



February 26, 2025

Mr. Chris Hill  
Department of Finance  
915 L Street, 8th 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: Proposed Decision**

*Lead Sampling in Schools: Public Water System No. 3710020, 17-TC-03-R2*  
On Remand from City of San Diego v. Commission on State Mandates,  
Sacramento County Superior Court, Case No. 24WM000056; Permit  
Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System  
No. 3710020, effective January 18, 2017  
City of San Diego, Claimant

Dear Mr. Hill and Mr. Palmucci:

The Proposed Decision for the above-captioned matter is enclosed for your review.

**Hearing:** This matter is set for hearing on **Friday, March 28, 2025, at 10:00 a.m., at Park Tower, 980 9th Street, Second Floor Conference Room, Sacramento, California, 95814 and via Zoom.**

The Commission is committed to ensuring that its public meetings are accessible to the public and that the public has the opportunity to observe the meeting and to participate by providing written and verbal comment on Commission matters whether they are physically appearing at the in-person meeting location or participating via Zoom. If you want to speak during the hearing and you are in-person, please come to the table for the swearing in and to speak when your item is up for hearing. If you are participating via Zoom, you must use the "Raise Hand" feature in order for our moderators to know you need to be unmuted.

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**Testimony at the Commission Hearing:** If you plan to address the Commission on an agenda item, please notify the Commission Office not later than noon on the Tuesday prior to the hearing, March 25, 2025. Please also include the names of the people who will be speaking for inclusion on the witness list and the names and email addresses of the people who will be speaking remotely to receive a hearing panelist link in Zoom. When calling or emailing, identify the item you want to testify on and the entity you represent. The Commission Chairperson reserves the right to impose time limits on presentations as may be necessary to complete the agenda.

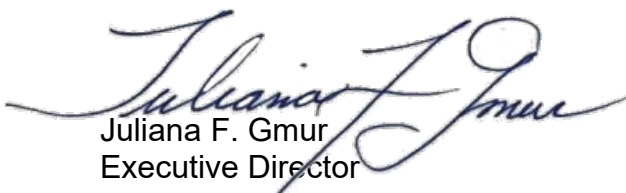
**Time to File Written Comments:** If you plan to file any written document, please note that Commission staff will include written comments filed at least 15 days in advance of the hearing in the Commissioners' hearing binders, a copy of which is available for public viewing at the Commission meeting. Additionally, written comments filed more than five days in advance of the meeting shall be included in the Commission's meeting binders, if feasible, or shall be provided to the Commission when the item is called, unless otherwise agreed by the Commission or the executive director. (Cal. Code Regs., tit. 2, § 1181.10(b)(1)(A-B).

However, comments filed less than five days in advance of the meeting, the commenter shall provide 12 copies to Commission staff at the in-person meeting. In the case of participation by teleconference, a PDF copy shall be filed via the Commission's dropbox at <https://www.csm.ca.gov/dropbox.shtml> at least 24 hours prior to the meeting. Commission staff shall provide copies of the comments to the Commission and shall place a copy on a table for public review when the item is called or, in the case of participation via teleconference, shall provide an electronic copy to the Commission and post a copy on the Commission's website, and may share the document with the Commission and the public using the "share screen" function. (Cal. Code Regs., tit. 2, § 1181.10(b)(1)(C)).

**Postponement:** If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

**Special Accommodations:** For any special accommodations such as a sign language interpreter, an assistive listening device, materials in an alternative format, or any other accommodations, please contact the Commission Office at least five to seven *working* days prior to the meeting.

Very truly yours,



Juliana F. Gmur  
Executive Director

**ITEM 2**  
**TEST CLAIM**  
**PROPOSED DECISION**

On Remand from *City of San Diego v. Commission on State Mandates*,  
Sacramento County Superior Court, Case No. 24WM000056

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-R2

City of San Diego, Claimant

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**EXECUTIVE SUMMARY**

**Overview**

This Test Claim alleges reimbursable state-mandated activities arising from Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017 *which is applicable to the City of San Diego only*. This amendment applies to a domestic water supply permit issued to the City of San Diego (claimant) and requires the claimant's public water system,<sup>1</sup> beginning January 18, 2017, to submit to the State Water Resources Control Board's (State Water Board's) Division of Drinking Water a list of all K-12 schools it serves and to sample and test drinking water in K-12 schools for the presence of lead, upon the request of an authorized representative of the school made prior to November 1, 2019.

This Test Claim has been previously heard by the Commission and denied twice on separate grounds. The claimant successfully litigated both prior Decisions, resulting in final court decisions concluding the test claim order mandates a new program or higher level of service. On April 29, 2022, the Third District Court of Appeal issued an unpublished opinion, finding that the test claim order imposes a new program or higher level of service in that "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."<sup>2</sup> On October 31, 2024, the Sacramento County Superior Court

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<sup>1</sup> Public water systems are also known as "community water systems" which are public water systems that supply water to the same population year-round. (See Health and Safety Code section 116275(i).) These two terms are used interchangeably throughout the record.

<sup>2</sup> Exhibit K (2), *City of San Diego v. Commission on State Mandates*, Unpublished Opinion (Apr. 29, 2022, Case No. C092800), page 13.

entered judgment holding that the claimant was practically compelled and, thus, mandated by the state to comply with the test claim order.<sup>3</sup>

Thus, the only remaining issue is whether the test claim order imposes costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514, or whether the exception in Government Code section 17556(d) applies. Government Code section 17556(d) provides that that the Commission shall not find costs mandated by the state if it finds that the “local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.”

As described herein, staff finds that Government Code section 17556(d) does not apply in this case, that the test claim order imposes costs mandated by the state, and therefore the test claim order imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6. Staff recommends that the Commission approve this Test Claim.

### **Procedural History**

The State Water Board issued 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017. The claimant filed the Test Claim on January 11, 2018.<sup>4</sup> The State Water Board and the Department of Finance (Finance) filed comments on the Test Claim on August 13, 2018.<sup>5</sup> The claimant filed rebuttal comments on November 9, 2018.<sup>6</sup> On December 21, 2018, Commission staff issued the Draft Proposed Decision.<sup>7</sup> On January 11, 2019, the State Water Board and the claimant filed comments on the 2018 Draft Proposed Decision.<sup>8</sup> The Commission heard the Test Claim on March 22, 2019 and voted 6-1 to deny the claim on the ground that the test claim permit did not impose a new program or higher level of service.

On June 20, 2019, the claimant filed a petition for writ of mandate in Sacramento County Superior Court, and on July 30, 2020, the court denied the petition. The claimant appealed, and on April 29, 2022, the Third District Court of Appeal reversed the judgment issued by the superior court, finding that the test claim order imposes a

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<sup>3</sup> Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056), pages 12-13.

<sup>4</sup> Exhibit A, Test Claim, page 1.

<sup>5</sup> Exhibit B, State Water Board’s Comments on the Test Claim; Exhibit C, Finance’s Comments on the Test Claim.

<sup>6</sup> Exhibit D, Claimant’s Rebuttal Comments.

<sup>7</sup> Exhibit E, Draft Proposed Decision, issued December 21, 2018.

<sup>8</sup> Exhibit F, State Water Board’s Comments on the 2018 Draft Proposed Decision; Exhibit G, Claimant’s Comments on the 2018 Draft Proposed Decision.

new program or higher level of service.<sup>9</sup> The Court of Appeal directed the superior court to remand the matter to the Commission for further proceedings consistent with the appellate court's April 29, 2022 unpublished opinion. On November 16, 2022, the superior court issued a judgment and writ, commanding the Commission to set aside its March 22, 2019 decision denying the Test Claim and to consider in the first instance whether reimbursement is required.

On January 27, 2023, the Commission adopted the Order to Set Aside its March 22, 2019 Decision. On March 23, 2023, Commission staff issued the Draft Proposed Decision, which addressed the state mandate and fee authority issue.<sup>10</sup> On May 4, 2023, the claimant and the State Water Board filed comments on the 2023 Draft Proposed Decision.<sup>11</sup>

On December 1, 2023 the Commission heard the Test Claim on Remand and voted 4-2 to deny the claim on the ground the test claim order did not impose a state-mandated program.

On March 26, 2024, the claimant filed a petition for writ of mandate in Sacramento County Superior Court challenging the December 1, 2023 Decision. On October 31, 2024, the Sacramento County Superior Court issued a judgment, order, and writ, finding that the claimant was mandated by the state based on practical compulsion to comply with the test claim order, and commanding the Commission to set aside its December 1, 2023 Decision and to consider in the first instance whether reimbursement is required.<sup>12</sup> On January 24, 2025, the Commission adopted the Order to Set Aside its December 1, 2023 Decision.

This Proposed Decision was issued on February 26, 2025 for the March 28, 2025 Commission hearing.

### **Commission Responsibilities**

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. "Test claim" means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have

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<sup>9</sup> Exhibit K (2), *City of San Diego v. Commission on State Mandates*, Unpublished Opinion (Apr. 29, 2022, Case No. C092800).

<sup>10</sup> Exhibit H, Draft Proposed Decision, issued March 23, 2023.

<sup>11</sup> Exhibit I, Claimant's Comments on the 2023 Draft Proposed Decision; Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision.

<sup>12</sup> Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056).

the opportunity to participate in the test claim process and are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with 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 and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”<sup>13</sup>

**Claims**

The following chart provides a brief summary of the claims and issues raised and staff’s recommendation.

Issue	Description	Staff Recommendation
Is the Test Claim timely filed pursuant to Government Code section 17551?	<p>Government Code section 17551 states that test claims must 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.”<sup>14</sup></p> <p>Government Code section 17557(e) requires a test claim to be “submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year.”</p>	<p><i>Timely filed with a potential period of reimbursement beginning January 18, 2017</i></p> <p>– The effective date of the test claim order is January 18, 2017.<sup>15</sup> The claimant filed the Test Claim on January 11, 2018, less than 12 months after the effective date of the Order.<sup>16</sup> Therefore, the Test Claim is timely filed.</p> <p>Because the Test Claim was filed on January 11, 2018, the potential period of reimbursement under Government Code section 17557 begins on July 1, 2016. However, since the test claim permit has a later effective date, the potential period of reimbursement for this claim begins on the permit’s</p>

<sup>13</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

<sup>14</sup> Government Code section 17551(c).

<sup>15</sup> Exhibit A, Test Claim, page 104 (test claim order).

<sup>16</sup> Exhibit A, Test Claim, page 1.

Issue	Description	Staff Recommendation
		effective date, or January 18, 2017.
Does the test claim order impose a state-mandated program on the claimant?	On October 31, 2024, the Sacramento County Superior Court entered judgment holding that the claimant was practically compelled and, thus, mandated by the state to comply with the test claim order. <sup>17</sup>	Yes – By order of the Sacramento County Superior Court, the test claim order imposes a state-mandated program within the meaning of article XIII B, section 6.
Does the test claim order impose a new program or higher level of service?	On April 29, 2022, the Third District Court of Appeal issued an unpublished opinion in <i>City of San Diego v. Commission on State Mandates</i> , Court of Appeal, Third Appellate District, Case No. C092800, finding that the test claim order imposes a new program or higher level of service. <sup>18</sup>	Yes – by order of the Third District Court of Appeal, the test claim order imposes a new program or higher level of service in that “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.” <sup>19</sup>
Does the test claim order result in increased costs mandated by the state?	Article XIII B, section 6 of the California Constitution and Government Code section 17561(a) require reimbursement for all costs mandated by the state. Government Code section 17564(a) requires that no payment be made unless the claim exceeds \$1,000. In addition, a finding of costs mandated by the state	Yes – The evidence in the record shows that the claimant’s costs to comply with the mandated test claim activities exceed \$1,000. <sup>22</sup>  Staff finds that there are costs mandated by the state for the mandated activities and that the claimant does not have fee authority sufficient as a matter of law

<sup>17</sup> Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056), pages 12-13.

<sup>18</sup> Exhibit K (2), *City of San Diego v. Commission on State Mandates*, Unpublished Opinion (Apr. 29, 2022, Case No. C092800), page 13.

<sup>19</sup> Exhibit K (2), *City of San Diego v. Commission on State Mandates* Unpublished Opinion (Apr. 29, 2022, Case No. C092800), page 13.

<sup>22</sup> Exhibit A, Test Claim, pages 79 (Declaration of Rex Ragucos), 2767-2768.

Issue	Description	Staff Recommendation
	<p>means that none of the exceptions identified in Government Code section 17556 apply.<sup>20</sup></p> <p>The State Water Board and the Department of Finance contend that lead testing in K-12 schools provides a direct benefit to the water system as a whole and each ratepayer, and thus, the claimant may set water rates on property owners sufficient to pay for the costs of compliance with the permit amendment within the meaning of Government Code section 17556(d).<sup>21</sup></p> <p>The claimant contends that increasing property-related fees on schools is prohibited by the test claim order and would violate Propositions 218 and 26 if imposed on the remaining customers.</p> <p>Government Code section 17556(d) provides that the Commission shall not find costs mandated by the state if it finds that, as a matter of law, the “local agency or school district has the authority to levy service charges, fees, or</p>	<p>to pay for these activities within the meaning of Government Code section 17556(d).</p> <p>Although a property-related fee would satisfy article XIII D, sections 2 and 6(b)(4), the fee would violate article XIII D, section 6(b)(3) of the California Constitution (Proposition 218) as not proportional to the service attributable to each parcel since the schools cannot be charged, and makes the remaining customers subsidize the cost of the new mandated activities, which the courts have found to violate Proposition 218.<sup>23</sup></p> <p>Additionally, article XIII C (Proposition 26) prohibits the claimant from charging new or increased fees for the mandated activities on all ratepayers.</p>

<sup>20</sup> Government Code section 17556.

<sup>21</sup> Exhibit B, State Water Board’s Comments on the Test Claim, pages 15-16; Exhibit C, Finance’s Comments on the Test Claim, page 2.

<sup>23</sup> *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 937; *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493, 1505-1506.



Issue	Description	Staff Recommendation
	assessments sufficient to pay for the mandated program or increased level of service.”	

**Staff Analysis**

**A. This Test Claim Is Timely Filed Pursuant to Government Code Section 17551 and Has a Potential Period of Reimbursement Beginning January 18, 2017.**

Government Code section 17551 states that local agency and school district test claims must 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.”<sup>24</sup> Section 1183.1(c) of the Commission’s regulations defines 12 months as 365 days.<sup>25</sup>

The effective date of the order is January 18, 2017.<sup>26</sup> The claimant filed the Test Claim on January 11, 2018, less than 12 months after the effective date of the order.<sup>27</sup> Therefore, the Test Claim is timely filed.

Government Code section 17557(e) requires a test claim to be “submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year.” Because the Test Claim was filed on January 11, 2018, the potential period of reimbursement under Government Code section 17557 begins on July 1, 2016. However, since the test claim permit has a later effective date, the potential period of reimbursement for this Test Claim begins on the permit’s effective date, or January 18, 2017.

**B. The Test Claim Order Imposes a Reimbursable State-Mandated Program Within the Meaning of Article XIII B, Section 6 of the California Constitution.**

This Test Claim alleges new state-mandated activities and costs arising from a permit amendment issued by the State Water Resources Control Board (State Water Board) to the City of San Diego’s public water system, Order No. 2017PA-SCHOOLS. The test claim order is *applicable to the City of San Diego only*, and is one of over 1,100 permit amendments simultaneously issued to privately- and publicly-owned public water systems.<sup>28</sup>

<sup>24</sup> Government Code section 17551(c).

<sup>25</sup> California Code of Regulations, title 2, section 1183.1(c).

<sup>26</sup> Exhibit A, Test Claim, page 104 (test claim order).

<sup>27</sup> Exhibit A, Test Claim, page 1.

<sup>28</sup> This is unusual in that, generally, a test claim functions similarly to a class action and there are approximately 1,200 public water systems subject to the same exact

The test claim order is an amendment to the claimant's domestic water supply permit allowing its public water system to continue to provide drinking water. Under existing law, public water systems have to comply with the state and federal Lead and Copper Rule to protect public health by minimizing lead and copper levels in drinking water, primarily by reducing water corrosivity.<sup>29</sup> To determine the corrosivity of drinking water, the Lead and Copper Rule requires routine monitoring at kitchen or bathroom taps of residences and other buildings based on lead and copper action levels established by U.S. EPA.<sup>30</sup> At the time the test claim order was adopted, monitoring the taps at K-12 schools was not required by the Lead and Copper Rule.<sup>31</sup>

Beginning January 18, 2017, the test claim order requires the claimant to provide the State Water Board, 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, and upon a school's request made by November 1, 2019, *and at no charge to the school*, to 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). Beginning January 1, 2018, however, any lead testing conducted by the claimant on those public schools constructed or modernized before January 1, 2010, that did not request testing before January 1, 2018, is required by Health and Safety Code section 116227, and not by the test claim order.

This Test Claim has been previously heard by the Commission and denied twice on separate grounds. The claimant successfully litigated both prior Decisions, resulting in final court decisions concluding the test claim order mandates a new program or higher level of service.<sup>32</sup>

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requirements in separate amendments to their own permits, but no test claims were filed on those other permits. This Decision applies only to the San Diego permit.

<sup>29</sup> Exhibit A, Test Claim, pages 105-108 (test claim order); *Williams v. Moulton Niguel Water Dist.* (2018) 22 Cal.App.5th 1198, 1202, citing to Code of Federal Regulations, title 40, sections 141.80 and 141.81(b); Health and Safety Code sections 116525, 116271(k); California Code of Regulations, title 22, section 64670 et seq.

<sup>30</sup> *Williams v. Moulton Niguel Water Dist.* (2018) 22 Cal.App.5th 1198, 1203.

<sup>31</sup> Since 2021, federal Lead and Copper Rule regulations have required public water systems to collect samples from schools and childcare facilities within their distribution system that were constructed before 2014. (Code of Federal Regulations, title 40, section 141.92 (86 Fed. Reg. 4306, eff. Jan. 15, 2021).)

<sup>32</sup> Exhibit K (2), *City of San Diego v. Commission on State Mandates*, Unpublished Opinion (Apr. 29, 2022, Case No. C092800), page 13; Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056), pages 12-13.

Thus, the only remaining issue is whether the test claim order imposes costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514, or whether the exception in Government Code section 17556(d) applies.

The claimant's increased costs to comply with the mandated activities exceed \$1,000 and, thus, satisfy the requirements in Government Code sections 17514 and 17564.<sup>33</sup>

Government Code section 17556(d) provides, however, that the Commission shall not find costs mandated by the state if the "local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." The California Supreme Court upheld the constitutionality of Government Code section 17556(d) in *County of Fresno*, finding that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes.<sup>34</sup> Thus, where the claimant has "authority, i.e., the right or power, to levy fees sufficient to cover the costs" of a state mandated program, reimbursement is not required, notwithstanding other factors that may make the exercise of that authority impractical or undesirable.<sup>35</sup>

The claimant generally has the statutory authority to collect property-related fees from its customers to provide water under the California Safe Drinking Water Act, and such fees include those costs under the Lead and Copper Rule.<sup>36</sup> However, the claimant contends that it does not have the authority to charge increased fees on the schools requesting service pursuant to the plain language of the test claim order, and is prohibited from imposing fees on the remaining water customers to cover the costs of the mandated activities pursuant to Propositions 218 and 26 (which added articles XIII C and XIII D to the California Constitution). The claimant argues that lead testing at schools is triggered by voluntary requests of the schools, is not incident to property ownership and is, thus, not a property-related service; the services required by the test claim order are not immediately available to customers other than the requesting schools; and any fee would exceed the proportional cost of the service attributable to each parcel and, thus, article XIII D, sections 2 and 6(b)(3) and (4) (Proposition 218)

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<sup>33</sup> Exhibit A, Test Claim, pages 79 (Declaration of Rex Ragucos), 2767-2768.

<sup>34</sup> *County of Fresno v. State of California* (1990) 53 Cal.3d. 482, 487.

<sup>35</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Connell v. Superior Court* (1997) 59 Cal.App.4th 382; 401-402; *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 564, citing to *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

<sup>36</sup> Health and Safety Code section 116590(b) ("A public water system may collect a fee from its customers to recover the fees paid by the public water system pursuant to this chapter [California Safe Drinking Water Act]."); Exhibit A, Test Claim, page 70 (Declaration of Doug Campbell, Senior Chemist of the Public Utilities Department, City of San Diego).

cannot be satisfied, and any fee would be considered a tax under article XIII C (Proposition 26).<sup>37</sup>

The State Water Board contends – and Finance agrees – that Proposition 218 does not prevent the claimant from increasing water rates on property owners because lead testing confers a “direct benefit” to the water system as a whole and, by extension, each ratepayer.<sup>38</sup> Specifically, the State Water Board alleges that the mandated program “functionally extends” the Lead and Copper Rule and helps to maintain and possibly improve property values.<sup>39</sup>

Staff finds that the claimant does not have the authority to impose fees sufficient to cover the costs of the mandated activities pursuant to Government Code section 17556(d) and, thus, there are costs mandated by the state.

Pursuant to the plain language of the test claim order, the claimant does not have the authority to impose fees on schools requesting lead testing to cover the increased costs to comply with the new state-mandated activities.<sup>40</sup>

In addition, the claimant does not have the authority to impose fees on the remaining customers to cover the increased costs of the new state-mandated activities. Although such a fee would satisfy article XIII D, sections 2 and 6(b)(4), the fee would violate article XIII D, section 6(b)(3) of the California Constitution (Proposition 218) as not proportional to the service attributable to each parcel since the schools cannot be charged, and makes the remaining customers subsidize the cost of the new mandated activities. In addition, a levy would not fall under any exception to the definition of “taxes” in article XIII C (Proposition 26). In this respect, the Proposed Decision makes the following findings:

- The requirements mandated by the test claim order are conditions imposed by the state for the claimant to *continue* providing water service to its existing customers.<sup>41</sup> Health and Safety Code section 116525(a) provides that “No person shall operate a public water system unless he or she first submits an application to the department and receives a permit as provided in this chapter.”

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<sup>37</sup> Exhibit A, Test Claim, page 54; Exhibit D, Claimant’s Rebuttal Comments, page 11.

<sup>38</sup> Exhibit B, State Water Board’s Comments on the Test Claim, page 16; Exhibit C, Finance’s Comments on the Test Claim, page 2.

<sup>39</sup> Exhibit B, State Water Board’s Comments on the Test Claim, page 16.

<sup>40</sup> Exhibit A, Test Claim, page 107 (test claim order), 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).

<sup>41</sup> Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 145 (Governor’s Veto Message); see also, Exhibit J, State Water Board’s Comments on the 2023 Draft Proposed Decision, pages 5-6 (“The permit is subject to revocation or penalties for failure to comply. . . . Thus, to continue to operate its public water system, the City must comply with the lead testing requirement to provide drinking water service within its service area.”).

And the Sacramento County Superior Court found that “Because the City operates its water system under a permit from the Board, it would not be able to continue to do so if its permit was suspended or revoked.”<sup>42</sup> The test claim order applies to the “schools that are served water through a utility meter by July 1, 2017” and request testing and, therefore, the mandate is to test for lead in the schools already connected to the water distribution system.<sup>43</sup>

Although a school has a choice to request lead testing under the test claim order, its request is not based on a business decision of the school. The dual purpose of the test claim order is to “further safeguard California’s water quality” generally and to “ensure we are continuing to protect our most vulnerable populations.”<sup>44</sup> As indicated above, the schools that request service cannot be charged for these activities. And the mandated activities are not triggered by a voluntary decision of the other property owners. Thus, the *Richmond* and *Apartment Assn.* cases, which held that fees triggered by a voluntary action of the property owner are not property-related fees, are distinguishable and do not apply here.<sup>45</sup> Accordingly, any fee would satisfy the requirements of a property-related fee within the meaning of article XIII D, section 2.<sup>46</sup>

- A fee imposed on the claimant’s remaining customers would satisfy article XIII D, section 6(b)(4), which requires that “No fee or charge may be imposed for a service *unless that service is actually used by, or immediately available to, the owner of the property in question.*” Continued water service provided by the claimant is immediately available to and is used by the claimant’s customers.<sup>47</sup>

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<sup>42</sup> Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056), page 9 (“Because the City operates its water system under a permit from the Board, it would not be able to continue to do so if its permit was suspended or revoked. (See Health & Saf. Code, § 116525, subd. (a).) . . . No city could reasonably ignore such an obligation [imposed by the test claim order] and roll the dice on whether 1.3 million residents will have their water service disrupted.”).

<sup>43</sup> Exhibit A, Test Claim, page 105 (Test claim order).

<sup>44</sup> Exhibit A, Test Claim, page 115 (Media Release); see also, pages 104-105 (test claim order, paragraphs 4-6).

<sup>45</sup> *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal. 4th 409, 426–427; *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 839-840.

<sup>46</sup> *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 216; *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 426–427; *Wolstoncroft v. County of Yolo* (2021) 68 Cal.App.5th 327, 344.

