kelly, City Administrator, *City and County of San Francisco*
City Hall, Room 362, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102
Phone: (415) 554-4851
city.administrator@sfgov.org

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

Jody Kershberg, Director of Administrative Services, *City of Simi Valley*
2929 Tapo Canyon Road, Simi Valley, CA 93063
Phone: (805) 583-6700
jkershberg@simivalley.org

Tim Kiser, City Manager, *City of Grass Valley*
125 East Main Street, Grass Valley, CA 95945
Phone: (530) 274-4312
timk@cityofgrassvalley.com

Craig Koehler, Finance Director, *City of South Pasadena*
1414 Mission Street, South Pasadena, CA 91030
Phone: (626) 403-7250
ckoehler@southpasadenaca.gov

Will Kolbow, Finance Director, *City of Orange*
300 E. Chapman Avenue, Orange, CA 92866-1508
Phone: (714) 744-2234
WKolbow@cityoforange.org

Patty Kong, *City of Mountain View*
P.O. Box 7540, Mountain View, CA 94039-7540
Phone: N/A
patty.kong@mountainview.gov

James Krueger, Director of Administrative Services, *City of Coronado*
1825 Strand Way, Coronado, CA 92118

Phone: (619) 522-7309
jkrueger@coronado.ca.us

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

Karina Lam, *City of Paramount*
16400 Colorado Avenue, Paramount, CA 90723
Phone: N/A
klam@paramountcity.com

Ramon Lara, City Administrator, *City of Woodlake*
350 N. Valencia Blvd., Woodlake, CA 93286
Phone: (559) 564-8055
rlara@ci.woodlake.ca.us

Nancy Lassey, Finance Administrator, *City of Lake Elsinore*
130 South Main Street, Lake Elsinore, CA 92530
Phone: N/A
nlassey@lake-elsinore.org

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

Tamara Layne, *City of Rancho Cucamonga*
10500 Civic Center Drive, Rancho Cucamonga, CA 91730
Phone: (909) 477-2700
Tamara.Layne@cityofrc.us

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

Linda Leaver, Finance Director, *City of Crescent City*
377 J Street, Crescent City, CA 95531
Phone: (707) 464-7483
lleaver@crescentcity.org

Gloria Leon, Admin Services Director, *City of Calistoga*
Administrative Services, 1232 Washington Street, Calistoga, CA 94515
Phone: (707) 942-2802
GLeon@ci.calistoga.ca.us

Grace Leung, City Manager, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3001
gleung@newportbeachca.gov

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

Joseph Lillio, Director of Finance, *City of El Segundo*

350 Main Street, El Segundo, CA 90245-3813
Phone: (310) 524-2315
jlillio@elsegundo.org

Michael Lima, Director of Finance, *City of Fresno*
2600 Fresno St. Rm. 2157, Fresno, CA 93721
Phone: (559) 621-2489
Michael.Lima@fresno.gov

Gilbert A. Livas, City Manager, *City of Downey*
11111 Brookshire Ave, Downey, CA 90241-7016
Phone: (562) 904-7102
glivas@downeyca.org

Rudolph Livingston, Finance Director, *City of Ojai*
PO Box 1570, Ojai, CA 93024
Phone: N/A
livingston@ojaicity.org

Karla Lobatos, Finance Director, *City of Calexico*
608 Heber Avenue, Calexico, CA 92231
Phone: (760) 768-2135
klobatos@calexico.ca.gov

Paula Lofgren, Finance Director and Treasurer, *City of Hanford*
315 North Douty Street, Hanford, CA 93230
Phone: (559) 585-2506
plofgren@cityofhanfordca.com

Linda Lopez, Town Clerk, *Town of Ross*
P.O. Box 320, Ross, CA 94957
Phone: (415) 453-4153
llopez@townofross.org

Kenneth Louie, *City of Lawndale*
14717 Burin Avenue, Lawndale, CA 90260
Phone: N/A
klouie@lawndalecity.org

Linda Lowry, City Manager, *City of Pomona*
City Manager's Office, 505 South Garey Ave., Pomona, CA 91766
Phone: (909) 620-2051
linda_lowry@ci.pomona.ca.us

Nicole Lugotff, Interim Finance Director, *City of West Covina*
1444 West Garvey Avenue South, West Covina, CA 91790
Phone: (626) 939-8463
Nicole.Lugotff@westcovina.org

Elizabeth Luna, Accounting Services Manager, *City of Suisun City*
701 Civic Center Blvd, Suisun City, CA 94585
Phone: (707) 421-7320
eluna@suisun.com

Janet Luzzi, Finance Director, *City of Arcata*
Finance Department, 736 F Street, Arcata, CA 95521
Phone: (707) 822-5951
finance@cityofarcata.org

Gary J. Lysik, Chief Financial Officer, *City of Calabasas*
100 Civic Center Waya, Calabasas, CA 91302
Phone: (818) 224-1600
glysik@cityofcalabasas.com

Martin Magana, City Manager/Finance Director, *City of Desert Hot Springs*
Finance Department, 65-950 Pierson Blvd, Desert Hot Springs, CA 92240
Phone: (760) 329-6411, Ext.
CityManager@cityofdhs.org