<sup>47</sup> See, for example, *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493, 1516, where the court held as follows: “Water service fees to fund the costs of capital-intensive operations to produce more or new water, such as the

In addition, the claimant's declarant states that in all instances where remediation was performed at the schools that had lead exceedances, follow-up sampling showed the source of the lead was removed and no problems to the city's water system were identified.<sup>48</sup> Thus, the service provided by the test claim order provides a benefit to all of its customers.

- However, a property-related fee cannot be imposed on the remaining customers and not on the schools without violating article XIII D, section 6(b)(3), which requires that the amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel. This requirement "ensures that the aggregate fee collected on *all* parcels is *distributed among those parcels in proportion to the cost of service for each parcel*."<sup>49</sup>

Here, the cost of the overall service of providing water is higher because of the additional and new required activities mandated by the state.<sup>50</sup> These activities are performed *in addition* to the prior requirements imposed by the Lead and Copper Rule. As indicated in the test claim order, the claimant may not use any lead samples collected under the order to satisfy federal or state Lead and Copper Rule requirements.<sup>51</sup> The State Water Board nevertheless asserts that the benefits of the test claim order are similar to those under the Lead and Copper Rule, where the claimant tests individual residential homes and uses those test results to optimize corrosion control for the larger system.<sup>52</sup> The difference, however, is that under the Lead and Copper Rule, *all* customers share in the costs of lead testing. Here, the claimant is prohibited by the test claim order from passing those increased costs on to the schools receiving the lead testing. Thus, passing the increased costs on to the remaining customers, making the costs of service to their parcels higher than the cost of service to the schools receiving the additional lead testing, is no different than a water district recouping costs from irrigation users to keep costs to the remaining customers proportionately low (as in *City of Palmdale*) or using revenues from the top tiers

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recycling plant at issue in this case, do not contravene article XIII, section 6, subdivision (b)(4) of the Constitution. While that provision precludes fees for a service not immediately available, both recycled water and traditional potable water are part of the same service—water service. And water service most assuredly is immediately available to City Water's customers now."

<sup>48</sup> Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, pages 60-61.

<sup>49</sup> *Coziahr v. Otay Water District* (2024) 103 Cal.App.5th 785, 795, emphasis added.

<sup>50</sup> Exhibit A, Test Claim, pages 79 (Declaration of Rex Ragucos), 2767-2768.

<sup>51</sup> Exhibit A, Test Claim, page 108 (test claim order).

<sup>52</sup> Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision, pages 5-6.

to subsidize below-cost rates for the bottom tier (*Capistrano*), all of which violate article XIII D, section 6(b)(3).<sup>53</sup>

- Any fee imposed by the claimant on the remaining customers would not fall under any of the seven exceptions to the definition of a tax in article XIII C of the California Constitution (Proposition 26) and, thus, the fee would be considered a tax. Article XIII B, section 6 was specifically designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues and, thus, the test claim order imposes costs mandated by the state.<sup>54</sup>

Accordingly, this case is distinguishable from the stormwater fee analysis performed by the Third District Court of Appeal in *Department of Finance v. Commission on State Mandates*, where the court held that unless there is a showing that a fee cannot meet the substantive requirements of article XIII D, section 6(b) as a matter of law or undisputed fact, then the finding that a fee would meet the substantive requirements is implicit in the determination that permittees have the right or power to levy a fee.<sup>55</sup> Here, as a matter of law, a property-related fee cannot be imposed on school districts under the test claim order and cannot be imposed on the remaining property owners without violating article XIII C (Proposition 26) and article XIII D, section 6(b)(3) (Proposition 218).

In addition, no law or facts in the record support a finding that any of the other exceptions specified in Government Code section 17556 apply to this claim.

### **Conclusion**

Based on the forgoing analysis, staff finds that the test claim order imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 and requires the claimant, as a public water system, to perform the following mandated activities, beginning January 18, 2017:

1. Submit to the State Water Board's Division of Drinking Water [DDW] a comprehensive list of the names and addresses of all K-12 schools served water through a utility meter [by the claimant] by July 1, 2017;<sup>56</sup>
2. If an authorized school representative of a private or public K-12 school in the claimant's service area requests lead sampling assistance in writing by November 1, 2019:

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<sup>53</sup> *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 937; *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493, 1505-1506.

<sup>54</sup> *County of Fresno v. State of California* (1990) 53 Cal.3d. 482, 487.

<sup>55</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 584-585.

<sup>56</sup> Exhibit A, Test Claim, page 105 (test claim order).

- a. Respond in writing within 60 days and schedule a meeting with school officials to develop a sampling plan;<sup>57</sup>
- b. Finalize a sampling plan and complete initial sampling within 90 days [or an alternative time schedule approved by DDW];<sup>58</sup>
- c. 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;<sup>59</sup>
- d. 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;<sup>60</sup>
- e. Ensure samples are collected by an adequately trained water system representative;<sup>61</sup>
- f. Submit the samples to an ELAP certified laboratory for analysis;<sup>62</sup>
- g. Require the laboratory to submit the data electronically to DDW;<sup>63</sup>
- h. Provide a copy of the results to the school representative;<sup>64</sup>
- i. Within two business days of a result that shows an exceedance of 15 ppb, notify the school of the sample result;<sup>65</sup>
- j. If an initial sample shows an exceedance of 15 ppb:
  - Collect an additional sample within 10 days if the sample site remains in service;<sup>66</sup>

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<sup>57</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>58</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>59</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>60</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>61</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>62</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>63</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>64</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>65</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>66</sup> Exhibit A, Test Claim, page 106 (test claim order).



- Collect a third sample within 10 business days after notification that a resample result is less than or equal to 15 ppb;<sup>67</sup>
  - 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;<sup>68</sup>
- k. Ensure that the water system receives the results of repeat lead samples from the laboratory in no more than 10 business days;<sup>69</sup>
  - l. 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;<sup>70</sup>
  - m. 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.<sup>71</sup> ***The water system is not responsible for the costs of any corrective action or maintenance;***<sup>72</sup>
  - n. Keep records of all requests for lead related assistance and provide the records to DDW, upon request;<sup>73</sup>
  - o. Include in the annual Consumer Confidence Report a statement summarizing the number of schools requesting lead sampling.<sup>74</sup>

***Beginning January 1, 2018, any lead testing conducted by the claimant on those public schools constructed or modernized before January 1, 2010, that did not request testing by January 1, 2018, is not required by the test claim order and is not reimbursable.***

### **Staff Recommendation**

Staff recommends that the Commission adopt the Proposed Decision to approve the Test Claim and authorize staff to make any technical, non-substantive changes to the Proposed Decision following the hearing.

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<sup>67</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>68</sup> Exhibit A, Test Claim, page 107 (test claim order).

<sup>69</sup> Exhibit A, Test Claim, page 107 (test claim order).

<sup>70</sup> Exhibit A, Test Claim, page 107 (test claim order).

<sup>71</sup> Exhibit A, Test Claim, page 108 (test claim order).

<sup>72</sup> Exhibit A, Test Claim, page 108 (test claim order).

<sup>73</sup> Exhibit A, Test Claim, page 108 (test claim order).

<sup>74</sup> Exhibit A, Test Claim, page 108 (test claim order).

BEFORE THE  
 COMMISSION ON STATE MANDATES  
 STATE OF CALIFORNIA

**IN RE TEST CLAIM ON REMAND**

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-R2

*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

On Remand from *City of San Diego v. Commission on State Mandates*, Sacramento County Superior Court, Case No. 24WM000056

*(Adopted March 28, 2025)*

**DECISION**

The Commission in State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on March 28, 2025. [Witness list will be included in the adopted Decision.]

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/modified] the Proposed Decision to [approve/partially approve/deny] the Test Claim by a vote of [vote will be included in the adopted Decision], as follows:

<b>Member</b>	<b>Vote</b>
Lee Adams, County Supervisor	
Shannon Clark, Representative of the Director of the Governor’s Office of Land Use and Climate Innovation	
Deborah Gallegos, Representative of the State Controller, Vice Chairperson	
Karen Greene Ross, Public Member	
Renee Nash, School District Board Member	
William Pahland, Representative of the State Treasurer	

Member	Vote
Michelle Perrault, Representative of the Director of the Department of Finance, Chairperson	

### **Summary of the Findings**

This Test Claim alleges new state-mandated activities and costs arising from a permit amendment issued by the State Water Resources Control Board (State Water Board) to the City of San Diego’s public water system, Order No. 2017PA-SCHOOLS. The test claim order is *applicable to the City of San Diego only*, and is one of over 1,100 permit amendments simultaneously issued to privately- and publicly-owned public water systems.<sup>75, 76</sup>

The test claim order is an amendment to the claimant’s domestic water supply permit allowing its public water system to continue to provide drinking water. Under existing law, public water systems have to comply with the state and federal Lead and Copper Rule to protect public health by minimizing lead and copper levels in drinking water, primarily by reducing water corrosivity.<sup>77</sup> To determine the corrosivity of drinking water, the Lead and Copper Rule requires routine monitoring at kitchen or bathroom taps of residences and other buildings based on lead and copper action levels established by EPA.<sup>78</sup> At the time the test claim order was adopted, monitoring the taps at K-12 schools was not required by the Lead and Copper Rule.<sup>79</sup>

Beginning January 18, 2017, the test claim order requires the claimant to provide the State Water Board, 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, and upon a school’s request made by November 1, 2019, *and at no charge to the school*, to

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<sup>75</sup> This is unusual in that, generally, a test claim functions similarly to a class action and there are approximately 1,200 public water systems subject to the same exact requirements in separate amendments to their own permits, but no test claims were filed on those other permits. This Decision applies only to the San Diego permit.

<sup>76</sup> These systems are also known as “community water systems” which are public water systems 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.

<sup>77</sup> Exhibit A, Test Claim, pages 105-108 (test claim order); *Williams v. Moulton Niguel Water Dist.* (2018) 22 Cal.App.5th 1198, 1202, citing to Code of Federal Regulations, title 40, sections 141.80 and 141.81(b); Health and Safety Code sections 116525, 116271(k); California Code of Regulations, title 22, section 64670 et seq.

<sup>78</sup> *Williams v. Moulton Niguel Water Dist.* (2018) 22 Cal.App.5th 1198, 1203.

<sup>79</sup> Since 2021, federal Lead and Copper Rule regulations have required public water systems to collect samples from schools and childcare facilities within their distribution system that were constructed before 2014. (Code of Federal Regulations, title 40, section 141.92 (86 Fed. Reg. 4306, eff. Jan. 15, 2021).)

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). Beginning January 1, 2018, however, any lead testing conducted by the claimant on those public schools constructed or modernized before January 1, 2010, that did not request testing before January 1, 2018, is required by Health and Safety Code section 116227, and not by the test claim order.

This Test Claim has been previously heard by the Commission and denied twice on separate grounds. The claimant successfully litigated both prior decisions, resulting in final court decisions concluding the test claim order mandates a new program or higher level of service. On April 29, 2022, the Third District Court of Appeal issued an unpublished opinion, finding that the test claim order imposes a new program or higher level of service in that “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.”<sup>80</sup> On October 31, 2024, the Sacramento County Superior Court entered judgment holding that the claimant was practically compelled and, thus, mandated by the state to comply with the test claim order.<sup>81</sup>

Thus, the only remaining issue is whether the test claim order imposes costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514, or whether the exception in Government Code section 17556(d) applies.

The claimant's increased costs to comply with the mandated activities exceed \$1,000 and, thus, satisfy the requirements in Government Code sections 17514 and 17564.<sup>82</sup>

Government Code section 17556(d) provides that the Commission shall not find costs mandated by the state, however, if it finds that the “local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.” The California Supreme Court upheld the constitutionality of Government Code section 17556(d) in *County of Fresno*, finding that the term “costs” in article XIII B, section 6, excludes expenses recoverable from sources other than taxes.<sup>83</sup> Thus, where the claimant has “authority, i.e., the right or power, to levy fees sufficient to cover the costs” of a state mandated program,

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<sup>80</sup> Exhibit K (2), *City of San Diego v. Commission on State Mandates*, Unpublished Opinion (Apr. 29, 2022, Case No. C092800), page 13.

<sup>81</sup> Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056), pages 12-13.

<sup>82</sup> Exhibit A, Test Claim, pages 79 (Declaration of Rex Ragucos), 2767-2768.

<sup>83</sup> *County of Fresno v. State of California* (1990) 53 Cal.3d. 482, 487.

reimbursement is not required, notwithstanding other factors that may make the exercise of that authority impractical or undesirable.<sup>84</sup>

The claimant generally has the statutory authority to collect property-related fees from its customers to provide water under the California Safe Drinking Water Act, and such fees include those costs under the Lead and Copper Rule.<sup>85</sup> However, the claimant contends that it does not have the authority to charge increased fees on the schools requesting service pursuant to the plain language of the test claim order, and is prohibited from imposing fees on the remaining water customers to cover the costs of the mandated activities pursuant to Propositions 218 and 26 (which added articles XIII C and XIII D to the California Constitution). The claimant argues that lead testing at schools is triggered by voluntary requests of the schools, is not incident to property ownership and is, thus, not a property-related service; the services required by the test claim order are not immediately available to customers other than the requesting schools; and any fee would exceed the proportional cost of the service attributable to each parcel and, thus, article XIII D, sections 2 and 6(b)(3) and (4) (Proposition 218) cannot be satisfied and any fee but would be considered a tax under article XIII C (Proposition 26).<sup>86</sup>

The State Water Board contends – and Finance agrees – that Proposition 218 does not prevent the claimant from increasing water rates on property owners because lead testing confers a “direct benefit” to the water system as a whole and, by extension, each ratepayer.<sup>87</sup> Specifically, the State Water Board alleges that the mandated program “functionally extends” the Lead and Copper Rule and helps to maintain and possibly improve property values.<sup>88</sup>

The Commission finds that the claimant does not have the authority to impose fees sufficient to cover the costs of the mandated activities pursuant to Government Code section 17556(d) and, thus, there are costs mandated by the state.

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<sup>84</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Connell v. Superior Court* (1997) 59 Cal.App.4th 382; 401-402; *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 564, citing to *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

<sup>85</sup> Health and Safety Code section 116590(b) (“A public water system may collect a fee from its customers to recover the fees paid by the public water system pursuant to this chapter [California Safe Drinking Water Act.]”); Exhibit A, Test Claim, page 70 (Declaration of Doug Campbell, Senior Chemist of the Public Utilities Department, City of San Diego).

<sup>86</sup> Exhibit A, Test Claim, page 54; Exhibit D, Claimant’s Rebuttal Comments, page 11.

<sup>87</sup> Exhibit B, State Water Board’s Comments on the Test Claim, page 16; Exhibit C, Finance’s Comments on the Test Claim, page 2.

<sup>88</sup> Exhibit B, State Water Board’s Comments on the Test Claim, page 16.

Pursuant to the plain language of the test claim order, the claimant does not have the authority to impose fees on schools requesting lead testing to cover the increased costs to comply with the new state-mandated activities.<sup>89</sup>

In addition, the claimant does not have the authority to impose fees on the remaining customers to cover the increased costs of the new state-mandated activities. Although such a fee would satisfy article XIII D, sections 2 and 6(b)(4), the fee would violate article XIII D, section 6(b)(3) of the California Constitution (Proposition 218) as not proportional to the service attributable to each parcel since the schools cannot be charged, and make the remaining customers subsidize the cost of the new mandated activities. In addition, a levy would not fall under any exception to the definition of “taxes” in article XIII C (Proposition 26). In this respect, the Commission makes the following findings:

- The requirements mandated by the test claim order are conditions imposed by the state for the claimant to *continue* providing water service to its existing customers.<sup>90</sup> Health and Safety Code section 116525(a) provides that “No person shall operate a public water system unless he or she first submits an application to the department and receives a permit as provided in this chapter.” And the Sacramento County Superior Court found that “Because the City operates its water system under a permit from the Board, it would not be able to continue to do so if its permit was suspended or revoked.”<sup>91</sup> The test claim order applies to the “schools that are served water through a utility meter by July 1, 2017” and request testing and, therefore, the mandate is to test for lead in the schools already connected to the water distribution system.<sup>92</sup>

Although a school has a choice to request lead testing under the test claim order, its request is not based on a business decision of the school. The dual purpose of the test claim order is to “further safeguard California’s water quality” generally

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<sup>89</sup> Exhibit A, Test Claim, page 107 (test claim order), 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).

<sup>90</sup> Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 145 (Governor’s Veto Message); see also, Exhibit J, State Water Board’s Comments on the 2023 Draft Proposed Decision, pages 5-6 (“The permit is subject to revocation or penalties for failure to comply. . . . Thus, to continue to operate its public water system, the City must comply with the lead testing requirement to provide drinking water service within its service area.”).

<sup>91</sup> Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WMO00056), page 9 (“Because the City operates its water system under a permit from the Board, it would not be able to continue to do so if its permit was suspended or revoked. (See Health & Saf. Code, § 116525, subd. (a).) . . . No city could reasonably ignore such an obligation [imposed by the test claim order] and roll the dice on whether 1.3 million residents will have their water service disrupted.”).

<sup>92</sup> Exhibit A, Test Claim, page 105 (Test claim order).

and to “ensure we are continuing to protect our most vulnerable populations.”<sup>93</sup> As indicated above, the schools that request service cannot be charged for these activities. And the mandated activities are not triggered by a voluntary decision of the other property owners. Thus, the *Richmond* and *Apartment Assn.* cases, which held that fees triggered by a voluntary action of the property owner are not property-related fees, are distinguishable and do not apply here.<sup>94</sup> Accordingly, any fee would satisfy the requirements of a property-related fee within the meaning of article XIII D, section 2.<sup>95</sup>

- A fee imposed on the claimant’s remaining customers would satisfy article XIII D, section 6(b)(4), which requires that “No fee or charge may be imposed for a service *unless that service is actually used by, or immediately available to, the owner of the property in question.*” Continued water service provided by the claimant is immediately available to and is used by the claimant’s customers.<sup>96</sup> In addition, the claimant’s declarant states that in all instances where remediation was performed at the schools that had lead exceedances, follow-up sampling showed the source of the lead was removed and no problems to the city’s water system were identified.<sup>97</sup> Thus, the service provided by the test claim order provides a benefit to all of its customers.
- However, a property-related fee cannot be imposed on the remaining customers and not on the schools without violating article XIII D, section 6(b)(3), which requires that the amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel. This requirement “ensures that the aggregate fee collected on *all* parcels is *distributed among those parcels in proportion to the*

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<sup>93</sup> Exhibit A, Test Claim, page 115 (Media Release); see also, pages 104-105 (test claim order, paragraphs 4-6).

<sup>94</sup> *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal. 4th 409, 426–427; *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 839-840.

<sup>95</sup> *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 216; *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 426–427; *Wolstoncroft v. County of Yolo* (2021) 68 Cal.App.5th 327, 344.

<sup>96</sup> See, for example, *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493, 1516, where the court held as follows: “Water service fees to fund the costs of capital-intensive operations to produce more or new water, such as the recycling plant at issue in this case, do not contravene article XIII, section 6, subdivision (b)(4) of the Constitution. While that provision precludes fees for a service not immediately available, both recycled water and traditional potable water are part of the same service—water service. And water service most assuredly is immediately available to City Water’s customers now.”

<sup>97</sup> Exhibit G, Claimant’s Comments on the 2018 Draft Proposed Decision, pages 60-61.

*cost of service for each parcel.*<sup>98</sup>

Here, the cost of the overall service of providing water is higher because of the additional and new required activities mandated by the state.<sup>99</sup> These activities are performed *in addition* to the prior requirements imposed by the Lead and Copper Rule. As indicated in the test claim order, the claimant may not use any lead samples collected under the order to satisfy federal or state Lead and Copper Rule requirements.<sup>100</sup> The State Water Board nevertheless asserts that the benefits of the test claim order are similar to those under the Lead and Copper Rule, where the claimant tests individual residential homes and uses those test results to optimize corrosion control for the larger system.<sup>101</sup> The difference, however, is that under the Lead and Copper Rule, *all* customers share in the costs of lead testing. Here, the claimant is prohibited by the test claim order from passing those increased costs on to the schools receiving the lead testing. Thus, passing the increased costs on to the remaining customers, making the costs of service to their parcels higher than the cost of service to the schools receiving the additional lead testing, is no different than a water district recouping costs from irrigation users to keep costs to the remaining customers proportionately low (as in *City of Palmdale*) or using revenues from the top tiers to subsidize below-cost rates for the bottom tier (*Capistrano*), all of which violate article XIII D, section 6(b)(3).<sup>102</sup>

- Any fee imposed by the claimant on the remaining customers would not fall under any of the seven exceptions to the definition of a tax in article XIII C of the California Constitution (Proposition 26) and, thus, the fee would be considered a tax. Article XIII B, section 6 was specifically designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues and, thus, there are costs mandated by the state.<sup>103</sup>

Accordingly, this case is distinguishable from the stormwater fee analysis performed by the Third District Court of Appeal in *Department of Finance v. Commission on State Mandates*, where the court held that unless there is a showing that a fee cannot meet the substantive requirements of article XIII D, section 6(b) as a matter of law or undisputed fact, then the finding that a fee would meet the substantive requirements is

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<sup>98</sup> *Coziahr v. Otay Water District* (2024) 103 Cal.App.5th 785, 795, emphasis added.

<sup>99</sup> Exhibit A, Test Claim, pages 79 (Declaration of Rex Ragucos), 2767-2768.

<sup>100</sup> Exhibit A, Test Claim, page 108 (test claim order).

<sup>101</sup> Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision, pages 5-6.

<sup>102</sup> *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 937; *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493, 1505-1506.

<sup>103</sup> *County of Fresno v. State of California* (1990) 53 Cal.3d. 482, 487.



implicit in the determination that permittees have the right or power to levy a fee.<sup>104</sup> Here, as a matter of law, a property-related fee cannot be imposed on school districts under the test claim order and cannot be imposed on the remaining property owners without violating article XIII C (Proposition 26) and article XIII D, section 6(b)(3) (Proposition 218).

In addition, no law or facts in the record support a finding that any of the other exceptions specified in Government Code section 17556 apply to this claim.

Accordingly, the Commission finds that the test claim order imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 and requires the claimant's public water system to perform the following mandated activities, beginning January 18, 2017:

1. Submit to the State Water Board'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] by July 1, 2017;<sup>105</sup>
2. If an authorized school representative of a private or public K-12 school in the claimant's service area requests lead sampling assistance in writing by November 1, 2019:
  - a. Respond in writing within 60 days and schedule a meeting with school officials to develop a sampling plan;<sup>106</sup>
  - b. Finalize a sampling plan and complete initial sampling within 90 days [or an alternative time schedule approved by DDW];<sup>107</sup>
  - c. 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;<sup>108</sup>
  - d. 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;<sup>109</sup>

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<sup>104</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 584-585.

<sup>105</sup> Exhibit A, Test Claim, page 105 (test claim order).

<sup>106</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>107</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>108</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>109</sup> Exhibit A, Test Claim, page 106 (test claim order).

- e. Ensure samples are collected by an adequately trained water system representative;<sup>110</sup>
- f. Submit the samples to an ELAP certified laboratory for analysis;<sup>111</sup>
- g. Require the laboratory to submit the data electronically to DDW;<sup>112</sup>
- h. Provide a copy of the results to the school representative;<sup>113</sup>
- i. Within two business days of a result that shows an exceedance of 15 ppb, notify the school of the sample result;<sup>114</sup>
- j. If an initial sample shows an exceedance of 15 ppb:
  - Collect an additional sample within 10 days if the sample site remains in service;<sup>115</sup>
  - Collect a third sample within 10 business days after notification that a resample result is less than or equal to 15 ppb;<sup>116</sup>
  - 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;<sup>117</sup>
- k. Ensure that the water system receives the results of repeat lead samples from the laboratory in no more than 10 business days;<sup>118</sup>
- l. 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;<sup>119</sup>
- m. Communicate with the school after lead sampling and assist the school with the interpretation of laboratory results and provide information regarding potential

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<sup>110</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>111</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>112</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>113</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>114</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>115</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>116</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>117</sup> Exhibit A, Test Claim, page 107 (test claim order).

<sup>118</sup> Exhibit A, Test Claim, page 107 (test claim order).

<sup>119</sup> Exhibit A, Test Claim, page 107 (test claim order).

corrective actions if the results confirm lead levels above 15 ppb.<sup>120</sup> ***The water system is not responsible for the costs of any corrective action or maintenance;***<sup>121</sup>

- n. Keep records of all requests for lead related assistance and provide the records to DDW, upon request;<sup>122</sup>
- o. Include in the annual Consumer Confidence Report a statement summarizing the number of schools requesting lead sampling.<sup>123</sup>

***Beginning January 1, 2018, any lead testing conducted by the claimant on those public schools constructed or modernized before January 1, 2010, that did not request testing by January 1, 2018, is not required by the test claim order and is not reimbursable.***

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<sup>120</sup> Exhibit A, Test Claim, page 108 (test claim order).

<sup>121</sup> Exhibit A, Test Claim, page 108 (test claim order).

<sup>122</sup> Exhibit A, Test Claim, page 108 (test claim order).

<sup>123</sup> Exhibit A, Test Claim, page 108 (test claim order).

## COMMISSION FINDINGS

### I. Chronology

- 01/18/2017 Permit Amendment No. 2017PA-SCHOOLS for City of San Diego PWS 3710020 was adopted by the State Water Board's Division of Drinking Water.<sup>124</sup>
- 01/11/2018 The claimant filed the Test Claim.<sup>125</sup>
- 08/13/2018 The State Water Board filed comments on the Test Claim.<sup>126</sup>
- 08/13/2018 Finance filed comments on the Test Claim.<sup>127</sup>
- 11/09/2018 The claimant filed its rebuttal comments.<sup>128</sup>
- 12/21/2018 Commission staff issued the Draft Proposed Decision.<sup>129</sup>
- 01/11/2019 The State Water Board filed comments on the Draft Proposed Decision.<sup>130</sup>
- 01/11/2019 The claimant filed comments on the Draft Proposed Decision.<sup>131</sup>
- 03/22/2019 The Commission heard the Test Claim and voted 6-1 to deny the claim on the ground there was no new program or higher level of service.
- 06/20/2019 The claimant filed a petition for writ of mandate in Sacramento County Superior Court.
- 07/30/2020 Sacramento County Superior Court denied the claimant's petition for writ of mandate.
- 09/25/2020 The claimant appealed the denial of its petition for writ of mandate to the Third District Court of Appeal.
- 04/29/2022 The Third District Court of Appeal reversed the judgment issued by Sacramento County Superior Court.
- 11/16/2022 Sacramento County Superior Court issued a judgment and writ commanding the Commission to set aside its March 22, 2019 Decision and to consider in the first instance whether reimbursement is required.

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<sup>124</sup> Exhibit A, Test Claim, page 14.

<sup>125</sup> Exhibit A, Test Claim.

<sup>126</sup> Exhibit B, State Water Board's Comments on the Test Claim.

<sup>127</sup> Exhibit C, Finance's Comments on the Test Claim.

<sup>128</sup> Exhibit D, Claimant's Rebuttal Comments.

<sup>129</sup> Exhibit E, Draft Proposed Decision, issued December 21, 2018.

<sup>130</sup> Exhibit F, State Water Board's Comments on the 2018 Draft Proposed Decision.

<sup>131</sup> Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision.

01/27/2023 The Commission adopted the Order setting aside its March 22, 2019 Decision.

03/23/2023 Commission staff issued the Draft Proposed Decision for the May 23, 2023 Commission hearing.<sup>132</sup>

04/07/2023 The State Water Board filed a request for an extension of time to file comments on the Draft Proposed Decision and postponement of the hearing until July 28, 2023, which was approved for good cause.

04/11/2023 Finance filed a request for extension of time to file comments on the Draft Proposed Decision, which was approved for good cause.

04/12/2023 The claimant filed a request for extension of time to file comments on the Draft Proposed Decision, which was approved for good cause.

05/04/2023 The claimant and the State Board filed comments on the Draft Proposed Decision.<sup>133</sup>

06/21/2023 The Commission cancelled the July 28, 2023 Commission Meeting and set a new hearing date of September 22, 2023.

09/06/2023 Commission staff issued the Proposed Decision for the September 22, 2023 Commission hearing.

09/08/2023 The claimant filed a request for extension of time to file comments on the Proposed Decision and postponement of hearing.

09/12/2023 The Commission denied the claimant's request for extension of time to file comments on the Proposed Decision and granted the request for postponement of hearing, setting the hearing for December 1, 2023.

12/01/2023 The Commission heard the Test Claim and voted 4-2, with one abstention to deny the claim on the ground the test claim order did not impose a state-mandated program.

03/26/2024 The claimant filed a petition for writ of mandate in Sacramento County Superior Court.

10/31/2024 Sacramento County Superior Court issued a judgment, order, and writ, finding that the claimant was mandated by the state based practical compulsion to comply with the test claim order, and commanding the Commission to set aside its December 1, 2023 Decision and to consider in the first instance whether reimbursement is required.<sup>134</sup>

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<sup>132</sup> Exhibit H, Draft Proposed Decision, issued March 23, 2023.

<sup>133</sup> Exhibit I, Claimant's Comments on the 2023 Draft Proposed Decision; Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision.

<sup>134</sup> Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056).

- 01/24/2025 The Commission adopted the Order setting aside its December 1, 2023 Decision.
- 02/26/2025 Commission staff issued the Proposed Decision for the March 28, 2025 Commission hearing.

## II. Background

The test claim order is one of over 1,100 permit amendments simultaneously issued to privately-and publicly-owned “public water systems,” and requires the claimant, beginning January 11, 2017, to test for lead in the drinking water connections of every K-12 school that it serves, upon the request of an authorized representative of the school made prior to November 1, 2019, at no charge to the school.

### A. Lead as an Environmental Health Risk

Lead is toxic and has “no known value to the human body.”<sup>135</sup> 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.”<sup>136</sup> 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.<sup>137</sup> 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.<sup>138</sup> Higher lead levels can cause severe neurological problems and ultimately death.<sup>139</sup>

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.”<sup>140</sup> 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, batteries, and cosmetics.<sup>141</sup> In 1984, burning leaded gasoline was the

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<sup>135</sup> Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6).

<sup>136</sup> Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6).

<sup>137</sup> Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6).

<sup>138</sup> Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools).

<sup>139</sup> Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6).

<sup>140</sup> Exhibit K (7), *Public Health Statement, Lead, CAS # 7439-92-1*, page 2.

<sup>141</sup> Exhibit K (6), National Institute of Environmental Health Sciences, Lead Information Home Page, <https://www.niehs.nih.gov/health/topics/agents/lead/index.cfm> (accessed on September 26, 2018), page 1.

largest source of lead emissions in the air, and so the Environmental Protection Agency (EPA) phased out and eventually banned leaded gasoline.<sup>142</sup> 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.”<sup>143</sup> 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.<sup>144</sup>

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.<sup>145</sup> 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.’”<sup>146</sup> 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.”<sup>147</sup> 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.”<sup>148</sup> 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.

To potentially close some of the gaps in lead exposure prevention, the California Legislature in 1992 enacted the Lead-Safe Schools Protection Act,<sup>149</sup> 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

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<sup>142</sup> Exhibit K (7), *Public Health Statement, Lead, CAS # 7439-92-1*, page 4.

<sup>143</sup> Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools).

<sup>144</sup> Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, pages 163-164 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools).

<sup>145</sup> Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 164 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools).

<sup>146</sup> Exhibit K (7), *Public Health Statement, Lead, CAS : 7439-92-1*, pages 3-4.

<sup>147</sup> Exhibit K (7), *Public Health Statement, Lead, CAS # 7439-92-1*, page 4.

<sup>148</sup> Exhibit K (7), *Public Health Statement, Lead, CAS # 7439-92-1*, page 4.

<sup>149</sup> Education Code section 32240 et seq.

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.”<sup>150</sup> 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, 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.<sup>151</sup> 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.<sup>152</sup> U.S. EPA states that there are over 170,000 public water systems providing drinking water to Americans, to which the Act applies.<sup>153</sup>

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.<sup>154</sup> The purpose of the Lead and Copper Rule “is to protect public health by minimizing lead and copper levels in drinking water, primarily by reducing water corrosivity.”<sup>155</sup> Lead and copper enter drinking water primarily through corrosion of service and plumbing lines and plumbing materials. To determine the corrosivity of drinking water, the Lead and Copper Rule requires routine monitoring at kitchen or bathroom taps of residences and other buildings based on action levels established by EPA.<sup>156</sup>

The federal action level for lead “is exceeded if the concentration of lead in more than 10 percent of tap water samples collected during any monitoring period...is greater than

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<sup>150</sup> Education Code section 32242.

<sup>151</sup> Exhibit K (11), U.S. EPA, *Understanding the Safe Drinking Water Act*, <https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf> (accessed on February 21, 2023), page 1.

<sup>152</sup> United States Code, title 42, section 300f(4).

<sup>153</sup> Exhibit K (11), U.S. EPA, *Understanding the Safe Drinking Water Act*, <https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf> (accessed on February 21, 2023), page 2.

<sup>154</sup> Code of Federal Regulations, title 40, section 141.80 et seq.

<sup>155</sup> *Williams v. Moulton Niguel Water Dist.* (2018) 22 Cal.App.5th 1198, 1202, citing to Code of Federal Regulations, title 40, sections 141.80 and 141.81(b).

<sup>156</sup> *Williams v. Moulton Niguel Water Dist.* (2018) 22 Cal.App.5th 1198, 1203.



0.015 mg/L [15 ppb].”<sup>157</sup> The number of samples required depends on the size of the drinking water system, and any history of prior exceedances.<sup>158</sup> An action level exceedance is not a violation of the Rule, but the exceedance may trigger requirements that include additional water quality monitoring and source identification, corrosion control treatment, public education, notification to all customers with a lead service line, reporting, and lead service line replacement.<sup>159</sup>

Since 2021, federal Lead and Copper Rule regulations have required public water systems to collect samples from schools and childcare facilities within their distribution system that were constructed before 2014.<sup>160</sup>

## 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.”<sup>161</sup> These provisions do not provide a right to the delivery of water, but merely provide that drinking water delivered by a public water system 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

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<sup>157</sup> Code of Federal Regulations, title 40, section 141.80(c).

<sup>158</sup> See Exhibit K (5), *Lead and Copper Rule: A Quick Reference Guide*, 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).

<sup>159</sup> *Williams v. Moulton Niguel Water Dist.* (2018) 22 Cal.App.5th 1198, 1202; Code of Federal Regulations, title 40, sections 141.80-141.91.

<sup>160</sup> Code of Federal Regulations, title 40, section 141.92 (86 Fed. Reg. 4306, eff. Jan. 15, 2021).

<sup>161</sup> Health and Safety Code section 116270.

establishment of drinking water standards and public health goals greater emphasis and visibility within the state.<sup>162</sup>

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.<sup>163</sup> The State Water Board 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.”<sup>164</sup>

In 1995, the State adopted a Lead and Copper Rule to reduce water corrosivity, 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.<sup>165</sup>

Under the [Lead and Copper Rule] (LCR), public water systems are required to test water for lead at a set number of service connections (depending on the number of customers served by the system) that are at a higher risk for lead in the tap water due to their plumbing characteristics. Water suppliers are not required to test every customer's tap. Schools that

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<sup>162</sup> Health and Safety Code section 116270.

<sup>163</sup> 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, or 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.

<sup>164</sup> 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 State Water Board, effective July 1, 2014); “Public Water Systems” are defined in Health and Safety Code section 116275(h) and United States Code, title 42, section 300f(4).

<sup>165</sup> See California Code of Regulations, title 22, section 64670 et seq.; Exhibit B, State Water Board’s Comments on the Test Claim, pages 5-6.

are served by community water systems are generally not included in the LCR testing; only residential connections are included.<sup>166</sup>

Public water systems conduct water sampling once every six months for lead. If a system has 90th percentile levels that do not exceed the action levels for lead for two consecutive periods, it may reduce sampling to once every three years and reduce the number of sites required to be sampled.<sup>167</sup>

However, 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.<sup>168</sup> In addition, a water system with a lead action level exceedance is required to offer to sample the tap water of any customer who requests it, but the system is not required to pay for collecting or analyzing the sample.<sup>169</sup>

The courts have described the California Lead and Copper Rule as follows:

Under the Lead and Copper Rule, public water distribution systems must identify sampling sites within the distribution system. (Regs., § 64682, subd. (a).) These sampling sites must each contain lead solder or lead pipes or be served by a lead service line. (Regs., § 64682, subd. (c)-(f).) One-liter tap and service line water samples must be drawn after letting the water sit in the distribution system for at least six hours. (Regs., §§ 64671.25, 64683, subds.(a)-(c).) The Lead and Copper Rule specifies the number and frequency of samples to be drawn. (Regs., §§ 64684–64685.) Subsequent analysis of the samples is to be done in accordance with federal regulations governing the monitoring of contaminants in public water systems. (Regs., § 64672; 40 C.F.R. §§ 141.23, 141.89(a).)

The Lead and Copper Rule establishes a threshold concentration, one microgram per liter, below which the lead level shall be considered zero. (Regs., § 64672, subd. (c)(3).) Public water systems must report their test results on a regular basis (Regs., § 64691) and, depending on those results, must take steps to install corrosion control, treat the system source water, remove lead service lines, and/or issue warning notices to residents served by the distribution system. (Regs., §§ 64673–64680.)

[¶¶]

The Lead and Copper Rule includes detailed context-specific sampling procedures. (Regs., §§ 64671.25, 64682–64685.) These procedures

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<sup>166</sup> Exhibit A, Test Claim, page 105 (Test claim order).

<sup>167</sup> California Code of Regulations, title 22, section 64675.5(a)(1).

<sup>168</sup> See, e.g., California Code of Regulations, title 22, sections 64673 and 64674 (Describing monitoring and corrosion control measures to be taken if an elevated lead level is detected for small, medium, and large water systems).

<sup>169</sup> California Code of Regulations, title 22, section 64679.

include the requirement that a “water system” identify and take samples at between 5 and 100 sites over at least two six-month periods. (Regs., § 64684, subds. (a), (b).) *The pool of sites is limited to residences containing copper pipes with lead solder, lead pipes, or pipes serviced by lead service lines.* (Regs., § 64682, subds. (c)-(g).) These sampling requirements limit the applicability of the Lead and Copper Rule. The rule cannot be applied outside a public water system.<sup>170</sup>

Approximately 500 schools within California are themselves permitted as a “public water system,” because they have their own water supply, such as a well.<sup>171</sup> Those schools are already required to test their taps for lead and copper under the Lead and Copper Rule and the test claim order does not apply to schools that are already regulated as public water systems.<sup>172</sup> However, most schools are served by community water systems that are not required to test for lead specifically at the school’s taps.<sup>173</sup>

### **C. The Test Claim Order; An Amendment to the City of San Diego’s Domestic Water Supply Permit**

Both the federal and state law have long required drinking water systems to monitor 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.<sup>174</sup>

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

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<sup>170</sup> *Mateel Environmental Justice Foundation v. Edmund A. Gray, Co.* (2003) 115 Cal.App.4th 8, 21-22, emphasis added.

<sup>171</sup> Exhibit A, Test Claim, page 118 (State Water Board’s *Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).

<sup>172</sup> Exhibit A, Test Claim, page 118 (State Water Board’s *Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).

<sup>173</sup> Exhibit A, Test Claim, page 118 (State Water Board’s *Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).

<sup>174</sup> Exhibit A, Test Claim, page 105 (Test claim order); Exhibit B, State Water Board’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”).

areas of the schools under its jurisdiction.<sup>175</sup> SB 334 was vetoed by then-Governor Brown, whose veto message expressed concern that the bill could create a very expensive reimbursable state mandate.<sup>176</sup> The veto message instead directed the State Water Board to examine the scope of the potential problem by incorporating water quality testing in schools as part of the state's Lead and Copper Rule.<sup>177</sup>

Accordingly, the State Water Board adopted the Permit Amendment (the test claim order) at issue here, as well as over 1,100 other nearly identical permit amendments (but for the individual public water system information) for other drinking water systems serving K-12 schools. Specifically, beginning January 18, 2017, 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 by November 1, 2019, the drinking water system shall:

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

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<sup>175</sup> Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 148 (SB 334, Legislative Counsel's Digest).

<sup>176</sup> Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 145 (Governor's Veto Message).

<sup>177</sup> Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 145 (Governor's Veto Message).

- 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.<sup>178</sup>

The order further states that the water system may not use any lead samples collected under the order to satisfy federal or state Lead and Copper Rule requirements.<sup>179</sup> Thus, the lead testing requirements imposed by the test claim order must be done in addition to the testing and monitoring requirements imposed by the Lead and Copper Rule.

The test claim order further requires the water system to 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.<sup>180</sup>

The test claim order requires the claimant to provide testing to both private and public K-12 schools, upon request of the school. Under the test claim order, the claimant’s public water system must assist those schools to which it serves drinking water with “at least one or more of grades Kindergarten through 12<sup>th</sup> grade,” when a request for one-time assistance is made in writing by an authorized school representative.<sup>181</sup>

“Authorized school representative” is defined as “the superintendent or designee of a school, governing board or designee of a charter school, or administrator or designee of a private school.”<sup>182</sup>

The test claim order also requires the claimant to pay for these activities by stating the following:

5. The water system is responsible for the following costs:
  - a. Laboratory fees for all lead samples and reporting of the results to DDW and the school, and all laboratory coordination and instruction.
  - b. All water system staff time dedicated to the tasks required by the provisions in this permit amendment.<sup>183</sup>

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<sup>178</sup> Exhibit A, Test Claim, pages 105-107 (test claim order).

<sup>179</sup> Exhibit A, Test Claim, page 108 (test claim order).

<sup>180</sup> Exhibit A, Test Claim, page 108 (test claim order).

<sup>181</sup> Exhibit A, Test Claim, pages 105-106 (test claim order); see also, Exhibit A, Test Claim, page 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).

<sup>182</sup> Exhibit A, Test Claim, pages 105-106 (test claim order).

<sup>183</sup> Exhibit A, Test Claim, page 107 (test claim order).

The State Water Board’s “Frequently Asked Questions” document explains that the community water system that serves the school is responsible for all costs associated with collecting, analyzing, and reporting the results as follows:

**6. Who pays for lead testing of drinking water in California schools?**

The community water system that serves the school is responsible for all costs associated with collecting, analyzing, and reporting drinking water samples for lead testing at up to five locations at each school, and is required to meet with the authorized school representative to develop a sampling plan and review the sampling results. The community water system will *not* pay for any maintenance or corrections needed at the school if elevated lead levels are found in the drinking water, but is required to conduct repeat sampling at the school to confirm elevated lead levels and the effectiveness of any corrective action taken by the school.<sup>184</sup>

The “Frequently Asked Questions” document also states the following:

The community water system that serves the school is responsible for all costs associated with collecting, analyzing, and reporting drinking water samples for lead testing at California schools required by the January 17, 2017 permit action and the water system is also required to meet with the authorized school representative to develop a sampling plan and review the sampling results. The community water system will *not* pay for any maintenance or corrections needed at the school.<sup>185</sup>

The State Water Board’s media release reiterates “The Board’s new requirement ensures schools that want lead testing can receive it for free.”<sup>186</sup>

The claimant explains its compliance with the test claim order in a Declaration from Doug Campbell, a Senior Chemist for the claimant’s Public Utilities Department who oversaw the implementation of the test claim order, as follows:

7. The City is on a reduced monitoring program approved by the SWRCB and is only required to test 50 residences every three years under the federal and state lead and copper rules, as the City’s past test results have not exceeded action levels at the 90<sup>th</sup> percentile.

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<sup>184</sup> Exhibit A, Test Claim, page 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).

<sup>185</sup> Exhibit A, Test Claim, page 123 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).

<sup>186</sup> Exhibit A, Test Claim, page 115 (State Water Board’s Media Release). See also, Exhibit B, State Water Board’s Comments on the Test Claim, page 7 [“An important element of the lead testing in schools program is that the requesting schools receive the lead testing at no charge.”].

8. The City tested 262 schools from the date of the Permit Amendment until January 7, 2019. Elevated levels with values greater than 15 ppb were discovered in five fixtures on four school sites.
9. Three of the four school sites took remedial action to replace the fixtures. When the City retested after the schools took remedial action, lead levels were Not Detected or below the 15-ppb action level. One school did not perform any remediation, as it is no longer located in the facility.
10. All remediations conducted by the schools consisted of replacement of fixtures or drinking fountains, or replacement of plumbing lines internal to the schools themselves. In all instances where remediation was performed, follow-up sampling has shown that the source of lead was removed. The City has not identified any problems with City water through the Permit Amendment.<sup>187</sup>

**D. Health and Safety Code Section 116277 (AB 746)**

Effective January 1, 2018 (almost one year after the effective date of the test claim order), Health and Safety Code section 116277 (AB 746) required community water systems<sup>188</sup> serving a public school constructed before January 1, 2010, and that did not previously request lead testing, to affirmatively test for lead in those schools' potable water system by July 1, 2019.<sup>189</sup> The section became inoperative July 1, 2019, and was repealed effective January 1, 2020.<sup>190</sup> Section 116277 states in its entirety as follows:

(a)(1) A community water system that serves a schoolsite of a local educational agency with a building constructed before January 1, 2010, on that schoolsite shall test for lead in the potable water system of the schoolsite on or before July 1, 2019.

(2) The community water system shall report its findings to the schoolsite within 10 business days after the community water system receives the results from the testing laboratory or within two business days if it is found that the schoolsite's lead level exceeds 15 parts per billion.

(3) If the lead level exceeds 15 parts per billion, the community water system shall also test a water sample from the point in which

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<sup>187</sup> Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, pages 60-61.

<sup>188</sup> "Community water systems" are public water systems that supply water to the same population year-round. (See Health and Safety Code section 116275(i).)

<sup>189</sup> Health and Safety Code section 116277 (as added by Stats. 2017, ch. 746) (AB 746).

<sup>190</sup> Health and Safety Code section 116277(g) (as added by Stats. 2017, ch. 746) (AB 746).



the schoolsite connects to the community water system's supply network to determine the lead level of the water entering the schoolsite from the community water system's water supply network.

(b)(1) A local educational agency shall allow the community water system access to each of the local educational agency's schoolsites that are subject to subdivision (a) to conduct testing.

(2) If the lead level exceeds 15 parts per billion, the local educational agency shall notify the parents and guardians of the pupils who attend the schoolsite or preschool where the elevated lead levels are found.

(c)(1) If lead levels exceed 15 parts per billion, the local educational agency shall take immediate steps to make inoperable and shut down from use all fountains and faucets where the excess lead levels may exist. Additional testing may be required to determine if all or just some of the school's fountains and faucets are required to be shut down.

(2) Each local educational agency shall work with the schoolsites within its service area to ensure that a potable source of drinking water is provided for students at each schoolsite where fountains or faucets have been shut down due to elevated lead levels. Providing a potable source of drinking water may include, but is not limited to, replacing any pipes or fixtures that are contributing to the elevated lead levels, providing onsite water filtration, or providing bottled water as a short-term remedy.

(d) Each community water system, in cooperation with the appropriate corresponding local educational agency, shall prepare a sampling plan for each schoolsite where lead sampling is required under subdivision (a). The community water system and the local educational agency may request assistance from the state board or any local health agency responsible for regulating community water systems in developing the plan.

(e) This section shall not apply to a schoolsite that is subject to any of the following:

(1) The schoolsite was constructed or modernized after January 1, 2010.

(2) The local educational agency of the schoolsite is currently permitted as a public water system and is currently required to test for lead in the potable water system.

(3) The local educational agency completed lead testing of the potable water system after January 1, 2009, and posts information about the lead testing on the local educational agency's public Internet Web site, including, at a minimum, identifying any

schoolsite where the level of lead in drinking water exceeds 15 parts per billion.

(4) The local educational agency has requested testing from its community water system consistent with the requirements of this section.

(f) For purposes of this section, the following definitions apply:

(1) "Local educational agency" means a school district, county office of education, or charter school located in a public facility.

(2) "Potable water system" means water fountains and faucets used for drinking or preparing food.

(g) This section shall become inoperative on July 1, 2019, and, as of January 1, 2020, is repealed.<sup>191</sup>

Thus, AB 746 requires preparation of a sampling plan, repeat testing when lead levels exceed 15 ppb, notification procedures based on sampling results, and requires the local educational agency to take action if lead levels exceed 15 ppb.<sup>192</sup> AB 746 does not require testing in the following situations: (1) The schoolsite was constructed or modernized after January 1, 2010; (2) The local educational agency of the schoolsite is currently permitted as a public water system and is currently required to test for lead; (3) The local educational agency completed lead testing after January 1, 2009, and posts this information on its website; (4) The local educational agency has requested testing from its community water system consistent with the requirements of AB 746.<sup>193</sup>

The State Water Board describes the requirements of AB 746 as follows:

As of July 1, 2019, the Division of Drinking Water (DDW), in collaboration with the California Department of Education, has completed the initiative to test for lead in drinking water at all public K-12 schools. California Assembly Bill 746 (AB 746) published on October 12, 2017, effective January 1, 2018, *required community water systems to test lead levels, by July 1, 2019, in drinking water at all California public, K-12 school sites that were constructed before January 1, 2010.*

Prior to the passage of AB 746, in early 2017, the DDW and Local Primacy Agencies issued amendments to the domestic water supply permits of approximately 1,200 community water systems so that schools

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<sup>191</sup> Health and Safety Code section 116277 (as added by Stats. 2017, ch. 746) (AB 746).

<sup>192</sup> Health and Safety Code section 116277(a) – (d) (as added by Stats. 2017, ch. 746) (AB 746); see also Exhibit B, State Water Board's Comments on the Test Claim, page 7.