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

James Makshanoff, City Manager, *City of San Clemente*
100 Avenida Presidio, San Clemente, CA 92672
Phone: (949) 361-8322
CityManager@San-Clemente.org

Licette Maldonado, Administrative Services Director, *City of Carpinteria*
5775 Carpinteria Avenue, Carpinteria, CA 93013
Phone: (805) 755-4448
licettem@ci.carpinteria.ca.us

Eddie Manfro, *City of Westminster*
8200 Westminster Blvd., Westminster, CA 92683
Phone: N/A
emanfro@westminster-ca.gov

Denise Manoogian, *City of Cerritos*
P.O. Box 3130, Cerritos, CA 90703-3130
Phone: N/A
dmanoogian@cerritos.us

Terri Marsh, Finance Director, *City of Signal Hill*
Finance, 2175 Cherry Ave., Signal Hill, CA 90755
Phone: (562) 989-7319
Finance1@cityofsignalhill.org

Thomas Marston, *City of San Gabriel*
425 South Mission Drive, San Gabriel, CA 91776
Phone: N/A
tmarston@sgch.org

Pio Martin, Finance Manager, *City of Firebaugh*
Finance Department, 1133 P Street, Firebaugha, CA 93622
Phone: (559) 659-2043
financedirector@ci.firebaugh.ca.us

Brent Mason, Finance Director, *City of Riverside*
Finance, 3900 Main St, Riverside, CA 92501
Phone: (951) 826-5454
bmason@riversideca.gov

Janice Mateo-Reyes, Finance Manager, *City of Laguna Hills*
Administrative Services Department , 24035 El Toro Rd., Laguna Hills, CA 92653

Phone: (949) 707-2623
jreyes@ci.laguna-hills.ca.us

Mike Matsumoto, *City of South Gate*
8650 California Ave, South Gate, CA 90280
Phone: N/A
zcaltitla@pico-rivera.org

Dan Matusiewicz, *City of Newport Beach*
3300 Newport Blvd, Newport Beach, CA 92663
Phone: N/A
danm@newportbeachca.gov

Dennice Maxwell, Finance Director, *City of Redding*
Finance Department, 3rd Floor City Hall, 777 Cypress Avenue, Redding, CA 96001
Phone: (530) 225-4079
finance@cityofredding.org

Charles McBride, *City of Carlsbad*
1635 Faraday Avenue, Carlsbad, CA 92008-7314
Phone: N/A
chuck.mcbride@carlsbadca.gov

Kevin McCarthy, Director of Finance, *City of Indian Wells*
Finance Department, 44-950 Eldorado Drive, Indian Wells, CA 92210-7497
Phone: (760) 346-2489
kmccarthy@indianwells.com

Mary McCarthy, Finance Manager, *City of Pleasant Hill*
Finance Division, 100 Gregory Lane, Pleasant Hill, CA 94523
Phone: (925) 671-5231
Mmccarthy@ci.pleasant-hill.ca.us

Tim McDermott, Director of Finance, *City of Santee*
10601 Magnolia Avenue, Building #3, Santee, CA 92071
Phone: (619) 258-4100
tmcdermott@cityofsanteeca.gov

Michael McHatten, City Manager, *City of Soledad*
248 Main Street, PO Box 156, Soledad, CA 93960
Phone: (831) 223-5014
Michael.McHatten@cityofsoledad.com

Bridgette McInally, Accounting Manager, *City of Buenaventura*
Finance and Technology , 501 Poli Street, Ventura, CA 93001
Phone: (805) 654-7812
bmcinally@ci.ventura.ca.us

Kelly McKinnis, Finance Director, *City of Weed*
Finance Department, 550 Main Street, Weed, CA 96094
Phone: (530) 938-5020
mckinnis@ci.weed.ca.us

Larry McLaughlin, City Manager, *City of Sebastopol*
7120 Bodega Avenue, P.O. Box 1776, Sebastopol, CA 95472
Phone: (707) 823-1153
lwmclaughlin@juno.com

Dennis McLean, *City of Rancho Palos Verdes*

30940 Hawthorne Blvd., Rancho Palos Verdes, CA 90275
Phone: N/A
dennism@rpv.com

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

Paul Melikian, *City of Reedley*
1717 Ninth Street, Reedley, CA 93654
Phone: (559) 637-4200
paul.melikian@reedley.ca.gov

Rebecca Mendenhall, *City of San Carlos*
600 Elm Street, P.O. Box 3009, San Carlos, CA 94070-1309
Phone: (650) 802-4205
rmendenhall@cityofsancarlos.org

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

Olga Mendoza, *City of Ceres*
2220 Magnolia Street, Ceres, CA 95307
Phone: (209) 538-5766
olga.mendoza@ci.ceres.ca.us

Dawn Merchant, *City of Antioch*
P.O. Box 5007, Antioch, CA 94531
Phone: (925) 779-7055
dmerchant@ci.antioch.ca.us

Jeff Meston, Acting City Manager, *City of South Lake Tahoe*
1901 Airport Road, Ste. 203, South Lake Tahoe, CA 96150
Phone: (530) 542-7950
jmeston@cityofslt.us