<sup>193</sup> Health and Safety Code section 116277(e) (as added by Stats. 2017, ch. 746) (AB 746); see also Exhibit B, State Water Board's Comments on the Test Claim, page 7.

that are served by a public water system could request assistance from their public water system to conduct water sampling for lead and receive technical assistance if an elevated lead sample was found. These amendments allowed the private schools to continue to request sampling and assistance after the passage of AB 746.<sup>194</sup>

According to a legislative analysis of AB 746, events in early 2017 raised concerns about the issue of lead in public school drinking water.

In February 2017, the safety of drinking water was questioned after elevated levels of lead, copper, and bacteria were discovered at three campuses in the San Ysidro School District. In addition, Folsom Cordova Unified started testing water last year at schools built before 1960 that have galvanized steel pipes. The testing was prompted by elevated levels of copper, iron, and lead in water coming from a classroom tap in 2015 at Cordova Lane Center, which serves preschoolers and special education students.

Because testing drinking water at schools is not mandatory, it is unknown whether these are isolated incidents or roughly representative of school districts around the state. Conducting sample tests at each schoolsite is one way to determine the scope of the problem.<sup>195</sup>

The same legislative analysis describes lead testing provided under the test claim order and the other substantially similar permit amendments as “more limited in scope compared to the bill’s requirements.”<sup>196</sup>

### **III. Positions of the Parties**

#### **A. City of San Diego**

The claimant alleges that the test claim order imposes a reimbursable state-mandated program and required the claimant’s public water system to perform lead testing, at no charge, on the property of all schools that receive water from their system, upon request.<sup>197</sup> The claimant asserts that it does not receive any dedicated state or federal funds, or any other non-local agency funds dedicated to this program.<sup>198</sup>

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<sup>194</sup> Exhibit K (10), State Water Board, *Lead Sampling in Schools*, [https://www.waterboards.ca.gov/drinking\\_water/certlic/drinkingwater/leadsamplinginschools.html](https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/leadsamplinginschools.html) (accessed on January 30, 2023), page 1.

<sup>195</sup> Exhibit K (4), Concurrence in Senate Amendments, Analysis of AB 746, as amended September 8, 2017, page 3.

<sup>196</sup> Exhibit K (4), Concurrence in Senate Amendments, Analysis of AB 746, as amended September 8, 2017, page 2.

<sup>197</sup> Exhibit A, Test Claim, page 14.

<sup>198</sup> Exhibit A, Test Claim, pages 16-17; 52-53.

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.<sup>199</sup> 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 provisions in articles XIII C and XIII D of the California Constitution, which were added by Propositions 218 and 26, that it 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 in which it conducts lead testing, and it is legally proscribed from imposing or increasing fees on other water users.<sup>200</sup> The claimant raises the following points:

- The City's Public Utilities Department is funded almost entirely by ratepayers or through financing secured by ratepayer revenue. Proposition 218 imposes restrictions on ratepayer funds. The Public Utilities Department does not have "general purpose funds" available outside of these restrictions.<sup>201</sup>
- Outside of the Public Utilities Department, the City has general fund revenue from taxes and fees that do not exceed the cost of the services provided pursuant to Proposition 26.<sup>202</sup>
- Property-related fees for water service provided by the Public Utilities Department are governed by Proposition 218. Under Proposition 218, the revenue from the fee cannot exceed the cost to provide the property-related service, and the amount of the fee cannot exceed the proportional cost of the service attributable to the parcel.<sup>203</sup> The claimant argues:

Because of these restrictions, the PUD cannot stand idle and simply absorb the cost of lead testing for schools without violating Proposition 218. Testing for lead on school property, which is outside PUD's water distribution system, has no relationship to providing water service to other City customers. Allowing water ratepayer funds to absorb the cost of lead testing would result in PUD water service fees "exceed[ing] the proportional cost of the service attributable to the parcel" because all ratepayers would be contributing to the cost of a service provided only to parcels with schools.<sup>204</sup>

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<sup>199</sup> Exhibit A, Test Claim, page 58.

<sup>200</sup> Exhibit A, Test Claim, page 54; Exhibit D, Claimant's Rebuttal Comments, page 9.

<sup>201</sup> Exhibit A, Test Claim, page 53.

<sup>202</sup> Exhibit A, Test Claim, page 53.

<sup>203</sup> Exhibit A, Test Claim, page 54 (citing to California Constitution, article XIII D, section 6(b)(1) and (3)).

<sup>204</sup> Exhibit A, Test Claim, page 54.

- Lead testing in schools is not a property-related service that could properly be funded through water rates. A “property-related service” is defined as a public service having a direct relationship to property ownership (Cal. Const. art. XIII D, § 2(h)). Services provided due to the activities of property owners are not property-related services under Proposition 218.<sup>205</sup>

The claimant states that 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,”<sup>206</sup> 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.

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.<sup>207</sup>

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<sup>205</sup> Exhibit A, Test Claim, pages 54-55 (citing *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 427 and *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 841-84).

<sup>206</sup> Exhibit D, Claimant’s Rebuttal Comments, page 10.

<sup>207</sup> Exhibit D, Claimant’s Rebuttal Comments, page 11.

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.<sup>208</sup> 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 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

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<sup>208</sup> Exhibit D, Claimant’s Rebuttal Comments, page 12.

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.<sup>209</sup>

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

#### **B. Department of Finance**

Finance contends there are no costs mandated by the state since the claimant has fee authority sufficient to cover the costs of the required activities pursuant to Government Code section 17556(d). Finance argues that “claimants do have fee authority undiminished by Propositions 218 or 26.”<sup>210</sup> Finance states that “Proposition 26 specifically excludes assessments and property-related fees imposed in accordance with Proposition 218 from the definition of taxes.”<sup>211</sup> 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).”<sup>212</sup> Finance further asserts that “as the State Water Board makes clear in its comments on this test claim, lead testing in K-12 schools provides a direct benefit to the water system as a

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<sup>209</sup> Exhibit D, Claimant’s Rebuttal Comments, pages 12-13.

<sup>210</sup> Exhibit C, Finance’s Comments on the Test Claim, page 2.

<sup>211</sup> Exhibit C, Finance’s Comments on the Test Claim, page 2.

<sup>212</sup> Exhibit C, Finance’s Comments on the Test Claim, page 2.

whole and each ratepayer, and the City may therefore set water rates sufficient to pay for the costs of compliance with the permit amendment.”<sup>213</sup>

### **C. State Water Resources Control Board**

The State Water Board asserts that the test claim order is not subject to state mandate reimbursement because the claimant has fee authority sufficient to cover the costs of any required activities pursuant to Government Code section 17556(d).<sup>214</sup> The State Water Board further argues that Proposition 218 does not prevent the claimant from imposing or increasing water rates to recoup the costs of the alleged mandate. In this respect, the State Water Board argues that the lead testing required by the test claim order confers a direct benefit on all water system users as a whole because it functionally extends the Lead and Copper Rule by providing additional water quality data of systemwide importance, which in turn “will help to maintain and possibly improve property values.”<sup>215</sup>

The State Water Board further contends, in response to the Draft Proposed Decision issued in March 2023, that reliance on the *Richmond* case to find that a fee incident to property ownership could not be imposed, is misplaced and that the facts here are distinguishable from *Richmond*.<sup>216</sup> In addition, the State Water Board argues that a fee would satisfy all of the substantive requirements of article XIII B, section 6(b) as follows:

Additionally, a fee imposed to comply with the lead testing requirements would meet all substantive elements of article XIII D, section 6, subdivision (b). Regarding subdivisions (b)(1) and (b)(2), the City has not claimed that it cannot impose a fee in the correct amount or use the fee for the appropriate purpose. Regarding subdivision (b)(5) of section 6, the City has not alleged, nor can it, that the fee imposed would be for general government services, such as police, fire, ambulance, or library services.

Regarding subdivisions (b)(3) and (b)(4) of section 6, the City claims that that [sic] lead testing in schools confers no direct benefit on the ratepayers. The City’s argument reflects an unnecessarily constricted, and ultimately unworkable, definition of the service for which fees are being charged. The service at issue here is water service, and the issue is whether the cost for lead testing in schools may be included in those fees. It should not be necessary to demonstrate that every feature of the overall program provides a direct benefit to every customer. If cost is reasonably included as part of a program to provide safe drinking water

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<sup>213</sup> Exhibit C, Finance’s Comments on the Test Claim, page 2.

<sup>214</sup> Exhibit B, State Water Board’s Comments on the Test Claim, pages 8-17.

<sup>215</sup> Exhibit B, State Water Board’s Comments on the Test Claim, pages 15-16.

<sup>216</sup> Exhibit J, State Water Board’s Comments on the 2023 Draft Proposed Decision, pages 4-5.



fees to recover those costs should not be vulnerable to claims that not every household needs every part of the program.

Moreover, and as discussed more thoroughly in the State Water Board's August 13, 2018, comments on the test claim, the additional lead testing requirements functionally extend the Lead and Copper Rule (LCR) by adding additional sampling points that the City can use to optimize its corrosion control. Although the requesting schools may receive a direct benefit in terms of assessing school pipes and fixtures for lead, this does not diminish the additional benefit the water system as a whole receives from the additional lead sampling points. This division of benefits is similar to those under the existing LCR, where the City test individual residential homes and uses those test results to optimize corrosion control for the larger system. All users with connections to the system benefit from using a select sample of connections, helping to assure provision of safe drinking water through the system. Although individual residents may derive additional benefits from lead testing in their homes, the City appears comfortable assessing property-related fees under article XIII D for compliance with the LCR. [Fn. omitted.]<sup>217</sup>

#### **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."<sup>218</sup> Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] ..." <sup>219</sup>

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

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<sup>217</sup> Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision, page 5.

<sup>218</sup> *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

<sup>219</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.<sup>220</sup>
2. The mandated activity either:
  - a. Carries out the governmental function of providing a service to the public; or
  - b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.<sup>221</sup>
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.<sup>222</sup>
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.<sup>223</sup>

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.<sup>224</sup> The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.<sup>225</sup> 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.”<sup>226</sup>

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<sup>220</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

<sup>221</sup> *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).

<sup>222</sup> *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.

<sup>223</sup> *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.

<sup>224</sup> *Kinlaw v. State of California* (1991) 53 Cal.3d 326, 335.

<sup>225</sup> *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

<sup>226</sup> *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).

**A. This Test Claim Is Timely Filed Pursuant to Government Code Section 17551 and Has a Potential Period of Reimbursement Beginning January 18, 2017.**

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.”<sup>227</sup>

The effective date of the order is January 18, 2017.<sup>228</sup> The claimant filed the Test Claim on January 11, 2018, less than 12 months after the effective date of the order.<sup>229</sup> Therefore, the Test Claim is timely filed.

Government Code section 17557(e) requires a test claim to be “submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year.” Because the Test Claim was filed on January 11, 2018, the potential period of reimbursement under Government Code section 17557 begins on July 1, 2016. However, since the test claim permit has a later effective date, the potential period of reimbursement for this claim begins on the permit’s effective date, or January 18, 2017.

**B. The Test Claim Order Imposes a Reimbursable State-Mandated Program Within the Meaning of Article XIII B, Section 6 of the California Constitution.**

This Test Claim alleges new state-mandated activities and costs arising from an amendment to the claimant’s public water system permit adopted by the State Water Board, Order No. 2017PA-SCHOOLS for the City of San Diego PWS No. 3710020. The test claim order 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 at no cost to the school.<sup>230</sup> Under the order, upon request, the claimant 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).

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<sup>227</sup> Government Code section 17551(c).

<sup>228</sup> Exhibit A, Test Claim, page 104 (test claim order).

<sup>229</sup> Exhibit A, Test Claim, page 1.

<sup>230</sup> Exhibit A, Test Claim, page 107 (test claim order) states that the water system is responsible for the following costs:

- a. Laboratory fees for all lead samples and reporting of the results to DDW and the school, and all laboratory coordination and instruction.
- b. All water system staff time dedicated to the tasks required by the provisions in this permit amendment.

The Commission finds that the test claim order imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution, as specified below.

**1. The Test Claim Order Imposes a State-Mandated Program on the City of San Diego.**

- a. The test claim order imposes new requirements on the claimant, the City of San Diego.

The plain language of the test claim order requires the claimant, as a public water system, to:

1. Submit to the State Water Board'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] by July 1, 2017;<sup>231</sup>
2. If a school representative requests lead sampling assistance in writing by November 1, 2019;<sup>232</sup>
  - a. Respond in writing within 60 days and schedule a meeting with school officials to develop a sampling plan;<sup>233</sup>
  - b. Finalize a sampling plan and complete initial sampling within 90 days [or an alternative time schedule approved by DDW];<sup>234</sup>
  - c. 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;<sup>235</sup>
  - d. 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;<sup>236</sup>
  - e. Ensure samples are collected by an adequately trained water system representative;<sup>237</sup>
  - f. Submit the samples to an ELAP certified laboratory for analysis;<sup>238</sup>

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<sup>231</sup> Exhibit A, Test Claim, page 105 (test claim order).

<sup>232</sup> Exhibit A, Test Claim, page 105 (test claim order).

<sup>233</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>234</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>235</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>236</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>237</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>238</sup> Exhibit A, Test Claim, page 106 (test claim order).

- g. Require the laboratory to submit the data electronically to DDW;<sup>239</sup>
- h. Provide a copy of the results to the school representative;<sup>240</sup>
- i. Within two business days of a result that shows an exceedance of 15 ppb, notify the school of the sample result;<sup>241</sup>
- j. If an initial sample shows an exceedance of 15 ppb:
  - Collect an additional sample within 10 days if the sample site remains in service;<sup>242</sup>
  - Collect a third sample within 10 business days after notification that a resample result is less than or equal to 15 ppb;<sup>243</sup>
  - 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;<sup>244</sup>
- k. Ensure that the water system receives the results of repeat lead samples from the laboratory in no more than 10 business days;<sup>245</sup>
- l. 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;<sup>246</sup>
- m. 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;<sup>247</sup>
- n. 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.<sup>248</sup> **The water**

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<sup>239</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>240</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>241</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>242</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>243</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>244</sup> Exhibit A, Test Claim, page 107 (test claim order).

<sup>245</sup> Exhibit A, Test Claim, page 107 (test claim order).

<sup>246</sup> Exhibit A, Test Claim, page 107 (test claim order).

<sup>247</sup> Exhibit A, Test Claim, page 107 (test claim order).

<sup>248</sup> Exhibit A, Test Claim, page 108 (test claim order).

**system is not responsible for the costs of any corrective action or maintenance;**<sup>249</sup>

- o. Keep records of all requests for lead related assistance and provide the records to DDW, upon request;<sup>250</sup>
- p. Include in the annual Consumer Confidence Report a statement summarizing the number of schools requesting lead sampling.<sup>251</sup>

Both the claimant and the State Water Board agree that these requirements are new, as compared against prior law.<sup>252</sup>

The Commission finds that the requirements imposed by the test claim order are new. Prior law, under the federal and state Safe Drinking Water Act 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. However, the requirements of the test claim order for the claimant, City of San Diego, as a public water system that supplies water to K-12 schools, to sample one to five drinking water fixtures on school property upon request of the school, are new.

Furthermore, while the test claim order is one of over 1,100 permit amendments simultaneously issued to privately- and publicly-owned public water systems, the test claim order is issued only to the claimant, the City of San Diego. Therefore, the new requirements imposed by the test claim order are imposed solely on the City of San Diego.

- b. However, beginning January 1, 2018, any lead testing conducted by the claimant on those public schools constructed or modernized before January 1, 2010, that did not request testing before January 1, 2018, is required by Health and Safety Code section 116227, and not by the test claim order.

Under the test claim order, the claimant's public water system must assist those schools to which it serves drinking water with "at least one or more of grades Kindergarten

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<sup>249</sup> Exhibit A, Test Claim, page 108 (test claim order).

<sup>250</sup> Exhibit A, Test Claim, page 108 (test claim order).

<sup>251</sup> Exhibit A, Test Claim, page 108 (test claim order).

<sup>252</sup> 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 B, State Water Board'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).

through 12<sup>th</sup> grade,” when a request for one-time assistance is made in writing by an authorized school representative by November 1, 2019.<sup>253</sup> “Authorized school representative” is defined as “the superintendent or designee of a school, governing board or designee of a charter school, or administrator or designee of a private school.”<sup>254</sup>

The State Water Board explained in its frequently asked questions documents regarding the lead sampling program that the “schools” which can request lead sampling include all K-12 schools in the water system’s service area that are listed in the California School Directory, including both private and public K-12 schools.

### **Which schools can request lead testing of their drinking water?**

The DDW permit action requires community water systems to assist any school in their service area that is listed in the California School Directory. This directory includes schools for grades K-12, including private, charter, magnet and non-public schools. The directory does *not* include preschools, daycare centers, or postsecondary schools.<sup>255</sup>

From January 1, 2018 through July 1, 2019, however, Health and Safety Code section 116277 required a community water system<sup>256</sup> serving any public school constructed or modernized prior to January 1, 2010, to test for lead in the school’s potable water system<sup>257</sup> by July 1, 2019, except for schools exempted from the requirement. There is no requirement in section 116277 that a school first make a request for testing.

The requirements imposed on a public water system under Health and Safety Code section 116277 are substantially similar to those required by the test claim order. Both require a public water system to work collaboratively with the school to prepare a sampling plan; to test for lead in the school’s drinking water system; to conduct additional testing if lead levels exceed 15 ppb; and to share test results with the school.

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<sup>253</sup> Exhibit A, Test Claim, pages 105-106 (test claim order).

<sup>254</sup> Exhibit A, Test Claim, pages 105-106 (test claim order).

<sup>255</sup> Exhibit A, Test Claim, page 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*), emphasis in original.

<sup>256</sup> “Community water system” is a public water system that supplies water to the same population year-round, and would include the claimant. (See Health and Safety Code section 116275(i).)

<sup>257</sup> Health and Safety Code section 116277(f)(2) (as added by Stats. 2017, ch. 746) (AB 746), which defines “potable water system” as “water fountains and faucets used for drinking or preparing food,” which is substantially similar to the test claim order’s requirement that samples be collected at “regularly used drinking fountains, cafeteria or food preparation areas, or reusable bottle filling stations.” Exhibit A, Test Claim, page 106 (test claim order).

In addition, by its plain language, Health and Safety Code section 116277 applies only to “schoolsite[s] of a local educational agency with a building constructed or modernized before January 1, 2010”<sup>258</sup> and does *not* apply if the “schoolsite was constructed or modernized after January 1, 2010.”<sup>259</sup> Section 116277 defines “local educational agency” as “a school district, county office of education, or charter school located in a public facility.”<sup>260</sup> Thus, section 116277 applies to all public schools constructed or modernized before January 1, 2010, but does *not* apply to those public schools constructed or modernized after January 1, 2010, or to private schools. As indicated in the Background, the State Water Board’s summary of Health and Safety Code section 116227 agrees that the requirements of section 116227 apply only to public schools.<sup>261</sup> Moreover, of those public schools constructed or modernized before January 1, 2010, only those that already completed lead testing before January 1, 2009, or requested lead testing before the enactment of section 116227 (i.e., those that requested testing under the test claim order before January 1, 2018) are exempt from the requirements of section 116227.<sup>262</sup>

Therefore, even in the absence of the test claim order, beginning January 1, 2018, the claimant is required by Health and Safety Code section 116227 to conduct lead testing on all public schools constructed or modernized before January 1, 2010 (except those that previously requested lead testing), and complete that testing by July 1, 2019. No written request by a school is required to trigger this duty.

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<sup>258</sup> Health and Safety Code section 116277(a)(1) (as added by Stats. 2017, ch. 746) (AB 746).

<sup>259</sup> Health and Safety Code section 116277(e)(1) (as added by Stats. 2017, ch. 746) (AB 746).

<sup>260</sup> Health and Safety Code section 116277(f)(1) (as added by Stats. 2017, ch. 746) (AB 746).

<sup>261</sup> Exhibit K (10), State Water Board, *Lead Sampling in Schools*, [https://www.waterboards.ca.gov/drinking\\_water/certlic/drinkingwater/leadsamplinginschools.html](https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/leadsamplinginschools.html) (accessed on January 30, 2023), page 1 (“As of July 1, 2019, the Division of Drinking Water (DDW), in collaboration with the California Department of Education, has completed the initiative to test for lead in drinking water at all public K-12 schools. California Assembly Bill 746 (AB 746) published on October 12, 2017, effective January 1, 2018, required community water systems to test lead levels, by July 1, 2019, in drinking water at all California public, K-12 school sites that were constructed before January 1, 2010.”).

<sup>262</sup> Health and Safety Code section 116277(e) (as added by Stats. 2017, ch. 746) (AB 746). Section 116277(e) also exempts those schools whose local educational agency is currently permitted as a public water system and is currently required to test for lead in the potable water system. The claimant would not have to provide lead testing services to these schools under the test claim order either, since the water is supplied by the local educational agency and not the claimant.



Finally, the test claim order requires the claimant to submit to the State Water Board's Division of Drinking Water a comprehensive list of the names and addresses of all K-12 schools to which it serves water by July 1, 2017, which is *prior* to the effective date of Health and Safety Code section 116277.<sup>263</sup> Section 116277 was not effective until January 1, 2018 and contains no similar requirement. Thus, this requirement is imposed solely by the test claim order.

Accordingly, beginning January 1, 2018, any lead testing conducted by the claimant on those public schools constructed or modernized before January 1, 2010, that did not request testing before January 1, 2018, is required by Health and Safety Code section 116227, and not by the test claim order.

c. The test claim order imposes a state-mandated program on the claimant as an operator of a public water system.

When determining whether a test claim statute or order compels compliance and, thus, creates a state-mandated program for purposes of reimbursement under article XIII B, section 6, the courts have identified two distinct theories: legal compulsion and practical compulsion.<sup>264</sup> Activities undertaken at the option or discretion of local government, without legal or practical compulsion, do not trigger a state-mandated program within the meaning of article XIII B, section 6.<sup>265</sup> The California Supreme Court has described legal compulsion as follows:

Legal compulsion occurs when a statute or executive action uses mandatory language that require[s] or command[s] a local entity to participate in a program or service... Stated differently, legal compulsion is present when the local entity has a mandatory, legally enforceable duty to obey. This standard is similar to the showing necessary to obtain a traditional writ of mandate, which requires the petitioning party to establish the respondent has a clear, present, and usually ministerial duty to act. ... Mandate will not issue if the duty is ... mixed with discretionary power.

Thus, as a general matter, a local entity's voluntary or discretionary decision to undertake an activity cannot be said to be legally compelled, even if that decision results in certain mandatory actions.<sup>266</sup>

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<sup>263</sup> Exhibit A, Test Claim, page 105 (test claim order). The effective date of Health and Safety Code section 116277 is January 1, 2018.

<sup>264</sup> *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815.

<sup>265</sup> *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 73-76; *Department of Finance v. Commission on State Mandates (Kern)* (2003) 30 Cal.4th 727; *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1365-1366.

<sup>266</sup> *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815 (internal quotation marks and citations omitted).

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 communication.<sup>267</sup> The courts have interpreted article XI, section 9 (previously section 19) as granting authority, rather than imposing a duty.<sup>268</sup>

Under the Government Code, when interpreting statutes and constitutional provisions, “shall” is mandatory, and “may” is permissive.<sup>269</sup> Article XI, section 9 provides that a municipal corporation *may* establish water service. Government Code section 38742 also provides that the legislative body of any city “*may*” contract for supplying the city with water for municipal purposes; *or “may”* “[a]cquire, construct, repair, and manage pumps, aqueducts, reservoirs, or other works necessary or proper for supplying water for the use of the city or its inhabitants or for irrigating purposes of the city.”

As discussed above, the test claim order is one of over 1,100 nearly identical permit amendments issued to both privately- and publicly-owned public water systems serving K-12 schools. Therefore, because state law permits, but does not legally require, the claimant to provide water services or to operate as a public water system, the requirements imposed by the test claim order cannot be said to be legally compelled.

Nonetheless, even where a local government entity is not legally compelled to perform required activities, it may be practically compelled to do so. As the California Supreme Court recently stated in *Coast Community College Dist. v. Commission on State Mandates*, practical compulsion “arises when a statutory scheme does not command a local entity to engage in conduct, but rather induces compliance through the imposition of severe consequences that leave the local entity no reasonable alternative but to comply.”<sup>270</sup>

On October 31, 2024, the Sacramento County Superior Court issued a judgment with an attached ruling on submitted matter, which found the claimant was practically compelled to comply with the test claim order as follows:

The bottom line is the City will incur costs to comply with the new lead testing requirement, and it has no reasonable alternative to continuing its water service operations in compliance with its permit. Simply ceasing water service is not a reasonable alternative given the critical importance of water service. Continuing to operate while ignoring the permit condition

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<sup>267</sup> California Constitution, article XI, section 9(a).

<sup>268</sup> *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274.

<sup>269</sup> Government Code section 14.

<sup>270</sup> *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816; see also *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 754 (where no “legal” compulsion exists, “practical” compulsion may be found if the local agency faces “certain and severe...penalties” such as “double...taxation” or other “draconian” consequences if they fail to comply with the statute).

and hoping for no enforcement action from the Board, or continuing to operate despite a permit revocation, are not reasonable alternatives either. Selling the water system, as established by the City's uncontroverted evidence, is not a viable alternative under these circumstances. The City is, therefore, practically compelled to comply with the new permit condition, and the Commission erred in finding otherwise.<sup>271</sup>

Accordingly, the Commission finds that the test claim order imposes a state-mandated program on the claimant.

**2. The New Requirements of the Test Claim Order Constitute a New Program or Higher Level of Service, Within the Meaning of Article XIII B, Section 6 of the California Constitution.**

For the test claim order to be subject to subvention pursuant to article XIII B, section 6 of the California Constitution, the order must impose a new program or higher level of service. A new program or higher level of service is defined as a program that carries out the governmental function of providing services to the public, or, in implementing a state policy, imposes unique requirements on local government that do not apply generally to all residents and entities in the state.<sup>272</sup>

On April 29, 2022, the Third District Court of Appeal issued an unpublished opinion in *City of San Diego v. Commission on State Mandates*, finding that the test claim order imposes a new program or higher level of service in that “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.”<sup>273</sup> The Court stated its conclusion that the permit establishes a new program and remanded the claim back to the Commission to determine the remaining issues as follows:

On the City's appeal, we reverse. For reasons we will cover below, we conclude that the State 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 State 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

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<sup>271</sup> Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056), pages 12-13.

<sup>272</sup> California Constitution, article XIII B, section 6; *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

<sup>273</sup> Exhibit K (2), *City of San Diego v. Commission on State Mandates*, Unpublished Opinion (Apr. 29, 2022, Case No. C092800), page 13.

Commission to consider in the first instance whether reimbursement is appropriate on these facts following remand.<sup>274</sup>

Accordingly, the Commission finds that the test claim order imposes a new program or higher level of service.

**3. The Test Claim Order Results in Increased Costs Mandated by the State Within the Meaning of Article XIII B, Section 6 of the California Constitution and Government Code Section 17514.**

To be reimbursable, the mandated activities must also result in increased costs mandated by the state. Article XIII B, section 6 of the California Constitution and Government Code section 17561(a) require reimbursement for all costs mandated by the state, unless there is an express exemption in article XIII B, section 6. Government Code section 17514 defines “costs mandated by the state” as any increased costs that a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) further requires that no claim shall be made nor shall any payment be made unless the claim exceeds \$1,000. In addition, a finding of costs mandated by the state means that none of the exceptions identified in Government Code section 17556 apply.

- a. The claimant’s costs to comply with the mandated activities under the test claim order exceed \$1,000.

The claimant alleges that it has incurred costs to comply with the test claim order, as follows:<sup>275</sup>

<b>Test Claim Order</b>	<b>Actual Costs FY 2016-2017 (1/17/17-6/30/17)</b>	<b>Actual Costs FY 2017-2018 (7/1/17-3/29/18)</b>	<b>Estimated Costs FY 2017-2018 (3/30/18-6/30/18)</b>
Section 1	\$115,724.90	\$0	\$0
Section 2	\$6,706.65	\$0	\$0
Section 3(a)	\$25,566.73	\$9,299.63	\$11,693.89
Section 3(b)	\$9,294.99	\$4,739.59	\$4,069.22
Section 3(c)	\$64,103.96	\$5,000.29	\$12,476.13
Section 3(e)	\$6,090.78	\$0	\$1,208.59
Section 3(f)	\$61,087.21	\$6,399.85	\$12,364.08
Section 3(g)	\$4,261.12	\$1,549.94	\$1,948.98
Section 3(h)	\$3,059.99	\$677.17	\$607.19
Section 3(i)	\$4,261.12	\$1,549.94	\$1,948.98
Section 3(j)	\$4,547.46	\$1,549.94	\$2,005.80
Section 3(l)	\$4,261.12	\$1,549.94	\$1,948.98
Section 3(m)	\$17,044.49	\$6,199.75	\$7,795.93

<sup>274</sup> Exhibit K (2), *City of San Diego v. Commission on State Mandates*, Unpublished Opinion (Apr. 29, 2022, Case No. C092800), page 2.

<sup>275</sup> Exhibit A, Test Claim, pages 18-51, 58.

<b>Test Claim Order</b>	<b>Actual Costs FY 2016-2017 (1/17/17-6/30/17)</b>	<b>Actual Costs FY 2017-2018 (7/1/17-3/29/18)</b>	<b>Estimated Costs FY 2017-2018 (3/30/18-6/30/18)</b>
Section 7	\$12,783.37	\$4,649.82	\$5,846.95
Section 8	\$12,783.37	\$4,649.82	\$5,846.95
<b>TOTALS</b>	<b>FY 2016-2017 \$351,577.26</b>	<b>FY 2017-2018 (actual) \$47,815.67</b>	<b>FY 2017-2018 (estimated) \$69,761.67</b>

As shown above, the claimant alleges incurred costs of \$351,577.26 for fiscal year 2016-2017.<sup>276</sup> In support, the claimant cites to the declaration of Rex Ragucos, Supervising Management Analyst for the City of San Diego Public Utilities Department and to a cost analysis spreadsheet prepared by Mr. Ragucos.<sup>277</sup> Mr. Ragucos directly oversees the review of and budgetary requirements for implementation of the mandated activities in the test claim order.<sup>278</sup> His declaration contains a narrative of the cost analysis he performed of expenses incurred under the test claim order as of March 2018, as well as projected expenses through the end of fiscal year 2017-2018.<sup>279</sup> The cost analysis is attached to the Test Claim as Exhibit 36.<sup>280</sup>

The record contains substantial evidence pursuant to Government Code section 17559 that the claimant's costs to comply with the mandated activities under the test claim order exceed \$1,000.

The claimant states that it anticipates total costs will potentially be higher than the estimated \$69,761.67 during the last quarter of fiscal year 2017-2018 "because the legislature is planning to require all schools to receive this lead testing, whether voluntarily requested or not."<sup>281</sup> The claimant appears to be referencing AB 746, discussed above, which added Health and Safety Code section 116277 to require community water systems serving public school constructed before January 1, 2010 to test for lead in the schools' potable water system during the time period January 1, 2018 through July 1, 2019.<sup>282</sup> AB 746 is not the subject of this test claim, nor was a test claim timely filed on AB 746. Therefore, whether AB 746 imposes a reimbursable state-mandated program on the claimant or any other local government agency is not before the Commission, and the Commission makes no findings regarding whether Health and Safety Code section 116277 (as added by Stats. 2017, ch. 746) imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6. As

<sup>276</sup> Exhibit A, Test Claim, page 58.

<sup>277</sup> Exhibit A, Test Claim, page 79 (Declaration of Rex Ragucos).

<sup>278</sup> Exhibit A, Test Claim, page 79 (Declaration of Rex Ragucos).

<sup>279</sup> Exhibit A, Test Claim, page 79 (Declaration of Rex Ragucos).

<sup>280</sup> Exhibit A, Test Claim, pages 2767-2768.

<sup>281</sup> Exhibit A, Test Claim, pages 58, 86 (Declaration of Rex Ragucos).

<sup>282</sup> Health and Safety Code section 116277 (as added by Stats. 2017, ch. 746).

discussed above, beginning January 1, 2018, any lead testing conducted by the claimant on those public schools constructed or modernized before January 1, 2010, that did not request testing before January 1, 2018, is required by Health and Safety Code section 116227 (as added by Stats. 2017, ch. 746), and not by the test claim order.

- b. The requirement to not release lead sampling data for 60 days unless to comply with the California Public Records Act is not subject to the reimbursement requirement of article XIII B, section 6.

As stated above, the test claim order imposes the following new requirement on the claimant: “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.”<sup>283</sup> This activity is limited to releasing the lead sampling data in compliance with preexisting obligations under the Public Records Act.

Compliance with the Public Records Act, however, is not subject to the subvention requirement of article XIII B, section 6. Specifically, Proposition 42 adopted by the voters on June 3, 2014, added paragraph 4 to article XIII B, section 6(a) of the California Constitution which, together with article I, section 3(b), paragraph 7, expressly declare that “Legislative mandates contained in statutes within the scope of paragraph (7) of subdivision (b) of Section 3 of Article I” (which governs the compliance with the Public Records Act) are *not* reimbursable state mandates eligible for subvention.

Therefore, the Commission finds that requirement to not release lead sampling data for 60 days unless to comply with the Public Records Act is not subject to the reimbursement requirement of article XIII B, section 6.

- c. The claimant does not have fee authority sufficient as a matter of law to pay for the mandated program within the meaning of Government Code section 17556(d).

Government Code section 17556(d) provides that the Commission shall not find costs mandated by the state if it finds that the “local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.”

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<sup>283</sup> Exhibit A, Test Claim, page 107 (test claim order). The claimant alleges it incurred reimbursable costs under Section 3(l) of the test claim order to prepare presentations for the Environmental Committee of the City Council on the progress of lead testing and to respond to media requests on a daily basis. Exhibit A, Test Claim, pages 44-45. Section 3(l) of the test claim order simply requires the claimant to release the data in compliance with the Public Records Act (Government Code section 7920 et seq.) and does not require the claimant to prepare presentations or any new documents, or to respond to requests for lead sampling data.

The California Supreme Court upheld the constitutionality of Government Code section 17556(d) in *County of Fresno*.<sup>284</sup> The court, in holding that the term “costs” in article XIII B, section 6, excludes expenses recoverable from sources other than taxes, stated:

Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra*, 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the “state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service,” read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues*.<sup>285</sup>

Following the logic of *County of Fresno*, the Third District Court of Appeal held in *Connell v. Superior Court*, where the claimant has “authority, i.e., the right or power, to levy fees sufficient to cover the costs” of a state mandated program, reimbursement is not required, notwithstanding other factors that may make the exercise of that authority impractical or undesirable.<sup>286</sup> The parties dispute the applicability of Government Code section 17556(d).

The claimant, as a public water system, generally has the statutory authority to collect fees from its customers to provide water under the California Safe Drinking Water Act.<sup>287</sup> The claimant acknowledges that it has this general authority and imposes water service fees on water customers to comply with the Lead and Copper Rule, since the service of monitoring benefits all customers for water.

The Lead and Copper Rule (LCR) is a United States federal regulation that requires San Diego Public Utilities to test for corrosivity of the City’s

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<sup>284</sup> *County of Fresno v. State of California* (1990) 53 Cal.3d. 482.

<sup>285</sup> *County of Fresno v. State of California* (1990) 53 Cal.3d. 482, 487.

<sup>286</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Connell v. Superior Court* (1997) 59 Cal.App.4th 382; 401-402; *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 564, citing to *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

<sup>287</sup> Health and Safety Code section 116590(b) (“A public water system may collect a fee from its customers to recover the fees paid by the public water system pursuant to this chapter [California Safe Drinking Water Act].”).

water supply by analyzing samples from residential plumbing systems that contain copper and may contain lead. The LCR studies occur regularly every three years and are funded through rates charged by the Department. Since analyses required by the LCR are a normal part of the Public Utilities Department's scheduled responsibilities, and provide water quality information on a system-wide basis, no specific budget is earmarked for this activity. Instead, costs associated with LCR sampling and analyses have been included as part of the City's Public Utilities annual laboratory budget since the implementation of the regulation in the early 1990's. This service benefits all PUD customers for water, thus it is properly charged to all ratepayers.<sup>288</sup>

The claimant's water service fees are governed by chapter 6, article 7 of the San Diego Municipal Code, beginning with section 67.0501, which states that "[t]he water charge [for water and water service] begins when a service connection is installed and the meter is set."<sup>289</sup> The ordinances authorize the city to establish and adjust water rates by resolution as follows:

- The rates to be charged and collected for water supplied in any one month for Domestic, Commercial, and Industrial use within the City, and for all purposes for which no other rate for water supplied for use within the City is provided shall be established from time to time by a resolution of the City Council; provided, however, that prior to considering any change in the water service charge by resolution, a notice of the proposed change shall be posted by the City Clerk at least ten (10) days prior to consideration of such a resolution by the City Council. (San Diego Municipal Code § 67.0502.)<sup>290</sup>
- The water rates established in the Article shall be adjusted as necessary by the City Manager to compensate proportionately for any increase in the cost of water and energy purchased by the City. Notice of such increases in water rates shall be given by the City Manager to the City Council by report and to the public by publication once in the City Official Newspaper on or before the thirtieth (30th) day prior to the effective date of such increases. (San Diego Municipal Code § 67.0508.)<sup>291</sup>

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<sup>288</sup> Exhibit A, Test Claim, page 70 (Declaration of Doug Campbell, Senior Chemist of the Public Utilities Department, City of San Diego).

<sup>289</sup> Exhibit K (9), San Diego Municipal Code, Chapter 6, Article 7, Division 5 Water Rates and Charges, page 1.

<sup>290</sup> Exhibit K (9), San Diego Municipal Code, Chapter 6, Article 7, Division 5 Water Rates and Charges, page 1.

<sup>291</sup> Exhibit K (9), San Diego Municipal Code, Chapter 6, Article 7, Division 5 Water Rates and Charges, page 3.



The water service fee is made up of several components, including a base fee and usage fee, the latter of which includes costs associated with complying with the Federal Safe Drinking Water Act, which includes the Lead and Copper Rule requirements.<sup>292</sup>

However, the claimant contends that Government Code section 17556(d) does not apply because the test claim order expressly provides that the claimant must conduct the lead sampling at no charge to the schools in its service area. In addition, pursuant to Propositions 218 and 26, it 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 in which it conducts lead testing, and it is legally proscribed from imposing or increasing fees on other water users.<sup>293</sup>

The claimant contends that the mandated activities at issue here are different than those provided under the Lead and Copper Rule: “Unlike the LCR that is examining corrosivity system-wide, the Lead in Schools amendment determines whether plumbing at a specific school site may be contaminating that facility’s drinking water supply. This service directly benefits only the individual school tested and cannot be charged to all ratepayers.”<sup>294</sup> The claimant also raises the following points:

- Lead testing at schools is not a property-related service that could properly be funded through water rates. A “property-related service” is defined as a public service having a direct relationship to property ownership (Cal. Const. art. XIII D, § 2(h)). Services provided due to the voluntary activities of property owners (here, the requests for lead testing by the schools) are not property-related services under Proposition 218.<sup>295</sup>
- The City’s Public Utilities Department cannot absorb the cost of lead testing for schools without violating Proposition 218. “Testing for lead on school property, which is outside PUD’s water distribution system, has no relationship to providing water service to other City customers.”<sup>296</sup> Allowing water ratepayer funds to absorb the cost of lead testing would result in water service fees “exceed[ing] the proportional cost of the service attributable to the parcel” because all ratepayers

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<sup>292</sup> See, e.g., Exhibit K (8) Resolution Number R-286720, adopted December 4, 1995, [https://docs.sandiego.gov/council\\_reso\\_ordinance/rao1995/R-286720.pdf](https://docs.sandiego.gov/council_reso_ordinance/rao1995/R-286720.pdf) (accessed on January 12, 2023), pages 2-3.

<sup>293</sup> Exhibit A, Test Claim, page 54.

<sup>294</sup> Exhibit A, Test Claim, page 70 (Declaration of Doug Campbell, Senior Chemist of the Public Utilities Department, City of San Diego).

<sup>295</sup> Exhibit A, Test Claim, pages 54-55 (citing *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 427 and *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 841-84).

<sup>296</sup> Exhibit A, Test Claim, page 54.

would be contributing to the cost of a service provided only to parcels with schools.<sup>297</sup>

- Raising water rates to cover the mandated costs would violate the test claim order (by passing the costs on to the schools) and violate Proposition 218, which prohibits the claimant from charging customers for services that are not immediately available to them. The schools are the exclusive and direct recipients of lead testing and 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 water ratepayers under the test claim order, 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 the State Water Board says are direct benefits to all ratepayers, are collateral or incidental benefits.

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.<sup>298</sup>

The State Water Board and the Department of Finance disagree with the claimant and argue there are no costs mandated by the state since Government Code section 17556(d) applies. The State Water Board contends – and Finance agrees – that Proposition 218 does not prevent the claimant from increasing water rates because lead testing confers a “direct benefit” to the water system as a whole and, by extension, each ratepayer.<sup>299</sup> Specifically, the State Water Board alleges that the mandated program “functionally extends” the Lead and Copper Rule and helps to maintain and possibly improve property values.<sup>300</sup>

By 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. And to the extent the City takes corrective action, for example by additional treatment to reduce corrosivity, all users, not just the schools, will benefit [] from the reduced threat of lead exposure. Therefore, just as the testing of private residences under the Lead and

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<sup>297</sup> Exhibit A, Test Claim, page 54.

<sup>298</sup> Exhibit D, Claimant’s Rebuttal Comments, page 11.

<sup>299</sup> Exhibit B, State Water Board’s Comments on the Test Claim, page 16; Exhibit C, Finance’s Comments on the Test Claim, page 2.

<sup>300</sup> Exhibit B, State Water Board’s Comments on the Test Claim, page 16.

Copper rule benefits the water system as a whole, and by extension, each of the ratepayers, not just the owners of the residences being tested, the lead testing in K-12 schools provides similar direct benefit to each ratepayer by providing additional testing inputs the City can use to optimize its water chemistry and quality to reduce the amount of lead in [] all residences and businesses.

Additionally, the lead testing in schools provides a direct benefit for each ratepayer by maintaining, and possibly, improving property values.<sup>301</sup>

The State Water Board further contends that the existing property-related fee can be increased since the fee is imposed as an incident of property ownership and any reliance on the *Richmond v. Shasta Community Services Dist.* case is misplaced.<sup>302</sup> In *Richmond*, the court held a fee or charge imposed on persons who apply for a *new water connection* is not a “fee or charge” within the meaning of article XIII D, section 6 because it is triggered by a voluntary action of the property owner to undertake development that triggers a need for a new connection.<sup>303</sup> The Supreme Court noted that it would be impossible to comply with article XIII D, section 6 (added by Proposition 218) with respect to assessments for connection fees because the water district would be unable to determine which parcels would be subject to the proposed fee.<sup>304</sup> The State Water Board asserts the “facts that drove the decision in *Richmond* are not present in this test claim. Any increased fee . . . would be imposed on property owners who already receive water service, so this fee would be imposed as an incident of property ownership because it would require nothing besides normal ownership and use of property.”<sup>305</sup>

Finally, the State Water Board contends that all of the substantive requirements of article XIII D, section 6(b) (added by Proposition 218) are satisfied, including the requirements in article XIII D, section 6(b)(3) and (b)(4), which the claimant specifically disputes.

Regarding subdivisions (b)(3) and (b)(4) of [article XIII D,] section 6, the City claims that that lead testing in schools confers no direct benefit on the ratepayers. The City's argument reflects an unnecessarily constricted, and ultimately unworkable, definition of the service for which fees are being charged. The service at issue here is water service, and the issue is whether the cost for lead testing in schools may be included in those fees. It should not be necessary to demonstrate that every feature of the overall

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<sup>301</sup> Exhibit B, State Water Board’s Comments on the Test Claim, page 16.

<sup>302</sup> Exhibit J, State Water Board’s Comments on the 2023 Draft Proposed Decision, page 4 (citing *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409).

<sup>303</sup> *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 424.

<sup>304</sup> *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 427.

<sup>305</sup> Exhibit J, State Water Board’s Comments on the 2023 Draft Proposed Decision, pages 4-5.

program provides a direct benefit to every customer. If cost is reasonably included as part of a program to provide safe drinking water fees to recover those costs should not be vulnerable to claims that not every household needs every part of the program.

Moreover, and as discussed more thoroughly in the State Water Board's August 13, 2018, comments on the test claim, the additional lead testing requirements functionally extend the Lead and Copper Rule (LCR) by adding additional sampling points that the City can use to optimize its corrosion control. Although the requesting schools may receive a direct benefit in terms of assessing school pipes and fixtures for lead, this does not diminish the additional benefit the water system as a whole receives from the additional lead sampling points. This division of benefits is similar to those under the existing LCR, where the City tests individual residential homes and uses those test results to optimize corrosion control for the larger system. All users with connections to the system benefit from using a select sample of connections, helping to assure provision of safe drinking water through the system. Although individual residents may derive additional benefits from lead testing in their homes, the City appears comfortable assessing property-related fees under article XIII D for compliance with the LCR. [Fn. omitted.]

Additionally, a private entity or local government cannot operate a public water system without a permit from the State Water Board. [Fn. omitted.] The permit is subject to revocation or penalties for failure to comply. [Fn. omitted.] Thus, to continue to operate its public water system, the City must comply with the lead testing requirement to provide drinking water service within its service area. Compliance with permit conditions benefits all customers of the City because compliance is necessary for the public water system to continue operating as a utility providing drinking water service to any of the customers. Therefore, drinking water fees may spread the cost of compliance among all customers. There is no requirement that when drinking water requirements are set to protect sensitive groups such as children that the costs of compliance be imposed solely on households, businesses and public facilities that include or serve those sensitive groups. Because permit compliance is a condition necessary to enter or continue in the business of providing drinking water service, all customers benefit from the utility's compliance with permit requirements. Both public entities like the City and the privately-owned utilities that would step in if a public entity decided to cease providing drinking water service may appropriately include costs of compliance in the charges to its customers.<sup>306</sup>

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<sup>306</sup> Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision, pages 5-6.

Finally, the State Water Board contends that the fee would not be considered a tax under article XIII C (Proposition 26), since it would fall under the exception for “assessments and property-related fees imposed in accordance with the provisions of Article XIII D.”<sup>307</sup>

As explained below, the Commission finds that Government Code section 17556(d) does not apply in this case and, therefore, the test claim order imposes costs mandated by the state on the claimant.

- i. *Pursuant to the plain language of the test claim order, the claimant does not have the authority to impose fees on schools requesting lead testing to cover the increased costs to comply with the new state-mandated activities.*

Based on the plain language of the test claim order, the City does not have the authority to impose fees on the schools requesting lead testing to pay for the new state-mandated requirements. The test claim order states the following:

5. The water system is responsible for the following costs:
  - a. Laboratory fees for all lead samples and reporting of the results to DDW and the school, and all laboratory coordination and instruction.
  - b. All water system staff time dedicated to the tasks required by the provisions in this permit amendment.<sup>308</sup>

The State Water Board’s “Frequently Asked Questions” document explains that the community water system that serves the school is responsible for all costs associated with collecting, analyzing, and reporting the results as follows:

**6. Who pays for lead testing of drinking water in California schools?**

The community water system that serves the school is responsible for all costs associated with collecting, analyzing, and reporting drinking water samples for lead testing at up to five locations at each school, and is required to meet with the authorized school representative to develop a sampling plan and review the sampling results. The community water system will *not* pay for any maintenance or corrections needed at the school if elevated lead levels are found in the drinking water, but is required to conduct repeat sampling at the school to confirm elevated lead levels and the effectiveness of any corrective action taken by the school.<sup>309</sup>

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<sup>307</sup> Exhibit J, State Water Board’s Comments on the 2023 Draft Proposed Decision, page 6.

<sup>308</sup> Exhibit A, Test Claim, page 107 (test claim order).

<sup>309</sup> Exhibit A, Test Claim, page 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).

Thus, the Commission finds that increasing the existing water fees imposed on the schools requesting lead testing or imposing a separate fee on those schools violates the test claim order and the claimant has no authority to impose fees on these schools within the meaning of Government Code section 17556(d).

- ii. *The claimant does not have the authority to impose fees on the remaining customers to cover the increased costs of the new state-mandated activities since such a fee would violate article XIII D, section 6(b)(3) of the California Constitution (Proposition 218).*

Thus, the issue is whether the claimant has the authority (the right or power), to levy fees sufficient to cover the costs of the mandated activities on the remaining water customers, including residential customers, given the requirements imposed by Propositions 218 and 26 (adding and amending articles XIII C and XIII D to the California Constitution), which restrict the ability of state and local governments to impose taxes and fees.<sup>310</sup> As the courts have determined, the Commission is required to liberally construe these constitutional amendments in a manner that effectuates the voters' purpose in adopting the law:

The appropriate way of examining the text of Proposition 218 has already been spelled out by the Supreme Court in *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448 [unofficial cite omitted]: "We ' " 'must enforce the provisions of our Constitution and "may not lightly disregard or blink at ... a clear constitutional mandate." ' ' ' [Citation.] In so doing, we are obligated to construe constitutional amendments in a manner that effectuates the voters' purpose in adopting the law. [Citation.] [¶] Proposition 218 specifically states that '[t]he provisions of this act shall be *liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.*' (Ballot Pamp., [Gen. Elec. (Nov. 5, 1996)] text of Prop. 218, § 5, p. 109; see Historical Notes, [2A West's Ann. Const. (2008 supp.) foll. *Cal. Const., art. XIII C.*], at p. 85.) Also, as discussed above, the ballot materials explained to the voters that Proposition 218 was designed to 'constrain local governments' ability to impose assessments; place extensive requirements on local governments charging assessments; shift the burden of demonstrating assessments' legality to local government; *make it easier for taxpayers to win lawsuits; and limit the methods by which local governments exact revenue from taxpayers without their consent.*' " [Citation omitted.]<sup>311</sup>

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<sup>310</sup> *Coziahr v. Otay Water Dist.* (2024) 103 Cal.App.5th 785, 794, 795; *City of Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1200.