Joan Michaels Aguilar, *City of Dixon*
600 East A Street, Dixon, CA 95620
Phone: N/A
jmichaelsaguilar@ci.dixon.ca.us

Kris Michell, Chief Operating Officer, *City of San Diego*
Claimant Contact
City Hall, 202 C Street, Suite 901A, San Diego, CA 92101
Phone: (858) 236-5587
Kmichell@sandiego.gov

Ron Millard, Finance Director, *City of Vallejo*
Finance Department, 555 Santa Clara Street, 3rd Floor, Vallejo, CA 94590
Phone: (707) 648-4592
alison.hughes@cityofvallejo.net

Meredith Miller, Director of SB90 Services, *MAXIMUS*
3130 Kilgore Road, Suite 400, Rancho Cordova, CA 95670

Phone: (972) 490-9990
meredithcmiller@maximus.com

Kristina Miller, City Manager/Finance Director, *City of Corning*
794 Third Street, Corning, CA 96021
Phone: (530) 824-7020
kmiller@corning.org

Brett Miller, Director of Administrative Services, *City of Hollister*
375 Fifth Street, Hollister, CA 95023
Phone: (831) 636-4301
brett.miller@hollister.ca.gov

Leyne Milstein, Director of Finance, *City of Sacramento*
915 I Street, 5th Floor, Sacramento, CA 98514
Phone: (916) 808-5845
lmilstein@cityofsacramento.org

Greg Minor, City Administrator, *City of Oakland*
1 Frank H Ogawa Plaza, Oakland, CA 94612
Phone: (510) 238-3301
gminor@oaklandca.gov

April Mitts, Finance Director, *City of St. Helena*
1480 Main Street, Saint Helena, CA 94574
Phone: (707) 968-2751
amitts@cityofsthelena.org

Kevin Mizuno, Finance Director, *City of Clayton*
Finance Department, 600 Heritage Trail, Clayton, CA 94517
Phone: (925) 673-7309
kmizuno@ci.clayton.ca.us

Bruce Moe, *City of Manhattan Beach*
1400 Highland Ave., Manhattan Beach, CA 90266
Phone: N/A
bmoe@citymb.info

Mavet Mora, Assistant Finance Director, *City of Fresno*
2600 Fresno St. Rm. 2157, Fresno, CA 93721
Phone: (559) 621-7006
Mavet.Mora@fresno.gov

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

Debbie Moreno, *City of Anaheim*
200 S. Anaheim Boulevard, Anaheim, CA 92805
Phone: (716) 765-5192
DMoreno@anaheim.net

Minnie Moreno, *City of Patterson*
1 Plaza Circle, Patterson, CA 95363
Phone: N/A
mmoreno@ci.patterson.ca.us

Mark Moses, Finance Director, *City of San Rafael*

1400 Fifth Avenue, San Rafael, CA 94901
Phone: (415) 458-5018
mark.moses@cityofsanrafael.org

Cindy Mosser, Finance Director, *City of Benicia*
250 East L Street, Benicia, CA 94510
Phone: (707) 746-4217
CMosser@ci.benicia.ca.us

Walter Munchheimer, Interim Administrative Services Manager, *City of Marysville*
Administration and Finance Department, 526 C Street, Marysville, CA 95901
Phone: (530) 749-3901
wmunchheimer@marysville.ca.us

Bill Mushallo, Finance Director, *City of Petaluma*
Finance Department, 11 English St., Petaluma, CA 94952
Phone: (707) 778-4352
financeemail@ci.petaluma.ca.us

Renee Nagel, Finance Director, *City of Visalia*
707 W. Acequia Avenue, City Hall West, Visalia, CA 93291
Phone: (559) 713-4375
Renee.Nagel@visalia.city

Tim Nash, *City of Encinitas*
505 S Vulcan Avenue, Encinitas, CA 92054
Phone: N/A
finmail@encinitasca.gov

Geoffrey Neill, Senior Legislative Analyst, Revenue & Taxation, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
gneill@counties.org

Keith Neves, Director of Finance/City Treasurer, *City of Lake Forest*
Finance Department, 25550 Commercentre Drive, Lake Forest, CA 92630
Phone: (949) 461-3430
kneves@lakeforestca.gov

Dat Nguyen, Finance Director, *City of Morgan Hill*
17575 Peak Avenue, Morgan Hill, CA 95037
Phone: (408) 779-7237
dat.nguyen@morgan-hill.ca.gov

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Dale Nielsen, Director of Finance/Treasurer, *City of Vista*
Finance Department, 200 Civic Center Drive, Vista, CA 92084
Phone: (760) 726-1340
dnielsen@ci.vista.ca.us

David Noce, Accounting Division Manager, *City of Santa Clara*
1500 Warburton Ave, Santa Clara, CA 95050

Phone: (408) 615-2341
dnoce@santaclaraca.gov

Kiely Nose, Interim Director of Administrative Services, *City of Palo Alto*
250 Hamilton Avenue, Palo Alto, CA 94301
Phone: (650) 329-2692
Kiely.Nose@cityofpaloalto.org

Adriana Nunez, Staff Counsel, *State Water Resources Control Board*
1001 I Street, Sacramento, CA 95814
Phone: (916) 322-3313
Adriana.nunez@waterboards.ca.gov