<sup>311</sup> *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493, 1505, emphasis in original.

Article XIII D of the California Constitution, which was added in 1996 by Proposition 218, defines “fees” associated with property ownership in article XIII D, section 2(e), as follows:

(e) “Fee” or “charge” means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an *incident of property ownership*, including a user fee or charge for a property related service.<sup>312</sup>

Article XIII D, section 2(h), further defines a “property-related service” as “a public service having a *direct relationship* to property ownership.”<sup>313</sup>

Under article XIII D, section 6(c), property-related fees are subject to voter approval, with limited exceptions for fees or charges for sewer, water, and refuse collection services, as specified:

*Except for fees or charges for sewer, water, and refuse collection services*, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.<sup>314</sup>

“Thus, article XIII D expressly exempts water service charges from the voter-approval requirement that it imposes on all other fees and charges.”<sup>315</sup> Nonetheless, water service fees are still subject to the procedural requirements imposed by article XIII D, section 6(a), including the voter protest provisions.<sup>316</sup> And a water service fee must satisfy the five substantive requirements of article XIII D, section 6(b), which provides as follows:

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<sup>312</sup> California Constitution, article XIII D, section 2(e), emphasis added.

<sup>313</sup> California Constitution, article XIII D, section 2(h), emphasis added. In addition, section 2(g) of article XIII D defines “property ownership” to include tenancies if the tenant is directly liable for the payment of the fee.

<sup>314</sup> California Constitution, article XIII D, section 6(c).

<sup>315</sup> *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 219.

<sup>316</sup> *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal. 4th 205, 215 (“Because article XIII D does not include similar express exemptions from the other requirements that it imposes on property-related fee[s] and charges, the implication is strong that fees for water, sewer, and refuse collection services are subject to those other requirements”); *Paradise Irrigation Dist. v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194-196, holding that requirements imposed on water districts to conserve water and achieve water conservation goals did not impose costs mandated by the state since the districts had fee authority as a matter of law, subject only to the voter protest provisions of article XIII D, section 6(a).

A fee or charge shall not be extended, imposed, or increased by any agency unless it meets *all* of the following requirements:

- (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.
- (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
- (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership *shall not exceed the proportional cost of the service attributable to the parcel.*
- (4) No fee or charge may be imposed for a service *unless that service is actually used by, or immediately available to, the owner of the property in question.* Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.
- (5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.<sup>317</sup>

The claimant contends that the services provided under the test claim order are due to the voluntary requests for lead testing by the schools and, thus, the services are not property-related services under Proposition 218 and a fee would not be incident to property ownership pursuant to article XIII D, section 2(e) and (h).<sup>318</sup>

The California Supreme Court has held that domestic water delivery through a pipeline is a “property-related service” within the meaning of article XIII D,<sup>319</sup> and therefore a fee imposed for that service is a property-related fee subject to the restrictions of article XIII D.<sup>320</sup> In addition, the Proposition 218 Omnibus Implementation Act, enacted specifically to construe Proposition 218, defines “water” as “any system of public improvements intended to provide for the production, storage, supply, treatment, or

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<sup>317</sup> California Constitution, article XIII D, section 6(b), emphasis added.

<sup>318</sup> Exhibit A, Test Claim, pages 54-55 (citing *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 427 and *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 841-84).

<sup>319</sup> *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 426–427.

<sup>320</sup> *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 217.



distribution of water.”<sup>321</sup> Thus, the entity who produces, stores, supplies, treats, or distributes water necessarily provides water service.<sup>322</sup>

But this determination does not apply to any domestic water delivery system-related service without limitation. As the Court explained in *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, “[a] water service fee is a fee or charge under article XIII D if, but only if, it is imposed ‘upon a person as an incident of property ownership.’”<sup>323</sup>

As explained earlier, *Richmond* addressed whether a water district’s fee for fire suppression as part of a *new* service connection fee was subject to the restrictions of article XIII D. The Supreme Court held that a fee for making a new connection to the water system is not imposed “as an incident of property ownership” and therefore not subject to the restrictions that article XIII D imposes on property assessments and property related fees because the fee imposed on the owner results “from the owner’s *voluntary decision* to apply for the connection.”<sup>324</sup>

Thus, we agree that water service fees, being fees for property-related services, may be fees or charges within the meaning of article XIII D. But we do not agree that all water service charges are necessarily subject to the restrictions that article XIII D imposes on fees and charges. Rather, we conclude that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed “upon a person as an incident of property ownership.” (Art. XIII D, § 2, subd. (e).) A fee for ongoing water service through an existing connection is imposed “as an incident of property ownership” because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed “as an incident of property ownership” because it results from the owner’s voluntary decision to apply for the connection.

Any doubt on this point is removed by considering the requirements that article XIII D imposes on property-related fees and charges. As with assessments, article XIII D requires local government agencies to identify the parcels affected by a property-related fee or charge. Specifically, it requires the agency to identify “[t]he parcels upon which a fee or charge is proposed for imposition.” (Art. XIII D, § 6, subd. (a)(1).) As we have explained, *it is impossible for the District to comply with such a requirement for connection charges, because the District cannot determine in advance which property owners will apply for water service*

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<sup>321</sup> Government Code section 53750(m).

<sup>322</sup> *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 595 (disapproved on other grounds by *City of Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191).

<sup>323</sup> *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal. 4th 409, 426–427.

<sup>324</sup> *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal. 4th 409, 427.

*connection*. As with assessments, this impossibility of compliance strongly suggests that connection fees for new users are not subject to article XIII D's restrictions on property-related fees.<sup>325</sup>

Similarly, if a property owner incurs a fee as a result of a voluntary decision regarding the property's business use, rather than mere ownership or activities intertwined with property ownership, the fee imposed on that property owner is not imposed as an incident of property ownership.<sup>326</sup> In *Apartment Association of Los Angeles County, Inc.*, the Supreme Court determined whether a city ordinance imposing an inspection fee on private landlords violates article XIII D, section 6, as added by Proposition 218.<sup>327</sup> The Court determined that the fee was not imposed as an incident of property ownership and did not violate article XIII D, section 6, because the fee was imposed on business owners who choose to engage in the residential rental business and not in their capacity as landowners.

. . . a levy may not be imposed on a property owner as such—i.e., in its capacity as property owner—unless it meets constitutional prerequisites. In this case, however, the fee is imposed on landlords not in their capacity as landowners, but in their capacity as business owners. The exaction at issue here is more in the nature of a fee for a business license than a charge against property. It is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business.<sup>328</sup>

“In other words, taxes, assessments, fees, and charges are subject to the constitutional strictures when they burden landowners *as landowners*. The ordinance does not do so: it imposes a fee on its subjects by virtue of their ownership of a business—i.e., because they are landlords.”<sup>329</sup>

The Draft Proposed Decision issued in March 2023 agreed with the claimant's argument that a fee was triggered by a voluntary decision of the schools and, thus, was not a property-related fee under article XIII D.<sup>330</sup> Upon further review, however, the Commission finds that an increase in the existing fees for ongoing water service under

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<sup>325</sup> *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 427–428, emphasis added.

<sup>326</sup> *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830.

<sup>327</sup> *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 833.

<sup>328</sup> *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 839-840.

<sup>329</sup> *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 841.

<sup>330</sup> Exhibit H, Draft Proposed Decision, issued March 23, 2023.

the test claim order would satisfy the requirements of a property-related fee within the meaning of article XIII D, section 2.

The test claim order amended the claimant's *existing* domestic water supply permit as directed by then-Governor Brown in his veto message on AB 334 for the State Water Board to incorporate water quality testing in schools as part of the state's Lead and Copper Rule, and compliance with the test claim order is a requirement for the claimant to *continue* providing water to its customers.<sup>331</sup> Health and Safety Code section 116525(a) provides: "No person shall operate a public water system unless he or she first submits an application to the department and receives a permit as provided in this chapter." And the Sacramento County Superior Court found "[b]ecause the City operates its water system under a permit from the Board, it would not be able to continue to do so if its permit was suspended or revoked."<sup>332</sup> In addition, the mandate is to test for lead in the schools already connected to the water distribution system. The test claim order applies to the "schools that are served water through a utility meter by July 1, 2017" and request testing.<sup>333</sup> The Frequently Asked Questions document issued by the State Water Board explains that "[i]f your water system does not serve potable water to at least one K-12 school listed in the California School Directory, the permit amendment does not apply to your water system and no further action is necessary."<sup>334</sup> Thus, the claimant's assertion that "testing for lead on school property . . . is outside PUD's water distribution system"<sup>335</sup> is not supported by the test claim order or the record. Furthermore, the claimant already imposes a property-related fee for water service on property owners after a connection to the system is made, which covers the costs associated with complying with the Federal Safe Drinking Water Act, including the

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<sup>331</sup> Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 145 (Governor's Veto Message); see also, Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision, pages 5-6 ("The permit is subject to revocation or penalties for failure to comply. . . . Thus, to continue to operate its public water system, the City must comply with the lead testing requirement to provide drinking water service within its service area.").

<sup>332</sup> Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056), page 9 ("Because the City operates its water system under a permit from the Board, it would not be able to continue to do so if its permit was suspended or revoked. (See Health & Saf. Code, § 116525, subd. (a).) . . . No city could reasonably ignore such an obligation [imposed by the test claim order] and roll the dice on whether 1.3 million residents will have their water service disrupted.").

<sup>333</sup> Exhibit A, Test Claim, page 105 (Test claim order).

<sup>334</sup> Exhibit A, Test Claim, page 118.

<sup>335</sup> Exhibit A, Test Claim, page 54.

Lead and Copper Rule requirements.<sup>336</sup> Thus, the situation here is unlike *Richmond*, because the fee is associated with water service after the connection to the water system is made and the property owners have been identified, and is not related to voluntary requests for new connections.

In addition, the facts here are not like those in the *Apartment Assn.* case, where the city tried to impose an inspection fee on landowners who chose to conduct residential rental businesses and thus, the court held the fee was triggered by the property owners' business decisions rather than as an incident to property ownership. Although a school has a choice to request lead testing under the test claim order, its request is not based on a business decision of the school. The dual purpose of the test claim order is to "further safeguard California's water quality" generally and to "ensure we are continuing to protect our most vulnerable populations."<sup>337</sup> As indicated above, the schools that request service cannot be charged for these activities. And the mandated activities are not triggered by a voluntary decision of the other property owners. Thus, the *Richmond* and *Apartment Assn.* cases are distinguishable and do not apply here. The requirements mandated by the test claim order are conditions imposed by the state for the claimant to continue providing water service to its existing customers, are incident to property ownership, and fee would be considered a property-related fee under article XIII D, section 2.<sup>338</sup>

Moreover, a fee imposed on the claimant's remaining customers would satisfy article XIII D, section 6(b)(4), which requires: "No fee or charge may be imposed for a service *unless that service is actually used by, or immediately available to, the owner of the property in question.*" Continued water service provided by the claimant is immediately available and is used by the claimant's customers.<sup>339</sup> In addition, the claimant's declarant states that in all instances where remediation was performed at the schools that had lead exceedances, follow-up sampling showed the source of the lead was

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<sup>336</sup> See, Exhibit K (8), Resolution Number R-286720, adopted December 4, 1995, [https://docs.sandiego.gov/council\\_reso\\_ordinance/rao1995/R-286720.pdf](https://docs.sandiego.gov/council_reso_ordinance/rao1995/R-286720.pdf) (accessed on January 12, 2023), pages 2-3.

<sup>337</sup> Exhibit A, Test Claim, page 115 (Media Release); see also, pages 104-105 (test claim order, paragraphs 4-6).

<sup>338</sup> *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 216; *Wolstoncroft v. County of Yolo* (2021) 68 Cal.App.5th 327, 344.

<sup>339</sup> See, for example, *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493, 1516, where the court held as follows: "Water service fees to fund the costs of capital-intensive operations to produce more or new water, such as the recycling plant at issue in this case, do not contravene article XIII, section 6, subdivision (b)(4) of the Constitution. While that provision precludes fees for a service not immediately available, both recycled water and traditional potable water are part of the same service—water service. And water service most assuredly is immediately available to City Water's customers now."

removed and no problems to the city's water system were identified.<sup>340</sup> Thus, the service provided under the test claim order benefits all water users connected to the water system.

However, there remains an issue with respect to article XIII D, section 6(b)(3), which requires that "[t]he amount of a fee or charge imposed upon any parcel or person as an incident of property ownership *shall not exceed the proportional cost of the service attributable to the parcel*" since, pursuant to the test claim order, the claimants do not have the authority to impose fees on the schools requesting the lead testing service.<sup>341</sup> The courts have addressed the proportionality requirement in the following three cases.

In *City of Palmdale v. Palmdale Water District*, the city challenged increased tiered water rates imposed by the water district, which "dramatically" imposed higher rates on parcels owned by irrigation users (including the city), as violating article XIII D, section 6(b)(3), alleging that the district's increased rates exceeded the proportional cost of the service attributable to parcels owned by irrigation users and that the district intentionally tried to recoup most of its costs from a relatively few irrigation users to keep costs to the vast majority of district's customers proportionately low.<sup>342</sup> The Second District Court of Appeal agreed with the city, finding that "a review of the tier structure alone establishes that irrigation customers such as the city are charged disproportionate rates reaching tier 5 (\$5.03/unit) rates at 130 percent of their budgeted allocation as compared to other users who do not reach such high rates until they exceed 175 percent (SFR/MFR) [single-family residence or multi-family residence] or 190 percent (commercial) without any showing by [the district] of a corresponding disparity in the cost of providing water to these customers at such levels."<sup>343</sup>

*Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* also involved tiered water rates.<sup>344</sup> Using four budgets of consumption levels, the city allocated its total costs in such a way that the anticipated revenues from all four tiers would equal its total costs and, thus, taken as a whole, the city would be revenue neutral and not make a profit on its pricing structure. The city, however, "did not try to calculate the incremental cost of providing water at the level of use represented by each tier, and in fact, . . . admitted it effectively used revenues from the top tiers to *subsidize* below-cost rates for the bottom tier."<sup>345</sup> The court held the city's fee violates the constitutional requirement that fees "not exceed the proportional cost of the service attributable to the parcel":

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<sup>340</sup> Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, pages 60-61.

<sup>341</sup> Exhibit A, Test Claim, page 107 (test claim order).

<sup>342</sup> *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 934.

<sup>343</sup> *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 937.

<sup>344</sup> *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493.

<sup>345</sup> *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493, 1499, emphasis added.

If the phrase “proportional cost of the service attributable to *the* parcel” (italics added) is to mean anything, it has to be that article XIII D, section 6, subdivision (b)(3) assumes that there really *is* an ascertainable cost of the service that can be attributed to a specific—hence that little word “the”—parcel. Otherwise, the cost of service language would be meaningless. Why use the phrase “cost of the service to the parcel” if a local agency doesn’t actually have to ascertain a cost of service to that particular parcel?

The presence of subdivision (b)(1) of section 6, article XIII D, just a few lines above subdivision (b)(3), confirms our conclusion. Constitutional provisions, particularly when enacted in the same measure, should be construed together and read as a whole. (*Bighorn, supra*, 39 Cal.4th at p. 228 . . .) The “proportional cost of the service” language from subdivision (b)(3) is part of a general subdivision (b), and there is an additional reference to costs in subdivision (b)(1). Subdivision (b)(1) provides that the total revenue from fees “shall not exceed the funds required to provide *the property* related service.” (Italics added.)

It seems to us that to comply with the Constitution, City Water had to do more than merely balance its total costs of service with its total revenues—that’s already covered in subdivision (b)(1). To comply with subdivision (b)(3), City Water also had to correlate its tiered prices with the actual cost of providing water at those tiered levels. Since City Water didn’t try to calculate the actual costs of service for the various tiers, the trial court’s ruling on tiered pricing must be upheld simply on the basis of the constitutional text.<sup>346</sup>

The court further explained that water rates that exceed the cost of service operate as a tax, which have to be approved by the voters. However, tiered rates imposed without a vote of the electorate “must be based on the cost of service for the incremental level of usage, not predetermined budgets.”<sup>347</sup>

The most recent case is *Coziahr v. Otay Water District*, which involved a challenge by a class of single-family residential customers to tiered water rates that charged these customers a higher price for water units at each increasing tier based on rates of consumption, but moved commercial and irrigation customers to uniform rates without price increases based on volume.<sup>348</sup> Following a lengthy analysis of the water districts’ rate studies, expert opinions, and arguments that the rates were based on conservation and peak usage of residential customers, the court relied on *Palmdale* and *Capistrano*

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<sup>346</sup> *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493, 1505-1506.

<sup>347</sup> *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493, 1515.

<sup>348</sup> *Coziahr v. Otay Water District* (2024) 103 Cal.App.5th 785, 791-792.

and found the water district did not comply with article XIII D, section 6(b)(3),<sup>349</sup> and emphasized the following main points:

- “The limitation at issue here, Section 6(b)(3), states the ‘amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.’ This ‘requirement ensures that the aggregate fee collected on *all* parcels is *distributed among those parcels in proportion to the cost of service for each parcel.*”<sup>350</sup>
- The proportionality requirement under article XIII D, section 6(b)(3) demands something more than the reasonable basis standard under article XIII A (for regulatory fees). “To satisfy Section 6(b)(3), then, it is not enough for a water agency to show it uses a reasonable allocation method. Rather, an agency must show that the method produces rates that are proportional to costs.”<sup>351</sup>
- The water district had to substantiate the analysis with data that meaningfully captured the cost of service to the parcel for the district’s single-family residences. “Proportional cost means ‘there really *is* an ascertainable cost of service that can be attributed to a specific ... parcel.”<sup>352</sup>

Here, the cost of the overall service of providing water is higher because of the additional and new required activities mandated by the state. These activities are performed *in addition* to the prior requirements imposed by the Lead and Copper Rule. As indicated in the test claim order, the claimant may not use any lead samples collected under the order to satisfy federal or state Lead and Copper Rule requirements.<sup>353</sup> The State Water Board nevertheless asserts that the benefits of the test claim order are similar to those under the Lead and Copper Rule, where the claimant tests individual residential homes and uses those test results to optimize corrosion control for the larger system.<sup>354</sup> The difference, however, is that under the Lead and Copper Rule, *all* customers share in the costs of lead testing. Here, the claimant is prohibited by the test claim order from passing those increased costs on to the schools receiving the lead testing. Thus, passing the increased costs on to the remaining customers, making the costs of service to their parcels higher than the cost of

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<sup>349</sup> *Coziahr v. Otay Water District* (2024) 103 Cal.App.5th 785, 808-819.

<sup>350</sup> *Coziahr v. Otay Water District* (2024) 103 Cal.App.5th 785, 795, emphasis added.

<sup>351</sup> *Coziahr v. Otay Water District* (2024) 103 Cal.App.5th 785, 801.

<sup>352</sup> *Coziahr v. Otay Water District* (2024) 103 Cal.App.5th 785, 803, emphasis in original.

<sup>353</sup> Exhibit A, Test Claim, page 108 (test claim order, “The water system may not use any lead samples collected as part of these special school samples to satisfy federal or state Lead and Copper Rule requirements”).

<sup>354</sup> Exhibit J, State Water Board’s Comments on the 2023 Draft Proposed Decision, pages 5-6.

service to the schools receiving the additional lead testing, is no different than a water district recouping costs from irrigation users to keep costs to the remaining customers proportionately low (as in *City of Palmdale*) or using revenues from the top tiers to subsidize below-cost rates for the bottom tier (*Capistrano*), all of which violate article XIII D, section 6(b)(3). As *Coziahr* reiterated, the requirement in section 6(b)(3) “ensures that the aggregate fee collected on *all* parcels is *distributed among those parcels in proportion to the cost of service for each parcel*.”<sup>355</sup>

Finally, this case is distinguishable from the stormwater fee analysis performed by the Third District Court of Appeal in *Department of Finance v. Commission on State Mandates*, where the court held that unless there is a showing that a fee cannot meet the substantive requirements of article XIII D, section 6(b) as a matter of law or undisputed fact, then the finding that a fee would meet the substantive requirements is implicit in the determination that permittees have the right or power to levy a fee. Here, as a matter of law, a property-related fee cannot be imposed on school districts under the test claim order and cannot be imposed on the remaining property owners without violating article XIII D, section 6(b)(3).<sup>356</sup>

Accordingly, based on the facts in this case, the Commission finds that the claimant cannot impose a fee on the remaining water customers without violating article XIII D, section 6(b)(3).

- iii. Any fee imposed by the claimant on the remaining customers would not fall under any exception in article XIII C of the California Constitution (Proposition 26) and, thus, the fee would be considered a tax requiring voter approval.*

In 2010, the voters adopted Proposition 26, which sought to broaden the definition of “tax.” Thus, under article XIII C, section 1(e) of the California Constitution, “any levy, charge, or exaction of any kind imposed by a local government,” is a “tax,” and therefore

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<sup>355</sup> *Coziahr v. Otay Water District* (2024) 103 Cal.App.5th 785, 795, emphasis added.

<sup>356</sup> *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 584-585.



requires voter approval under article XIII C,<sup>357</sup> unless one of the following seven exceptions applies:<sup>358</sup>

- (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 [Proposition 218].<sup>359</sup>

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<sup>357</sup> California Constitution, article XIII C, section 2, which was added by Proposition 218 in 1996 states in pertinent part:

- (a) All taxes imposed by any local government shall be deemed to be either general taxes or special taxes...
- (b) No local government may impose, extend, or increase any general tax unless and until that tax is submitted to the electorate and approved by a majority vote....
- (c) [REDACTED]
- (d) No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote...

<sup>358</sup> California Constitution, article XIII C, section 1(e).

<sup>359</sup> California Constitution, article XIII C, section 1(e), emphasis added.

The claimant asserts that the test claim order prohibits it from exercising its fee authority on schools, and none of the seven exceptions under Proposition 26 apply.<sup>360</sup>

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 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.<sup>361</sup>

The claimant further states that the second exception (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”) might ordinarily apply but for the fact that here, the permit order prohibits the claimant from charging the schools receiving the lead testing services. “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.”<sup>362</sup>

Finance, however, argues that the claimant has fee authority under Proposition 26 to impose a property-related fee.<sup>363</sup> Similarly, while not specifically addressing Proposition 26, the State Water Board takes the position that the claimant has the authority to pay for the program costs by raising water rates, which it characterizes as a property-related service.<sup>364</sup>

The Commission finds that exceptions (1) through (7) do not apply here. Exceptions (1) and (2) (charges for benefits conferred and privileges granted, services and products provided) do not apply. The test claim order expressly provides that the claimant must conduct lead sampling at *no charge* to the schools in its service area. Because the claimant is required to provide lead sampling to “those not charged,” exceptions (1) and (2) do not apply.

Nor does exception (3) (reasonable regulatory costs) apply. Conducting lead sampling of drinking water at schools is not a “reasonable regulatory cost[] to a local government

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<sup>360</sup> Exhibit D, Claimant’s Rebuttal Comments, pages 12-13.

<sup>361</sup> Exhibit D, Claimant’s Rebuttal Comments, page 13.

<sup>362</sup> Exhibit D, Claimant’s Rebuttal Comments, page 13.

<sup>363</sup> Exhibit C, Finance’s Comments on the Test Claim, page 2.

<sup>364</sup> Exhibit B, State Water Board’s Comments on the Test Claim, pages 15-16.

for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.”<sup>365</sup> The claimant is not acting in a regulatory capacity in performing the mandated activities. Even characterizing the mandated activities as investigations or inspections, the activities are not carried out for a regulatory purpose. The claimant is not ensuring the school is complying with applicable laws regarding lead limits in school drinking water and expressly does not have any enforcement authority or responsibility under the test claim order if a lead level exceedance is detected. The testing is only done at the request of the school and if there is a violation, the test claim order requires the school, not the claimant, to remediate.<sup>366</sup> Thus, the claimant is performing a service (respond to a request, collect and test samples, provide the school with the results, and discuss the results with the school), not regulating school water quality.

Exceptions (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), and (6) (a charge imposed as a condition of property development) do not apply based on their plain language.

Exception (7), “assessments and property-related fees imposed in accordance with the provisions of Article XIII D,” is also inapplicable because, as discussed above, the claimant does not have the authority to impose a fee on the schools requesting service and cannot impose a fee on the remaining water customers without violating article XIII D, section 6(b)(3).