Michael O'Kelly, Director of Administrative Services, *City of Fullerton*
303 West Commonwealth Avenue, Fullerton, CA 92832
Phone: (714) 738-6803
mokelly@cityoffullerton.com

Jim O'Leary, Finance Director, *City of San Bruno*
567 El Camino Real, San Bruno, CA 94066
Phone: (650) 616-7080
webfinance@sanbruno.ca.gov

Andy Okoro, City Manager, *City of Norco*
2870 Clark Avenue, Norco, CA 92860
Phone: N/A
aokoro@ci.norco.ca.us

Brenda Olwin, Finance Director, *City of East Palo Alto*
2415 University Avenue, East Palo Alto, CA 94303
Phone: (650) 853-3122
financedepartment@cityofepa.org

Jose Ometeotl, Finance Director, *City of Lynwood*
11330 Bullis Road, Lynwood, CA 90262
Phone: (310) 603-0220
jometeotl@lynwood.ca.us

Cathy Orme, Finance Director, *City of Larkspur*
Finance Department, 400 Magnolia Ave, Larkspur, CA 94939
Phone: (415) 927-5019
corme@cityoflarkspur.org

John Ornelas, Interim City Manager, *City of Huntington Park*
, 6550 Miles Avenue, Huntington Park, CA 90255
Phone: (323) 584-6223
scrum@hpca.gov

Odi Ortiz, Assistant City Manager/Finance Director, *City of Livingston*
Administrative Services, 1416 C Street, Livingston, CA 95334
Phone: (209) 394-8041
oortiz@livingstoncity.com

June Overholt, Finance Director - City Treasurer, *City of Glendora*
116 E. Foothill Boulevard, Glendora, CA 91741-3380
Phone: (626) 914-8241
jOverholt@ci.glendora.ca.us

Wayne Padilla, Interim Director, *City of San Luis Obispo*

Finance & Information Technology Department, 990 Palm Street, San Luis Obispo, CA 93401
Phone: (805) 781-7125
wpadilla@slocity.org

Arthur Palkowitz, *Artiano Shinoff*
2488 Historic Decatur Road, Suite 200, San Diego, CA 92106
Phone: (619) 232-3122
apalkowitz@as7law.com

Raymond Palmucci, Deputy City Attorney, *Office of the San Diego City Attorney*
Claimant Representative
1200 Third Avenue, Suite 1100, San Diego, CA 92101
Phone: (619) 236-7725
rpalmucci@sandiego.gov

Donald Parker, Director of Finance, *City of Montclair*
5111 Benito St., Montclair, CA 91763
Phone: N/A
dparker@cityofmontclair.org

Stephen Parker, Administrative Services Director, *City of Stanton*
Administrative Services and Finance Department, 7800 Katella Avenue, Stanton, CA 90680
Phone: (714) 379-9222
sparker@ci.stanton.ca.us

Allen Parker, City Manager, *City of Hemet*
445 East Florida Avenue, Hemet, CA 92543
Phone: (951) 765-2301
aparker@cityofhemet.org

Matt Paulin, Chief Financial Officer, *City of Stockton*
425 North El Dorado Street, Stockton, CA 95202
Phone: (209) 937-8460
matt.paulin2@stocktonca.gov

Nick Pegueros, Administrative Services Director, *City of Menlo Park*
701 Laurel Street, Menlo Park, CA 94025
Phone: (650) 330-6640
nmpegueros@menlopark.org

Marla Pendleton, Interim Finance Director, *City of Palm Springs*
3200 E. Tahquitz Canyon Way, Palm Springs, CA 92262
Phone: (760) 323-8229
marla.pendleton@palmspringsca.gov

Eva Phelps, *City of San Ramon*
2226 Camino Ramon, San Ramon, CA 94583
Phone: N/A
ephelps@sanramon.ca.gov

Marcus Pimentel, *City of Santa Cruz*
809 Center Street, Rm 101, Santa Cruz, CA 95060
Phone: N/A
dl_Finance@cityofsantacruz.com

Johnnie Pina, Legislative Policy Analyst, *League of Cities*
1400 K Street, Suite 400, Sacramento, CA 95814

Phone: (916) 658-8214
jpina@cacities.org

Adam Pirrie, Finance Director, *City of Claremont*
207 Harvard Ave, Claremont, CA 91711
Phone: (909) 399-5356
apirrie@ci.claremont.ca.us

Ruth Piyaman, Finance / Accounting Manager, *City of Malibu*
Administrative Services / Finance, 23825 Stuart Ranch Road, Malibu, CA 90265
Phone: (310) 456-2489
RPiyaman@malibucity.org

Bret M. Plumlee, City Manager, *City of Los Alamitos*
3191 Katella Ave., Los Alamitos, CA 90720
Phone: (562) 431-3538 ext.
bplumlee@cityoflosalamitos.org

Darrin Polhemus, Deputy Director, *State Water Resources Control Board*
Division of Drinking Water, , ,
Phone: (916) 341-5045
Darrin.Polhemus@waterboards.ca.gov

Brian Ponty, *City of Redwood City*
1017 Middlefield Road, Redwood City, CA 94063
Phone: (650) 780-7300
finance@redwoodcity.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@atc.sbcounty.gov

Matt Pressey, Director, *City of Salinas*
Finance Department, 200 Lincoln Ave., Salinas, CA 93901
Phone: (831) 758-7211
mattp@ci.salinas.ca.us

Tom Prill, Finance Director, *City of San Jacinto*
Finance Department, 595 S. San Jacinto Ave., Building B, San Jacinto, CA 92583
Phone: (951) 487-7340
tprill@sanjacintoca.gov

Cindy Prothro, Finance Director, *City of Barstow*
Finance Department, 220 East Mountain View Street, Barstow, CA 92311
Phone: (760) 255-5115
cprothro@barstowca.org

Tim Przybyla, Finance Director, *City of Madera*
Finance Department, 205 West Fourth Street, Madera, CA 93637
Phone: (559) 661-5454
tprzybyla@cityofmadera.com

Deanne Purcell, Assistant Chief Financial Officer, *City of Oxnard*
300 West Third Street, Oxnard, CA 93030
Phone: (805) 385-7475
Deanne.Purcell@oxnard.org

Frank Quintero, *City of Merced*

678 West 18th Street, Merced, CA 95340
Phone: N/A
quinterof@cityofmerced.org

Sean Rabe, City Manager, *City of Colma*
1198 El Camino Real, Colma, CA 94014
Phone: (650) 997-8318
sean.rabe@colma.ca.gov

Paul Rankin, Finance Director, *City of Orinda*
22 Orinda Way, Second Floor, Orinda, CA 94563
Phone: (925) 253-4224
prankin@cityoforinda.org

Karan Reid, Finance Director, *City of Concord*
1950 Parkside Drive, Concord, CA 94519
Phone: (925) 671-3178
karan.reid@cityofconcord.org

Mark Rewolinski, *MAXIMUS*
808 Moorefield Park Drive, Suite 205, Richmond, VA 23236
Phone: (949) 440-0845
markrewolinski@maximus.com

Tae G. Rhee, Finance Director, *City of Bellflower*
Finance Department, 16600 Civic Center Dr, Bellflower, CA 90706
Phone: (562) 804-1424
trhee@bellflower.org

Terry Rhodes, Accounting Manager, *City of Wildomar*
23873 Clinton Keith Rd., Suite 201, Wildomar, CA 92595
Phone: (951) 677-7751
trhodes@cityofwildomar.org

David Rice, *State Water Resources Control Board*
1001 I Street, 22nd Floor, Sacramento, CA 95814
Phone: (916) 341-5161
davidrice@waterboards.ca.gov

Rachelle Rickard, City Manager, *City of Atascadero*
Finance Department, 6500 Palma Ave, Atascadero, CA 93422
Phone: (805) 461-7612
rrickard@atascadero.org

Jorge Rifa, City Administrator, *City of Commerce*
Finance Department, 2535 Commerce Way, Commerce, CA 90040
Phone: (323) 722-4805
jorger@ci.commerce.ca.us

Rosa Rios, *City of Delano*
1015 11th Ave., Delano, CA 93216
Phone: N/A
rrios@cityofdelano.org

Luke Rioux, Finance Director, *City of Goleta*
130 Cremona Drive, Suite B, Goleta, CA 93117
Phone: (805) 961-7500
Lrioux@cityofgoleta.org

David Riviere, Chief of Police/Acting City Administrator, *City of Chowchilla*
130 S. Second Street Civic Center Plaza, Chowchilla, CA 93610
Phone: (559) 665-8615
DRiviere@CityOfChowchilla.org

David Riviere, Chief of Police/Acting City Administrator, *City of Chowchilla*
130 S. Second Street Civic Center Plaza, Chowchilla, CA 93610
Phone: (559) 665-8615
DRiviere@CityOfChowchilla.org

Mark Roberts, *City of National City*
1243 National City Blvd., National City, CA 91950
Phone: N/A
finance@nationalcityca.gov

Genie Rocha, Finance Director, *City of Camarillo*
601 Carmen Drive, Camarillo, CA 93010
Phone: (805) 388-5320
grocha@cityofcamarillo.org

Rob Rockwell, Director of Finance, *City of Indio*
Finance Department, 100 Civic Center Mall, Indio, CA 92201
Phone: (760) 391-4029
rrockwell@indio.org

Benjamin Rosenfield, City Controller, *City and County of San Francisco*
1 Dr. Carlton B. Goodlett Place, Room 316, San Francisco, CA 94102
Phone: (415) 554-7500
ben.rosenfield@sfgov.org

Christina Roybal, Finance Director, *City of American Canyon*
4381 Broadway, Suite 201, American Canyon, CA 94503
Phone: (707) 647-4362
croybal@cityofamericancanyon.org

Linda Ruffing, City Manager, *City of Fort Bragg*
Finance Department, 416 N Franklin Street, Fort Bragg, CA 94537
Phone: (707) 961-2823
lruffing@fortbragg.com

Cynthia Russell, Chief Financial Officer/City Treasurer, *City of San Juan Capistrano*
Finance Department, 32400 Paseo Adelanto, San Juan Capistrano, CA 92675
Phone: (949) 443-6343
crussell@sanjuancapistrano.org