Thus, any fee imposed by the claimant on the remaining customers would not fall under any exception in article XIII C of the California Constitution (Proposition 26) and the fee would be considered a tax. Article XIII B, section 6 was specifically designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues.<sup>367</sup>

Therefore, because the test claim statute prohibits the claimant from imposing a fee for the service upon the schools, and because the claimant cannot impose a fee under Proposition 218 in accordance with the provisions of article XIII D, section 6(b)(3), or under Proposition 26 in accordance with the provisions of article XIII C (because it does not meet any of the exceptions to the definition of a tax), the claimant does not have fee authority sufficient to cover the costs of the mandated program pursuant to Government Code section 17556(d).

In addition, no law or facts in the record support a finding that any of the other exceptions specified in Government Code section 17556 apply to this claim.

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<sup>365</sup> California Constitution, article XIII C, section 1(e)(3).

<sup>366</sup> Exhibit A, Test Claim, page 108.

<sup>367</sup> *County of Fresno v. State of California* (1990) 53 Cal.3d. 482, 487.

Accordingly, the Commission finds that the test claim order results in increased costs mandated by the state within the meaning of Government Code sections 17514 and 17556.

## V. Conclusion

Based on the forgoing analysis, the Commission finds that the test claim order imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 and requires the claimant, as a public water system, to perform the following mandated activities, beginning January 18, 2017:

1. Submit to the State Water Board'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] by July 1, 2017;<sup>368</sup>
2. If an authorized school representative of a private K-12 school or a public K-12 school in the claimant's service area requests lead sampling assistance in writing by November 1, 2019:<sup>369</sup>
  - a. Respond in writing within 60 days and schedule a meeting with school officials to develop a sampling plan;<sup>370</sup>
  - b. Finalize a sampling plan and complete initial sampling within 90 days [or an alternative time schedule approved by DDW];<sup>371</sup>
  - c. 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;<sup>372</sup>
  - d. 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;<sup>373</sup>
  - e. Ensure samples are collected by an adequately trained water system representative;<sup>374</sup>

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<sup>368</sup> Exhibit A, Test Claim, page 105 (test claim order).

<sup>369</sup> Exhibit A, Test Claim, page 105 (test claim order).

<sup>370</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>371</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>372</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>373</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>374</sup> Exhibit A, Test Claim, page 106 (test claim order).

- f. Submit the samples to an ELAP certified laboratory for analysis;<sup>375</sup>
- g. Require the laboratory to submit the data electronically to DDW;<sup>376</sup>
- h. Provide a copy of the results to the school representative;<sup>377</sup>
- i. Within two business days of a result that shows an exceedance of 15 ppb, notify the school of the sample result;<sup>378</sup>
- j. If an initial sample shows an exceedance of 15 ppb:
  - Collect an additional sample within 10 days if the sample site remains in service;<sup>379</sup>
  - Collect a third sample within 10 business days after notification that a resample result is less than or equal to 15 ppb;<sup>380</sup>
  - 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;<sup>381</sup>
- k. Ensure that the water system receives the results of repeat lead samples from the laboratory in no more than 10 business days;<sup>382</sup>
- l. 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;<sup>383</sup>
- m. 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.<sup>384</sup> **The water**

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<sup>375</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>376</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>377</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>378</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>379</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>380</sup> Exhibit A, Test Claim, page 106 (test claim order).

<sup>381</sup> Exhibit A, Test Claim, page 107 (test claim order).

<sup>382</sup> Exhibit A, Test Claim, page 107 (test claim order).

<sup>383</sup> Exhibit A, Test Claim, page 107 (test claim order).

<sup>384</sup> Exhibit A, Test Claim, page 108 (test claim order).

**system is not responsible for the costs of any corrective action or maintenance;**<sup>385</sup>

- n. Keep records of all requests for lead related assistance and provide the records to DDW, upon request;<sup>386</sup>
- o. Include in the annual Consumer Confidence Report a statement summarizing the number of schools requesting lead sampling.<sup>387</sup>

**Beginning January 1, 2018, any lead testing conducted by the claimant on those public schools constructed or modernized before January 1, 2010, that did not request testing before January 1, 2018, is not required by the test claim order and is not reimbursable.**

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<sup>385</sup> Exhibit A, Test Claim, page 108 (test claim order).

<sup>386</sup> Exhibit A, Test Claim, page 108 (test claim order).

<sup>387</sup> Exhibit A, Test Claim, page 108 (test claim order).

## 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.

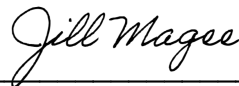
On February 26, 2025, I served the:

- **Current Mailing List dated February 26, 2025**
- **Proposed Decision issued February 26, 2025**

*Lead Sampling in Schools: Public Water System No. 3710020, 17-TC-03-R2  
On Remand from City of San Diego v. Commission on State Mandates,  
Sacramento County Superior Court, Case No. 24WM000056; 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 February 26, 2025 at Sacramento, California.



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

# COMMISSION ON STATE MANDATES

## Mailing List

**Last Updated:** 2/26/25

**Claim Number:** 17-TC-03-R2

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

**Claimant:** City of San Diego

### TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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

**Lupe Acero**, Finance Director, *City of Port Hueneme*  
250 North Ventura Road, Port Hueneme, CA 93041  
Phone: (805) 986-6524  
LAcero@ci.port-hueneme.ca.us

**Jackie Acosta**, Finance Director, *City of Union City*  
34009 Alvarado-Niles Road, Union City, CA 94587  
Phone: (510) 675-5338  
JackieA@unioncity.org

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

**Trevor Agrelius**, Finance Director, *City of Laguna Niguel*  
30111 Crown Valley Parkway, Laguna Niguel, CA 92677  
Phone: (949) 362-4358  
TAgrelius@cityoflagunaniguel.org

**Adaoha Agu**, *County of San Diego Auditor & Controller Department*  
Projects, Revenue and Grants Accounting, 5530 Overland Avenue, Ste. 410 , MS:O-53, San Diego,  
CA 92123  
Phone: (858) 694-2129  
Adaoha.Agu@sdcounty.ca.gov



**Ron Ahlers**, Chief Financial Officer, *City of Calabasas*  
Finance Department, 100 Civic Center Way, Calabasas, CA 91302  
Phone: (805) 517-6249  
RAhlers@cityofcalabasas.com

**Jason Al-Imam**, Director of Finance, *City of Newport Beach*  
3300 Newport Blvd, Newport Beach, CA 92663  
Phone: (949) 644-3123  
jalimam@newportbeachca.gov

**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

**Josefina Alvarez**, Interim Finance Director, *City of Kerman*  
850 South Madera Avenue, Kerman, CA 93630  
Phone: (559) 846-4682  
jalvarez@cityofkerman.org

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

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

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

**Socorro Aquino**, *State Controller's Office*  
Division of Audits, 3301 C Street, Suite 700, Sacramento, CA 95816  
Phone: (916) 322-7522  
SAquino@sco.ca.gov

**Louis Atwell**, City Manager, *City of Inglewood*  
1 Manchester Boulevard, Inglewood, CA 90301  
Phone: (310) 412-5301  
latwell@cityofinglewood.org

**Carol Augustine**, *City of Burlingame*  
501 Primrose Road, Burlingame, CA 94010

Phone: (650) 558-7210  
caugustine@burlingame.org

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

**Van Bach**, Accounting Manager, *City of San Rafael*  
1400 Fifth Avenue, San Rafael, CA 94901  
Phone: (415) 458-5001  
van.bach@cityofsanrafael.org

**Michelle Bannigan**, Finance Director, *City of Stanton*  
7800 Katella Ave, Stanton, CA 90680  
Phone: (714) 890-4226  
MBannigan@StantonCA.Gov

**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

**Dan Barros**, City Manager, *City of Colma*  
1198 El Camino Real, Colma, CA 94014  
Phone: (650) 997-8300  
dbarros@colma.ca.gov

**Jennifer Becker**, Financial Services Director, *City of Burbank*  
275 East Olive Avenue, Burbank, CA 91502  
Phone: (818) 238-5500  
jbecker@burbankca.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

**Aimee Belev**, Finance Director/Town Treasurer, *Town of Paradise*  
5555 Skyway, Paradise, CA 95969  
Phone: (530) 872-6291  
abelev@townofparadise.com

**Ginni Bella Navarre**, Deputy Legislative Analyst, *Legislative Analyst's Office*  
925 L Street, Suite 1000, Sacramento, CA 95814  
Phone: (916) 319-8342  
Ginni.Bella@lao.ca.gov

**Joe Bellomo**, Public Works Director, *City of Fillmore*  
250 Central Avenue, Fillmore, CA 93015  
Phone: (805) 524-1500  
jbellomo@fillmoreca.gov

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

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

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

**Robin Bertagna**, Interim Finance Director, *City of Marysville*  
Administration and Finance Department, 526 C Street, Marysville, CA 95901  
Phone: (530) 749-3903  
rbertagna@marysville.ca.us

**Kevin Biersack**, Financial Services Director, *City of Cathedral City*  
Administrative Services, 68700 Avenida Lalo Guerrero, Cathedral City , CA 92234  
Phone: (760) 770-0378  
kbiersack@cathedralcity.gov

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

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

**Michael Blay**, City Manager, *City of Upland*  
460 N. Euclid Avenue, Upland, CA 91786-4732  
Phone: (909) 931-4106  
CityManager@UplandCA.gov

**Lincoln Bogard**, Administrative Services Director, *City of Banning*  
99 East Ramsey Street, Banning, CA 92220  
Phone: (951) 922-3118  
lbogard@banningca.gov

**Jonathan Borrego**, City Manager, *City of Oceanside*  
300 North Coast Highway, Oceanside, CA 92054  
Phone: (760) 435-3065  
citymanager@oceansideca.org

**Jaime Boscarino**, Finance Director, *City of Thousand Oaks*  
2100 Thousand Oaks Boulevard, Thousand Oaks, CA 91362  
Phone: (805) 449-2200  
jboscarino@toaks.org

**Jason Bradford**, Finance Director, *City of Glendale*  
141 N. Glendale Ave, Room 346, Glendale, CA 91206

Phone: (818) 548-2085  
jbradford@glendaleca.gov

**Roger Bradley**, City Manager, *City of Downey*  
11111 Brookshire, Downey, CA 90241-7016  
Phone: (562) 904-7284  
citymanager@downeyca.org

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

**Molly Brennan**, Director of Finance, *City of National City*  
1243 National City Blvd., National City, CA 91950  
Phone: (619) 336-4330  
finance@nationalcityca.gov

**Jessica Brown**, Chief Financial Officer, *City of Fontana*  
8353 Sierra Avenue, Fontana, CA 92335  
Phone: (909) 350-7679  
jbrown@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

**Serena Bubenheim**, Assistant Chief Financial Officer, *City of Huntington Beach*  
2000 Main Street, Huntington Beach, CA 92648  
Phone: (714) 536-5630  
serena.bubenheim@surfcity-hb.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

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

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

**Shelby Burguan**, Budget Manager, *City of Newport Beach*  
100 Civic Center Drive, Newport Beach, CA 92660  
Phone: (949) 644-3085  
sburguan@newportbeachca.gov

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

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

**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 Division, Bureau of Payments, 3301 C Street, Suite 740,  
Sacramento, CA 95816  
Phone: (916) 324-5919  
ECalderonYee@sco.ca.gov

**Casha Cappuccio**, Associate Attorney, *Brown and Winters*  
3916 Riviera Drive, Apt 102, San Diego, CA 92109  
Phone: (401) 787-1514  
ccappuccio@brownandwinters.com

**Steve Carmona**, City Manager, *City of Pico Rivera*  
6615 Passons Boulevard, Pico Rivera, CA 90660  
Phone: (562) 801-4371  
scarmona@pico-rivera.org

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

**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

**Manuel Carrillo**, Director of Finance and Administrative Services, *City of Bell Gardens*  
7100 Garfield Ave, Bell Gardens, CA 90201  
Phone: (562) 806-7700  
MCarrillo@bellgardens.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

**Nicole Casey**, Administrative Services Director, *Town of Truckee*  
10183 Truckee Airport Road, Truckee, CA 96161  
Phone: (530) 582-2935  
ncasey@townoftruckee.com

**Arturo Castillo**, Administrative Services Director, *City of San Pablo*  
1000 Gateway Avenue, San Pablo, CA 94806  
Phone: (510) 215-3021  
AECastillo@sanpabloca.gov

**Leslie Caviglia**, City Manager, *City of Visalia*  
707 West Acequia Avenue, Visalia, CA 93291

Phone: (559) 713-4332  
leslie.caviglia@visalia.city

**Lisa Celaya**, Executive Assistant Director, *City of San Diego*  
Public Utilities Department, 9192 Topaz Way, San Diego, CA 92123  
Phone: (858) 614-4042  
lcelaya@sandiego.gov

**Javier Chagoyen-Lazaro**, Chief Financial Officer, *City of Oxnard*  
300 West Third Street, Third Floor, Oxnard, CA 93030  
Phone: (805) 200-5400  
javier.chagoyenlazaro@oxnard.org

**Karen Chang**, Finance Director, *City of South San Francisco*  
400 Grand Ave, South San Francisco, CA 94080  
Phone: (650) 877-8505  
Karen.Chang@ssf.net

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

**Diego Chavez**, Administrative Services Director, *City of Murrieta*  
1 Town Square, Murrieta, CA 92562  
Phone: (951) 461-6437  
dchavez@murrietaca.gov

**Henry Chen**, Acting Financial Services Manager, *City of Arcadia*  
240 West Huntington Drive, Arcadia, CA 91007  
Phone: (626) 574-5427  
hchen@ArcadiaCA.gov

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

**Erick Cheung**, Finance Manager, *City of Pleasant Hill*  
100 Gregory Lane, Pleasant Hill, CA 94523  
Phone: (925) 671-5231  
echeung@pleasanthillca.org

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

**Lawrence Chiu**, Finance Director, *City of Emeryville*  
1333 Park Ave, Emeryville, CA 94608  
Phone: (510) 596-4352  
Lawrence.Chiu@emeryville.org

**David Chiu**, City Attorney, *City and County of San Francisco*  
Office of the City Attorney, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102  
Phone: (415) 554-4700  
cityattorney@sfcityatty.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

**Paul Chung**, Director of Finance, *City of El Segundo*  
350 Main Street, El Segundo, CA 90245-3813  
Phone: (310) 524-2315  
pchung@elsegundo.org

**Justin Clifton**, City Manager, *City of Murrieta*  
1 Town Square, Murrieta, CA 92562  
Phone: (951) 461-6010  
jclifton@murrietaca.gov

**Luv Cofresi**, Finance Director, *City of Milpitas*  
455 East Calaveras Boulevard, Milpitas, CA 95035  
Phone: (408) 586-3111  
lcofresi-howe@milpitas.gov

**Michael Coleman**, *Coleman Advisory Services*  
2217 Isle Royale Lane, Davis, CA 95616  
Phone: (530) 758-3952  
coleman@munil.com

**Steve Conway**, Interim Assistant City Manager/Admin Services Director, *City of Morro Bay*  
595 Harbor Street, Morro Bay, CA 93442  
Phone: (805) 772-6217  
sconway@morrobayca.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

**Christine Cordon**, City Manager, *City of Westminster*  
8200 Westminster Blvd, Westminster, CA 92683

Phone: (714) 548-3178  
CCordon@westminster-ca.gov

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

**Adam Cripps**, Interim Finance Manager, *Town of Apple Valley*  
14955 Dale Evans Parkway, Apple Valley, CA 92307  
Phone: (760) 240-7000  
acripps@applevalley.org

**Robert Cross**, Financial Services Manager, *City of Lompoc*  
100 Civic Center Plaza, Lompoc, CA 93438-8001  
Phone: (805) 736-1261  
r\_cross@ci.lompoc.ca.us

**Nate Cruz**, Finance Director, *City of Foster City*  
610 Foster City Blvd., Foster City, CA 94404  
Phone: (650) 286-3204  
finance@fostercity.org

**Amy Cunningham**, Administrative Services Director, *City of Novato*  
922 Machin Avenue, Novato, CA 94945  
Phone: (415) 899-8918  
ACunningham@novato.org

**Gavin Curran**, Acting City Manager, *City of Laguna Beach*  
505 Forest Avenue, Laguna Beach, CA 92651  
Phone: (949) 497-0754  
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

**Santino Danisi**, Finance Director / City Controller, *City of Fresno*  
2600 Fresno St. Rm. 2157, Fresno, CA 93721  
Phone: (559) 621-2489  
Santino.Danisi@fresno.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

**Eric Dargan**, Chief Operating Officer, *City of San Diego*  
**Claimant Contact**  
City Hall, 202 C Street, Suite 901A, San Diego, CA 92101  
Phone: (858) 236-5587  
Edargan@sandiego.gov

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



**Thomas Deak**, Senior Deputy, *County of San Diego*  
Office of County Counsel, 1600 Pacific Highway, Room 355, San Diego, CA 92101  
Phone: (619) 531-4810  
Thomas.Deak@sdcounty.ca.gov

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

**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

**Shannon DeLong**, Assistant City Manager, *City of Whittier*  
13230 Penn Street, Whittier, CA 90602  
Phone: (562) 567-9301  
admin@cityofwhittier.org

**Keith DeMartini**, Director of Finance, *City of Santa Barbara*  
P.O. Box 1990, Santa Barbara, CA 93102-1990  
Phone: (805) 564-5336  
KDemartini@SantaBarbaraCA.gov

**Jeremy Dennis**, City Manager, *City of Brisbane*  
50 Park Place, Brisbane, CA 94005  
Phone: (415) 508-2110  
jdennis@brisbaneca.org

**Leticia Dias**, Finance Director, *City of Ceres*  
2220 Magnolia Street, Ceres, CA 95307  
Phone: (209) 538-5757  
leticia.dias@ci.ceres.ca.us

**Lana Dich**, Director of Fiance and Administrative Services, *City of Santa Fe Springs*  
11710 East Telegraph Road, Santa Fe Springs, CA 90670  
Phone: (562) 409-7520  
lanadich@santafesprings.org

**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

**June Du**, Finance Director, *City of Los Altos*  
1 North San Antonio Road, Los Altos, CA 94022  
Phone: (650) 947-2700  
jdu@losaltosca.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**, Director of Administrative Services, *City of Mission Viejo*  
200 Civic Center, Mission Viejo, CA 92691  
Phone: (949) 470-3059  
adminservices@cityofmissionviejo.org

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

**Ann Eifert**, Director of Financial Services/City Treasurer, *City of Aliso Viejo*  
12 Journey, Suite 100, Aliso Viejo, CA 92656-5335  
Phone: (949) 425-2520  
aeifert@avcity.org

**Mara Elliott**, City Attorney, *City of San Diego*  
Civil Litigation Division, 1200 Third Avenue, Suite 1100, San Diego, CA 92101-4100  
Phone: (619) 533-5800  
melliott@sandiego.gov

**Edward Enriquez**, Interim Assistant City Manager/CFO Treasurer, *City of Riverside*  
3900 Main Street, Riverside, CA 92501  
Phone: N/A  
EEnriquez@riversideca.gov

**Kelly Ent**, Director of Government 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

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

**Casey Estorga**, Administrative Services Director, *City of Hollister*  
375 Fifth Street, Hollister, CA 95023  
Phone: (831) 636-4301  
casey.estorga@hollister.ca.gov

**Nadia Feeser**, Administrative Services Director, *City of Pismo Beach*  
Finance Department, 760 Mattie Road, Pismo Beach, CA 93449  
Phone: (805) 773-7010  
nfeeser@pismo beach.org

**Donna Ferebee**, *Department of Finance*  
915 L Street, Suite 1280, Sacramento, CA 95814  
Phone: (916) 445-8918  
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

**Kevin Fisher**, Assistant City Attorney, *City of San Jose*  
Environmental Services, 200 East Santa Clara Street, 16th Floor, San Jose, CA 95113  
Phone: (408) 535-1987  
kevin.fisher@sanjoseca.gov

**Tim Flanagan**, Office Coordinator, *Solano County*  
Register of Voters, 678 Texas Street, Suite 2600, Fairfield, CA 94533  
Phone: (707) 784-3359  
Elections@solanocounty.com

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

**Sandy Fonseca**, Interim Finance Director, *City of Calexico*  
608 Heber Ave, Calexico, CA 92231  
Phone: (760) 768-2123  
sfonseca@calexico.ca.gov

**Anthony Forestiere**, Acting Finance Director, *City of Madera*  
205 West Fourth Street, Madera, CA 93637  
Phone: (559) 661-5454  
aforestiere1@madera.gov

**Aaron France**, City Manager, *City of Buena Park*  
6650 Beach Boulevard, Second Floor, Buena Park, CA 90621  
Phone: (714) 562-3550  
afrance@buenapark.com

**Cheri Freese**, Finance Director, *City of Ridgecrest*  
100 West California Avenue, Ridgecrest, CA 93555  
Phone: (760) 499-5026  
cfreese@ridgecrest-ca.gov

**Nora Frimann**, City Attorney, *City of San Jose*  
200 East Santa Clara Street, 16th Floor, San Jose, CA 95113  
Phone: (408) 535-1900  
nora.frimann@sanjoseca.gov

**Elizabeth Fuchen**, Interim Finance Director, *City of El Centro*  
1275 Main Street, El Centro, CA 92243

Phone: (760) 337-4573  
efuchen@cityofelcentro.org

**Melanie Gaboardi**, Assistant Finance Director, *City of Tulare*  
411 East Kern Ave., Tulare, CA 93274  
Phone: (559) 685-2300  
mgaboardi@tulare.ca.gov

**PJ Gagajena**, Interim Finance Director/Assistant City Manager, *City of Moorpark*  
799 Moorpark Ave. , Moorpark, CA 93021  
Phone: (805) 517-6249  
PJGagajena@MoorparkCA.gov

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

**Marlene Galvan**, Deputy Finance Officer, *City of Fontana*  
8353 Sierra Ave, Fontana, CA 92335  
Phone: (909) 350-7671  
Mgalvan@fontana.org

**Danielle Garcia**, Director of Finance, *City of Redlands*  
PO Box 3005, Redlands, CA 92373  
Phone: (909) 798-7510  
dgarcia@cityofredlands.org

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

**Martha Garcia**, Director of Management Services, *City of Monterey Park*  
320 West Newmark Ave, Monterey Park, CA 91754  
Phone: (626) 307-1349  
magarcia@montereypark.ca.gov

**Jorge Garcia**, Interim City Manager, *City of Pismo Beach*  
760 Mattie Road, Pismo Beach, CA 93449  
Phone: (805) 773-7007  
finance@pismo-beach.org

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

**Amber Garcia Rossow**, Legislative Analyst, *California State Association of Counties*  
1100 K Street, Suite 101, Sacramento, CA 95814  
Phone: (916) 650-8170  
arossow@counties.org

**David Gassaway**, City Manager, *City of Fairfield*  
1000 Webster Street, Fairfield,  
Phone: (707) 428-7398  
dgassaway@fairfield.ca.gov

**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

**John Gillison**, City Manager, *City of Rancho Cucamonga*  
10500 Civic Center Drive, Rancho Cucamonga, CA 91730  
Phone: (909) 477-2700  
john.gillison@cityofrc.us

**Juliana Gmur**, Executive Director, *Commission on State Mandates*  
980 9th Street, Suite 300, Sacramento, CA 95814  
Phone: (916) 323-3562  
juliana.gmur@csm.ca.gov

**Shannon Prentice Godfrey**, Senior Management Analyst, *City of Fillmore*  
250 Central Avenue, Fillmore, CA 93015  
Phone: (805) 524-1500  
sgodfrey@fillmoreca.gov

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

**Gabe Gonzalez**, City Administrator, *City of Gilroy*  
7351 Rosanna Street, Gilroy, CA 95020  
Phone: (408) 846-0202  
Denise.King@cityofgilroy.org

**Ana Gonzalez**, City Clerk, *City of Woodland*  
300 First Street, Woodland, CA 95695  
Phone: (530) 661-5830  
ana.gonzalez@cityofwoodland.org

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

**Pam Greer**, Finance Director, *City of Ojai*  
PO Box 1570, Ojai, CA 93024  
Phone: (805) 646-5581  
Pam.greer@ojai.ca.gov

**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**, Director of Administrative Services, *City of La Puente*  
15900 East Main Street, La Puente, CA 91744  
Phone: (626) 855-1500  
tgrunklee@lapuente.org

**Juan Guerreiro**, Director, *City of San Diego*  
Public Utilities Department, 9192 Topaz Way, San Diego, CA 92123

Phone: (858) 292-6436  
jguerreiro@sandiego.gov

**John Guertin**, City Manager, *City of Del Rey Oaks*  
650 Canyon Del Rey Road, Del Rey Oaks, CA 93940  
Phone: (831) 394-8511  
JGuertin@DelReyOaks.org

**Hillary Guirola-Leon**, Finance Director, *City of San Marino*  
2200 Huntington Drive, San Marino, CA 91108  
Phone: (626) 300-0708  
hguirola-leon@sanmarinoca.gov

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

**Anna Guzman**, Director of Finance, *City of Weed*  
550 Main Street, PO Box 470, Weed, CA 96094  
Phone: (530) 938-5020  
guzman@ci.weed.ca.us