Brian Rutledge, Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Brian.Rutledge@dof.ca.gov

Joan Ryan, Finance Director, *City of Escondido*
201 N. Broadway, Escondido, CA 92025
Phone: (760) 839-4338
jryan@ci.escondido.ca.us

Arlene Salazar, Acting City Manager, *City of Pico Rivera*
6615 Passons Blvd, Pico Rivera, CA 90660

Phone: (562) 801-4379
asalazar@pico-rivera.org

Leticia Salcido, *City of El Centro*
1275 Main Street, El Centro, CA 92243
Phone: N/A
lsalcido@ci.el-centro.ca.us

Robert Samario, *City of Santa Barbara*
P.O. Box 1990, Santa Barbara, CA 93102-1990
Phone: (805) 564-5336
BSamario@SantaBarbaraCA.gov

Tony Sandhu, Interim Finance Director, *City of Capitola*
Finance Department, 480 Capitola Ave, Capitola, CA 95010
Phone: (831) 475-7300
tsandhu@ci.capitola.ca.us

Kimberly Sarkovich, Chief Financial Officer, *City of Rocklin*
3970 Rocklin Road, Rocklin, CA 95677
Phone: (916) 625-5020
kim.sarkovich@rocklin.ca.us

Robin Scattini, Finance Manager, *City of Carmel*
PO Box CC, Carmel, CA 93921
Phone: (831) 620-2019
rscattini@ci.carmel.ca.us

Jay Schengel, Finance Director/City Treasurer, *City of Clovis*
1033 5th Street, Clovis, CA 93612
Phone: (559) 324-2113
jays@ci.clovis.ca.us

Stuart Schillinger, *City of Brisbane*
50 Park Place, Brisbane, CA 94005-1310
Phone: N/A
schillinger@ci.brisbane.ca.us

Donna Schwartz, City Clerk, *City of Huntington Park*
6550 Miles Avenue, Huntington park, CA 90255-4393
Phone: (323) 584-6231
DSchwartz@hpca.gov

Theresa Schweitzer, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3140
tschweitzer@newportbeachca.gov

Tami Scott, Administrative Services Director, *Cathedral City*
Administrative Services, 68700 Avenida Lalo Guerrero, Cathedral City, CA 92234
Phone: (760) 770-0356
tscott@cathedralcity.gov

Kelly Sessions, Finance Manager, *City of San Pablo*
Finance Department, 13831 San Pablo Avenue, Building #2, San Pablo, CA 94806
Phone: (510) 215-3021
kellys@sanpabloca.gov

Arnold Shadbehr, Interim City Manager, *City of Hawthorne*

Finance Department, 4455 W 126th St, Hawthorne, CA 90250
Phone: (310) 349-2980
ashadbehr@hawthorneca.gov

Mel Shannon, Finance Director , *City of La Habra*
Finance/Admin. Services, 201 E. La Habra Blvd, La Habra, CA 90633-0337
Phone: (562) 383-4050
mshannon@lahabraca.gov

Carla Shelton, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
carla.shelton@csm.ca.gov

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

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

Tess Sloan, Interim Finance Director, *City of Ridgecrest*
100 West California Avenue, Ridgecrest, CA 93555
Phone: (760) 499-5026
finance@ridgecrest-ca.gov

Nelson Smith, *City of Bakersfield*
1600 Truxtun Avenue, Bakersfield, CA 93301
Phone: N/A
nsmith@bakersfieldcity.us

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

Margarita Solis, City Treasurer, *City of San Fernando*
117 Macneil Street, San Fernando, CA 91340
Phone: (818) 898-1218
msolis@sfcity.org

Jim Spano, Chief, Mandated Cost Audits Bureau, *State Controller's Office*
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 323-5849
jspano@sco.ca.gov

Greg Sparks, City Manager, *City of Eureka*
531 K Street, Eureka, CA 95501

Phone: (707) 441-4144
cityclerk@ci.eureka.ca.gov

Dennis Speciale, *State Controller's Office*
Division of Accounting and Reporting, 3301 C Street, Suite 700, Sacramento, CA 95816
Phone: (916) 324-0254
DSpeciale@sco.ca.gov

Kenneth Spray, Finance Director, *City of Millbrae*
621 Magnolia Avenue, Millbrae, CA 94030
Phone: (650) 259-2433
kspray@ci.millbrae.ca.us

Betsy St. John, *City of Palmdale*
38300 Sierra Highway, Suite D, Palmdale, CA 93550
Phone: N/A
bstjohn@cityofpalmdale.org

Kelly Stachowicz, Assistant City Manager, *City of Davis*
23 Russell Blvd, Davis, CA 95616
Phone: (560) 757-5602
kstachowicz@cityofdavis.org

Pam Statsmann, Finance Director, *City of Lancaster*
44933 Fern Avenue, Lancaster, CA 93534
Phone: (661) 723-6038
pstatsmann@cityoflancasterca.org

Robb Steel, Interim Administrative Services Director, *City of Rialto*
150 South Palm Avenue, Rialto, CA 92376
Phone: (909) 820-2525
rsteel@rialtoca.gov

Kent Steffens, City Manager, *City of Sunnyvale*
456 West Olive Avenue, Sunnyvale, CA 94086
Phone: (408) 730-7911
ksteffens@ci.sunnyvale.ca.us

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

Sean Sterchi, *State Water Resources Control Board*
Division of Drinking Water, 1350 Front Street, Room 2050, San Diego, CA 92101
Phone: (619) 525-4159
Sean.Sterchi@waterboards.ca.gov

Jana Stuard, *City of Norwalk*
P.O. Box 1030, Norwalk, CA 90650
Phone: N/A
jstuard@norwalkca.gov

Edmund Suen, Finance Director, *City of Foster City*
610 Foster City Blvd., Foster City, CA 94404
Phone: (650) 853-3122
esuen@fostercity.org

Karen Suiker, City Manager, *City of Trinidad*

409 Trinity Street, PO Box 390, Trinidad, CA 95570
Phone: (707) 677-3876
citymanager@trinidad.ca.gov

Tracy Sullivan, Legislative Analyst, *California State Association of Counties (CSAC)*
1100 K Street, Suite 101, Suite 101, Sacramento, CA 95814
Phone: (916) 327-7500
tsullivan@counties.org

Deborah Sultan, Finance Director, *City of Oakley*
3231 Main Street, Oakley, CA 94561
Phone: (925) 625-7010
sultan@ci.oakley.ca.us

David Sykes, City Manager, *City of San Jose*
200 East Santa Clara Street, 17th Floor, San Jose, CA 95113
Phone: (408) 535-8111
Dave.Sykes@sanjoseca.gov

Derk Symons, Staff Finance Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Derk.Symons@dof.ca.gov

Michael Szczech, Finance Director, *City of Piedmont*
120 Vista Avenue, Piedmont, CA 94611
Phone: (510) 420-3045
mszczech@piedmont.ca.gov

Kim Szczurek, Administrative Services Director, *Town of Truckee*
Administrative Services, 10183 Truckee Airport Road, Truckee, CA 96161
Phone: (530) 582-2913
kszczurek@townoftruckee.com

Tatiana Szerwinski, Assistant Director of Finance, *City of Beverly Hills*
455 North Rexford Drive, Beverly Hills, CA 90210
Phone: (310) 285-2411
tszerwinski@beverlyhills.org

Jesse Takahashi, *City of Campbell*
70 North First Street, Campbell, CA 95008
Phone: N/A
jesset@cityofcampbell.com

Rose Tam, Finance Director, *City of Baldwin Park*
14403 East Pacific Avenue, Baldwin Park, CA 91706
Phone: (626) 960-4011
rtam@baldwinpark.com

Jeri Tejeda, Finance Director, *City of Manteca*
1001 West Center Street, Manteca, CA 95337
Phone: (209) 456-8730
jtejeda@mantecagov.com

Gina Tharani, Finance Director, *City of Aliso Viejo*
Finance Department, 12 Journey, Suite 100, Aliso Viejo, CA 92656-5335
Phone: (949) 425-2524
financial-services@cityofalisoviejo.com

Lynn Theissen, Finance Director, *City of Chico*
411 Main St., Chico, CA 95927
Phone: (530) 879-7300
lynn.theissen@chicoca.gov

Darlene Thompson, Finance Director / Treasurer, *City of Tulare*
Finance Department, 411 E Kern Ave., Tulare, CA 93274
Phone: (559) 684-4255
dthompson@ci.tulare.ca.us

Donna Timmerman, Financial Manager, *City of Ferndale*
Finance Department, 834 Main Street, Ferndale, CA 95535
Phone: (707) 786-4224
finance@ci.ferndale.ca.us

Jolene Tollenaar, *MGT of America*
2251 Harvard Street, Suite 134, Sacramento, CA 95815
Phone: (916) 243-8913
jolenetollenaar@gmail.com

Colleen Tribby, Finance Director, *City of Dublin*
100 Civic Plaza, Dublin, CA 94568
Phone: (925) 833-6640
colleen.tribby@dublin.ca.gov

Eric Tsao, *City of Torrance*
Finance Department, 3031 Torrance Blvd., Torrance, CA 90503
Phone: (310) 618-5850
etsao@TorranceCA.gov

Evelyn Tseng, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3127
etseng@newportbeachca.gov

Stefanie Turner, Finance Director, *City of Rancho Santa Margarita*
Finance Department, 22112 El Paseo, Rancho Santa Margarita, CA 92688
Phone: (949) 635-1808
sturner@cityofrsm.org

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

Nicole Valentine, Interim Director of Administrative Services, *City of Arroyo Grande*
300 E. Branch Street, Arroyo Grande, CA 93420
Phone: (804) 473-5410
nvalentine@arroyogrande.org

James Vanderpool, City Manager, *City of Buena Park*
6650 Beach Boulevard, Buena Park, CA 90622
Phone: N/A
jvanderpool@buenapark.com

Patty Virto, Finance Manager, *City of Fillmore*
Finance Department, 250 Central Avenue, Fillmore, CA 93015

Phone: (805) 524-3701
pvirto@ci.fillmore.ca.us

Rene Vise, Director of Administrative Services, *City of Santa Maria*
Department of Administrative Services, 110 East Cook Street Room 6, Santa Maria, CA 93454-5190
Phone: (805) 925-0951
rvise@ci.santa-maria.ca.us

Nawel Voelker, Acting Director of Finance (Management Analyst), *City of Belmont*
Finance Department, One Twin Pines Lane, Belmont, CA 94002
Phone: (650) 595-7433
nvoelker@belmont.gov

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

Nicholas Walker, Finance Director, *City of Lakeport*
225 Park Street, Lakeport, CA 95453
Phone: (707) 263-5615
nwalker@cityoflakeport.com

Melinda Wall, *City of Lompoc*
P.O. Box 8001, Lompoc, CA 93438-8001
Phone: N/A
m_wall@ci.lompoc.ca.us

Sarah Waller-Bullock, *City of La Mesa*
P.O. Box 937, La Mesa, CA 91944-0937
Phone: N/A
sbullock@ci.la-mesa.ca.us

Belinda Warner, Finance Director/Treasurer, *City of Richmond*
450 Civic Center Plaza, 1st Floor, Richmond, CA 94804
Phone: (510) 620-6740
Belinda_Warner@ci.richmond.ca.us

Dave Warren, Director of Finance, *City of Placerville*
Finance Department, 3101 Center Street, Placerville, CA 95667
Phone: (530) 642-5223
dwarren@cityofplacerville.org

Gary Watahira, Administrative Services Director, *City of Sanger*
1700 7th Street, Sanger, CA 93657
Phone: (559) 876-6300
gwatahira@ci.sanger.ca.us

Renee Wellhouse, *David Wellhouse & Associates, Inc.*
3609 Bradshaw Road, H-382, Sacramento, CA 95927
Phone: (916) 797-4883
dwa-renee@surewest.net

Amanda Wells, Finance Manager, *City of Rialto*
150 South Palm Avenue, Rialto, CA 92376
Phone: (909) 421-7242
awells@rialtoca.gov

Kevin Werner, City Administrator, *City of Ripon*

Administrative Staff, 259 N. Wilma Avenue, Ripon, CA 95366
Phone: (209) 599-2108
kwerner@cityofripon.org

David White, *City of Fairfield*
1000 Webster Street, Fairfield, CA 94533
Phone: N/A
dwhite@fairfield.ca.gov

Michael Whitehead, Administrative Services Director & City Treasurer, *City of Rolling Hills Estates*
Administrative Services, 4045 Palos Verdes Drive North, Rolling Hills Estates, CA 90274
Phone: (310) 377-1577
MikeW@RollingHillsEstatesCA.gov

Patrick Whitnell, General Counsel, *League of California Cities*
1400 K Street, Suite 400, Sacramento, CA 95814
Phone: (916) 658-8281
pwhitnell@cacities.org

Gina Will, Finance Director , *City of Paradise*
Finance Department, 5555 Skyway, Paradise, CA 95969
Phone: (530) 872-6291
gwill@townofparadise.com

David Wilson, *City of West Hollywood*
8300 Santa Monica Blvd., West Hollywood, CA 90069
Phone: N/A
dwilson@weho.org

Chris Woidzik, Finance Director, *City of Avalon*
Finance Department, 410 Avalon Canyon Rd., Avalon, CA 90704
Phone: (310) 510-0220
Scampbell@cityofavalon.com

Paul Wood, Interim City Manager, *City of Greenfield*
599 El Camino Real, Greenfield, CA 93927
Phone: 8316745591
pwood@ci.greenfield.ca.us

Susie Woodstock, *City of Newark*
37101 Newark Blvd., Newark, CA 94560
Phone: N/A
susie.woodstock@newark.org

Phil Wright, Director of Administrative Services, *City of West Sacramento*
Finance Division, 1110 West Capitol Avenue, 3rd Floor, West Sacramento, CA 95691
Phone: (916) 617-4575
Philw@cityofwestsacramento.org

Jane Wright, Finance Manager, *City of Ione*
Finance Department, 1 East Main Street , PO Box 398, Ione, CA 95640
Phone: (209) 274-2412
JWright@ione-ca.com

Hasmik Yaghobyan, *County of Los Angeles*
Auditor-Controller's Office, 500 W. Temple Street, Room 603, Los Angeles, CA 90012

Phone: (213) 974-9653
hyaghobyan@auditor.lacounty.gov

Curtis Yakimow, Town Manager, *Town of Yucca Valley*
57090 Twentynine Palms Highway, Yucca Valley, CA 92284
Phone: (760) 369-7207
townmanager@yucca-valley.org

Annie Yaung, *City of Monterey Park*
320 West Newmark Avenue, Monterey Park, CA 91754
Phone: N/A
ayaung@montereypark.ca.gov

Bobby Young, *City of Costa Mesa*
77 Fair Drive, Costa Mesa, CA 92626
Phone: N/A
Bobby.Young@costamesaca.gov

Helen Yu-Scott, Finance and Administrative Services Director, *City of San Anselmo*
525 San Anselmo Avenue, San Anselmo, CA 94960
Phone: (415) 258-4660
hyu-scott@townofsananselmo.org