**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

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

**Andy Hall**, City Manager, *City of San Clemente*  
910 Calle Negocio, San Clemente, CA 92673  
Phone: (949) 361-8341  
HallA@san-clemente.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

**George Harris**, Finance Director, *City of Lancaster*  
44933 Fern Avenue, Lancaster, CA 93534  
Phone: (661) 723-5988  
gharris@cityoflancasterca.org

**Sydney Harris**, Finance Director, *City of Barstow*  
220 East Mountain View Street, Suite A, Barstow, CA 92311  
Phone: (760) 255-5125  
sharris@barstowca.org

**Mary Harvey**, Director of Finance, *City of Santa Maria*  
City Hall Annex, 206 East Cook Street, Santa Maria, CA 93454  
Phone: (805) 925-0951  
mharvey@cityofsantamaria.org

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

**Eric Hendrickson**, Finance Director, *City of Laguna Hills*  
24035 El Toro Road, Laguna Hills, CA 92653  
Phone: (949) 707-2623  
ehendrickson@lagunahillsca.gov

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

**Ernie Hernandez**, City Manager, *City of Commerce*  
2535 Commerce Way, Commerce, CA 90040  
Phone: (323) 722-4805  
ehernandez@ci.commerce.ca.us

**Erika Herrera-Terriquez**, Interim City Manager, *City of Fillmore*  
250 Central Avenue, Fillmore, CA 93015  
Phone: (805) 524-1500  
eherrera@fillmoreca.gov

**Chad Hess**, Finance Director, *City of Sausalito*  
420 Litho Street, Sausalito, CA 94965  
Phone: (415) 289-4165  
Chess@sausalito.gov

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

**Chris Hill**, Principal Program Budget Analyst, *Department of Finance*  
Local Government Unit, 915 L Street, 8th Floor, Sacramento, CA 95814  
Phone: (916) 445-3274  
Chris.Hill@dof.ca.gov

**Ryan Hinchman**, Administrative Services Director, *City of Saratoga*  
13777 Fruitvale Avenue, Saratoga, CA 94025  
Phone: N/A  
rhinchman@saratoga.ca.us

**Tiffany Hoang**, Associate Accounting Analyst, *State Controller's Office*  
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740,  
Sacramento, CA 95816

Phone: (916) 323-1127  
THoang@sco.ca.gov

**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

**Jason Holley**, City Manager, *City of American Canyon*  
4381 Broadway Street, Suite 201, American Canyon, CA 94503  
Phone: (707) 647-5323  
jholley@cityofamericancanyon.org

**Linda Hollinsworth**, Finance Director, *City of Hawaiian Gardens*  
21815 Pioneer Blvd., Hawaiian Gardens, CA 90716  
Phone: (562) 420-2641  
lindah@hgcity.org

**Christina Holmes**, Director of Finance, *City of Escondido*  
201 North Broadway, Escondido, CA 92025  
Phone: (760) 839-4676  
cholmes@escondido.org

**Mike Howard**, Director of Finance, *City of Soledad*  
248 Main Street, Soledad, CA 93960  
Phone: (831) 674-5562  
mhoward@cityofsoledad.com

**Betsy Howze**, Finance Director, *City of Rohnert Park*  
130 Avram Avenue, Rohnert Park, CA 94928-1180  
Phone: (707) 585-6717  
bhowze@rpcity.org

**Karen Huang**, Finance Director, *City of San Mateo*  
330 West 20th Avenue, San Mateo, CA 94403  
Phone: (650) 522-7102  
khuang@cityofsanmateo.org

**Lewis Humphries**, Finance Director, *City of Newman*  
Finance Department, 938 Fresno Street, Newman, CA 95360  
Phone: (209) 862-3725  
lhumphries@cityofnewman.com

**Joe Irvin**, City Manager, *City of South Lake Tahoe*  
1901 Lisa Maloff Way, South Lake Tahoe, CA 96150  
Phone: (530) 542-6000  
jirvin@cityofslt.us

**Rachel Jacobs**, Finance Director/Treasurer, *City of Solana Beach*  
635 South Highway 101, Solana Beach, CA 92075-2215  
Phone: (858) 720-2463  
rjacobs@cosb.org

**Chris Jeffers**, Interim City Manager, *City of South Gate*  
8650 California Ave, South Gate, CA 90280  
Phone: (323) 563-9503  
cjeffers@sogate.org



**Elaine Jeng**, City Manager, *City of Palos Verdes Estates*  
340 Palos Verdes Dr West, Palos Verdes Estates, CA 90274  
Phone: (310) 378-0383  
ejeng@Pvestates.org

**Brooke Jenkins**, District Attorney, *City and County of San Francisco*  
350 Rhode Island Street, North Building, Suite 400N, San Francisco, CA 94103  
Phone: (628) 652-4000  
districtattorney@sfgov.org

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

**Heather Jennings**, Director of Finance, *City of Santee*  
10601 Magnolia Avenue, Building #3, Santee, CA 92071  
Phone: (619) 258-4100  
hjennings@cityofsanteeca.gov

**Jestin Johnson**, City Administrator, *City of Oakland*  
1 Frank H Ogawa Plaza, Oakland, CA 94612  
Phone: (510) 238-3301  
cityadministratorsoffice@oaklandca.gov

**Talika Johnson**, Director, *City of Azusa*  
213 E Foothill Blvd, Azusa, CA 91702  
Phone: (626) 812-5203  
tjohnson@ci.azusa.ca.us

**Christa Johnson**, Town Manager, *Town of Ross*  
31 Sir Francis Drake Boulevard, PO Box 320, Ross, CA 94957  
Phone: (415) 453-1453  
cjohnson@townofross.org

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

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

**Kim Juran Karageorgiou**, Administrative Services Director, *City of Rancho Cordova*  
2729 Prospect Park Drive , Rancho Cordova, CA 95670  
Phone: (916) 851-8731  
kjuran@cityofranhocordova.org

**Will Kaholokula**, Finance Director, *City of San Gabriel*  
425 South Mission Drive, San Gabriel, CA 91776  
Phone: (626) 308-2812  
wkaholokula@sgch.org

**Anne Kato**, Acting Chief, *State Controller's Office*  
Local Government Programs and Services Division, 3301 C Street, Suite 740, Sacramento, CA

95816  
Phone: (916) 322-9891  
akato@sco.ca.gov

**Dennis Kauffman**, Finance Director, *City of Roseville*  
311 Vernon Street, Roseville, CA 95678  
Phone: (916) 774-5313  
dkauffman@roseville.ca.us

**Jeff Kay**, City Manager, *City of Healdsburg*  
401 Grove Street, Healdsburg, CA 95448  
Phone: (707) 431-3396  
jkay@ci.healdsburg.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

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

**Jennifer King**, Acting Finance Director, *City of Tustin*  
300 Centennial Way, Tustin, CA 92780  
Phone: (714) 573-3079  
jking@tustinca.org

**Kevin King**, Deputy City Attorney, Affirmative Civil Enforcement Unit, *San Diego City Attorney's Office*  
1200 Third Avenue, Suite 1100, San Diego, CA 92101  
Phone: (619) 533-6103  
KBKing@sandiego.gov

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

**Tim Kirby**, City Manager, *City of Sunnyvale*  
456 West Olive Avenue, Sunnyvale, CA 94086  
Phone: (408) 730-7911  
citymanager@sunnyvale.ca.gov

**Tim Kiser**, City Manager, *City of Grass Valley*  
125 East Main Street, Grass Valley, CA 95945  
Phone: (530) 274-4312  
timk@cityofgrassvalley.com

**Zach Korach**, Finance Director, *City of Carlsbad*  
1635 Faraday Ave., Carlsbad, CA 92008

Phone: (442) 339-2127  
zach.korach@carlsbadca.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

**Mali LaGoe**, City Manager, *City of Scotts Valley*  
1 Civic Center Drive, Scotts Valley, CA 95066  
Phone: (831) 440-5600  
mlagoe@scottsvalley.gov

**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

**Eric Lawyer**, Legislative Advocate, *California State Association of Counties (CSAC)*  
Government Finance and Administration, 1100 K Street, Suite 101, Sacramento, CA 95814  
Phone: (916) 650-8112  
elawyer@counties.org

**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

**Krysten Lee**, Finance Director, *City of Newark*  
37101 Newark Blvd, Newark, CA 94560  
Phone: (510) 578-4288  
krysten.lee@newark.org

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

**Grace Leung**, City Manager, *City of Newport Beach*  
100 Civic Center Drive, Newport Beach, CA 92660  
Phone: (949) 644-3001  
gleung@newportbeachca.gov

**Jim Lewis**, City Manager, *City of Atascadero*  
Finance Department, 6500 Palma Ave, Atascadero, CA 93422  
Phone: (805) 461-7612  
jlewis@atascadero.org

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

**Pearl Lieu**, Director of Finance, *City of Alhambra*  
111 South First Street, Alhambra, CA 91801  
Phone: (626) 570-5020  
plieu@cityofalhambra.org

**Robert Lopez**, City Manager, *City of Cerritos*  
18125 Bloomfield Ave, Cerritos, CA 90703  
Phone: (562) 916-1310  
ralopez@cerritos.us

**Brian Loventhal**, City Manager, *City of Campbell*  
70 North First Street, Campbell, CA 95008  
Phone: (408) 866-2100  
dianaj@cityofcampbell.com

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

**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

**Carmen Magana**, Director of Administrative Services, *City of Santa Clarita*  
23920 Valencia Blvd, Santa Clarita, CA 91355  
Phone: (661) 255-4997  
cmagana@santa-clarita.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

**Jennifer Maguire**, City Manager, *City of San Jose*  
200 East Santa Clara Street, San Jose, CA 95113  
Phone: (408) 535-8111  
Jennifer.Maguire@sanjoseca.gov

**James Makshanoff**, City Manager, *City of Pomona*  
505 South Garey Ave, Pomona, CA 91766  
Phone: (909) 620-2051  
james\_makshanoff@ci.pomona.ca.us

**Licette Maldonado**, Administrative Services Director, *City of Carpinteria*  
5775 Carpinteria Avenue, Carpinteria, CA 93013  
Phone: (805) 755-4448  
licettem@carpinteriaca.gov

**Hrant Manuelian**, Director of Finance/City Treasurer, *City of Lawndale*  
14717 Burin Avenue, Lawndale, CA 90260  
Phone: (310) 973-3200  
hmanuelian@lawndalecity.org

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

**Terri Marsh**, Finance Director, *City of Signal Hill*  
Finance, 2175 Cherry Ave., Signal Hill, CA 90755  
Phone: (562) 989-7319  
Financel@cityofsignalhill.org

**Cyndie Martel**, Town Clerk and Administrative Manager, *Town of Ross*  
31 Sir Francis Drake Blvd, PO Box 320, Ross, CA 94957  
Phone: (415) 453-1453  
cmartel@townofross.org

**Barbara Martin**, Administrative Services Director, *City of Chico*  
411 Main St., Chico, CA 95927  
Phone: (530) 879-7300  
barbara.martin@chicoca.gov

**Pio Martin**, Finance Manager, *City of Firebaugh*  
Finance Department, 1133 P Street, Firebaugh, CA 93622  
Phone: (559) 659-2043  
financedirector@ci.firebaugh.ca.us

**Alma Martinez**, City Manager, *City of El Monte*  
11333 Valley Blvd, El Monte, CA 91731-3293  
Phone: (626) 580-2274  
amartinez@elmonteca.gov

**Ken Matsumiya**, Director of Finance, *City of Vacaville*  
650 Merchant Street, Vacaville, CA 95688  
Phone: (707) 449-5450  
Ken.Matsumiya@cityofvacaville.com

**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

**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

**Tim McDermott**, Director of Finance, *City of Poway*  
13325 Civic Center Drive, Poway, CA 92064  
Phone: (858) 668-4411  
tmcdermott@poway.org

**Suzanne McDonald**, Financial Operations Manager, *City of Concord*  
Finance Department, 1950 Parkside Drive, MS 06 , Concord, CA 94519  
Phone: (925) 671-3136  
Suzanne.McDonald@cityofconcord.org

**Kris McFadden**, Deputy Chief Operating Officer, *City of San Diego*  
Office of the Chief Operating Officer, 202 C Street, San Diego, CA 92101  
Phone: (619) 236-6595  
kmcfadden@sandiego.gov

**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

**Randy McKeegan**, Finance Director, *City of Bakersfield*  
1600 Truxtun Avenue, Bakersfield, CA 93301  
Phone: (661) 326-3742  
RMcKeegan@bakersfieldcity.us

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

**Larry McLaughlin**, City Manager, *City of Sebastopol*  
7120 Bodega Avenue, P.O. Box 1776, Sebastopol, CA 95472  
Phone: (707) 823-1153  
lwmclaughlin@juno.com

**Paul Melikian**, *City of Reedley*  
1717 Ninth Street, Reedley, CA 93654  
Phone: (559) 637-4200  
paul.melikian@reedley.ca.gov

**Brittany Mello**, Administrative Services Director, *City of Menlo Park*  
701 Laurel Street, Menlo Park, CA 94025  
Phone: (650) 330-6675  
bkmello@menlopark.gov

**Erica Melton**, Director of Finance / City Treasurer, *City of San Fernando*  
117 Macneil Street, San Fernando, CA 91340

Phone: (818) 898-1212  
EMelton@sfcity.org

**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

**Brant Mesker**, *City Manager, City of Corning*  
794 Third Street, Corning, CA 96021  
Phone: N/A  
bmesker@corning.org

**Joan Michaels Aguilar**, *City of Dixon*  
600 East A Street, Dixon, CA 95620  
Phone: N/A  
jmichaelsaguilar@ci.dixon.ca.us

**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

**Leyne Milstein**, *Director of Finance, City of Sacramento*  
915 I Street, 5th Floor, Sacramento, CA 98514  
Phone: (916) 808-5845  
lmilstein@cityofsacramento.org

**David Mirrione**, *City Manager, City of Hollister*  
375 Fifth Street, Hollister, CA 95023  
Phone: (831) 636-4300  
David.Mirrione@hollister.ca.gov

**Talyn Mirzakhania**, *City Manager, City of Manhattan Beach*  
1400 Highland Ave., Manhattan Beach, CA 90266  
Phone: (310) 802-5302  
tmirzakhania@citymb.info

**April Mitts**, *Finance Director, City of St. Helena*  
1480 Main Street, Saint Helena, CA 94574  
Phone: (707) 968-2751  
amitts@cityofstheleena.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

**Brian Mohan**, Chief Financial Officer, *City of Moreno Valley*  
14177 Frederick Street, PO Box 88005, Moreno Valley, CA 92552  
Phone: (951) 413-3021  
brianm@moval.org

**Monica Molina**, Finance Manager/Treasurer, *City of Del Mar*  
1050 Camino Del Mar, Del Mar, CA 92014  
Phone: (858) 755-9354  
mmolina@delmar.ca.us

**Rachel Molina**, City Manager, *City of Hesperia*  
9700 Seventh Ave. , Hesperia, CA 92345  
Phone: (760) 947-1018  
rmolina@cityofhesperia.us

**Isaac Moreno**, Finance Director, *City of Turlock*  
156 South Broadway, Suite 230, Turlock, CA 95380  
Phone: (209) 668-6071  
IMoreno@turlock.ca.us

**Debbie Moreno**, *City of Anaheim*  
200 S. Anaheim Boulevard, Anaheim, CA 92805  
Phone: (716) 765-5192  
DMoreno@anaheim.net

**Jill Moya**, Financial Services Director, *City of Oceanside*  
300 North Coast Highway, Oceanside, CA 92054  
Phone: (760) 435-3887  
jmoya@oceansideca.org

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

**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

**Shay Narayan**, Finance Director, *City of Manteca*  
1001 West Center Street, Manteca, CA 95337  
Phone: (209) 456-8730  
snarayan@mantecagov.com

**Tim Nash**, Director of Finance, *City of Encinitas*  
505 S Vulcan Avenue, Encinitas, CA 92054



Phone: N/A  
finmail@encinitasca.gov

**Mansour Nasser**, Water and Sewer Division Manager, *City of Sunnyvale*  
456 West Olive Avenue, Sunnyvale, CA 94086  
Phone: (408) 730-7578  
MNasser@sunnyvale.ca.gov

**Renee Neermann**, Finance Manager, *City of Malibu*  
23825 Stuart Ranch Road, Malibu, CA 90265  
Phone: (310) 456-2489  
RNeermann@malibucity.org

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

**Keith Neves**, Director of Finance/City Treasurer, *City of Lake Forest*  
Finance Department, 100 Civic Center Drive, Lake Forest, CA 92630  
Phone: (949) 461-3430  
kneves@lakeforestca.gov

**Tim Nevin**, Director of Finance and Administrative Services, *City of Daly City*  
333 90th Street, Daly City, CA 94015  
Phone: (650) 991-8040  
tnevin@dalycity.org

**Trang Nguyen**, Director of Finance, *City of Orange*  
300 E. Chapman Avenue, Orange, CA 92866-1508  
Phone: (714) 744-2230  
nguyent@cityoforange.org

**Dat Nguyen**, Finance Director, *City of Morgan Hill*  
17575 Peak Avenue, Morgan Hill, CA 95037  
Phone: (408) 779-7237  
dat.nguyen@morganhill.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

**Robert Nisbet**, City Manager, *City of Goleta*  
130 Cremona Drive, Suite B, Goleta, CA 93117  
Phone: (805) 961-7501  
rnisbet@cityofgoleta.org

**David Noce**, Accounting Division Manager, *City of Santa Clara*  
1500 Warburton Ave, Santa Clara, CA 95050  
Phone: (408) 615-2341  
dnoce@santaclaraca.gov

**Vontray Norris**, City Manager Director of Community Services, *City of Hawthorne*  
4455 W 126th St, Hawthorne, CA 90250  
Phone: (310) 349-2908  
vnorris@hawthorneca.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*  
Los Angeles Regional Water Quality Control Board, 1001 I Street, 22nd Floor, Sacramento, CA 95814  
Phone: (916) 322-3313  
Adriana.Nunez@waterboards.ca.gov

**Michael O'Brien**, Administrative Services Director, *City of San Dimas*  
245 East Bonita Ave, San Dimas, CA 91773  
Phone: (909) 394-6200  
mobrien@sandimasca.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

**Brenda Olwin**, Finance Director, *City of East Palo Alto*  
2415 University Avenue, East Palo Alto, CA 94303  
Phone: (650) 853-3122  
financedepartment@cityofepa.org

**Erika Opp**, Administrative Analyst, *City of St. Helena*  
City Clerk, 1480 Main Street, St. Helena, CA 94574  
Phone: (707) 968-2743  
eopp@cityofstheleena.gov

**Eric Oppenheimer**, Executive Director, *State Water Resources Control Board*  
1001 I Street, 22nd Floor, Sacramento, CA 95814-2828  
Phone: (916) 341-5615  
eric.oppenheimer@waterboards.ca.gov

**Cathy Orme**, Finance Director, *City of Larkspur*  
Finance Department, 400 Magnolia Ave, Larkspur, CA 94939  
Phone: (415) 927-5019  
cathy.orme@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

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

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

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

**Donald Parker**, Director of Finance, *City of Montclair*  
5111 Benito St., Montclair, CA 91763  
Phone: N/A  
dparker@cityofmontclair.org

**Nancy Pauley**, Director of Finance, *City of Palm Springs*  
3200 E. Tahquitz Canyon Way, Palm Springs, CA 92262  
Phone: (760) 323-8229  
Nancy.Pauley@palmspringsca.gov

**Virginia Penalzoza**, City Manager, *City of Huron*  
36311 Lassen Avenue, PO Box 339, Huron, CA 93234  
Phone: (559) 945-3827  
Virginia@cityofhuron.com

**David Persselin**, Finance Director, *City of Fremont*  
3300 Capitol Ave, Fremont, CA 94538  
Phone: (510) 494-4790  
DPersselin@fremont.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**, City Manager and Acting Finance Director, *City of Claremont*  
207 Harvard Ave, Claremont, CA 91711  
Phone: (909) 399-5456  
apirrie@ci.claremont.ca.us

**Sheila Poisson**, Finance Director, *City of Torrance*  
Finance Department, 3031 Torrance Blvd., Torrance, CA 90503  
Phone: (310) 618-5850  
SPoisson@TorranceCA.Gov

**Darrin Polhemus**, Deputy Director, *State Water Resources Control Board*  
Division of Drinking Water, , ,  
Phone: (916) 341-5045  
Darrin.Polhemus@waterboards.ca.gov

**Neil Polzin**, City Treasurer, *City of Covina*  
125 East College Street, Covina, CA 91723  
Phone: (626) 384-5400  
npolzin@covinaca.gov

**Brian Ponty**, *City of Redwood City*  
1017 Middlefield Road, Redwood City, CA 94063  
Phone: (650) 780-7300  
finance@redwoodcity.org

**Rajneil Prasad**, Deputy Finance Director, *City of Napa*  
955 School Street, PO Box 660, Napa, CA 94559  
Phone: (707) 257-9510  
rprasad@cityofnapa.org

**Jai Prasad**, *County of San Bernardino*  
Office of Auditor-Controller, 222 West Hospitality Lane, 4th Floor, San Bernardino, CA 92415-0018  
Phone: (909) 386-8854  
jai.prasad@sbcountyatc.gov

**Mark Prestwich**, City Manager, *City of Hemet*  
445 East Florida Avenue, Hemet, CA 92543  
Phone: (951) 765-2301  
mprestwich@hemetca.gov

**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

**Rod Pruett**, City Administrator, *City of Chowchilla*  
130 South 2nd Street, Chowchilla, CA 93610  
Phone: (559) 665-8615  
RPruett@cityofchowchilla.org

**Laura Pruneda**, Finance Director, *City of Marina*  
211 Hillcrest Avenue, Marina, CA 93933  
Phone: (831) 884-1221  
lpruneda@cityofmarina.org

**Mubeen Qader**, Acting Director of Finance, *City of Richmond*  
450 Civic Center Plaza, Richmond, CA 94804

Phone: (510) 620-2077  
Mubeen\_Qader@ci.richmond.ca.us

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

**Frank Quintero**, *City of Merced*  
678 West 18th Street, Merced, CA 95340  
Phone: N/A  
quinterof@cityofmerced.org

**Derek Rampone**, Finance and Administrative Services Director, *City of Mountain View*  
500 Castro Street, Mountain View, CA 94041  
Phone: (650) 903-6316  
Derek.Rampone@mountainview.gov

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

**Paul Rankin**, Finance Director, *City of Orinda*  
22 Orinda Way, Second Floor, Orinda, CA 94563  
Phone: (925) 253-4224  
prankin@cityoforinda.org

**Roberta Raper**, Director of Finance, *City of West Sacramento*  
1110 West Capitol Ave, West Sacramento, CA 95691  
Phone: (916) 617-4509  
robertar@cityofwestsacramento.org

**Chip Rerig**, City Administrator, *City of Carmel by the Sea*  
P.O. Box CC, Carmel-by-the-Sea, CA 93921  
Phone: (831) 620-2058  
crerig@ci.carmel.ca.us

**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

**Marie Ricci**, Administrative Services Director/City Treasurer, *City of Glendora*  
116 East Foothill Road, Glendora, CA 91741-3380  
Phone: (626) 914-8245  
mricci@cityofglendora.org

**David Rice**, *State Water Resources Control Board*  
1001 I Street, 22nd Floor, Sacramento, CA 95814  
Phone: (916) 341-5161  
david.rice@waterboards.ca.gov

**Jennifer Riedeman**, Director of Finance, *City of Patterson*  
1 Plaza Circle, Patterson, CA 95363  
Phone: (209) 895-8046  
jriedeman@ci.patterson.ca.us

**Jessica Riley**, Finance Director, *City of Seaside*  
440 Harcourt Ave., Seaside, CA  
Phone: (831) 899-6716  
jriley@ci.seaside.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

**Margaret Roberts**, City Manager, *City of Plymouth*  
P.O. Box 429, Plymouth, CA 95669  
Phone: (209) 245-6941  
MRoberts@cityofplymouth.org

**Mark Roberts**, Director of Finance, *City of Salinas*  
200 Lincoln Ave, Salinas, CA 93901  
Phone: (831) 758-7211  
Dof@ci.salinas.ca.us

**Rob Rockwell**, Director of Finance, *City of Indio*  
Finance Department, 100 Civic Center Mall, Indio, CA 92201  
Phone: (760) 391-4029  
rockwell@indio.org

**Paul Rodrigues**, Director of Finance, *City of Pittsburg*  
65 Civic Avenue, Pittsburg, CA 94565  
Phone: (925) 252-4848  
prodrigues@pittsburgca.gov

**Janie Rodriguez**, Finance Director, *City of Porterville*  
291 North Main Street, Porterville, CA 93257  
Phone: (559) 782-7566  
jrodriguez@ci.porterville.ca.us

**Lydia Romero**, City Manager, *City of Lemon Grove*  
3232 Main Street, Lemon Grove, CA 91945  
Phone: (619) 825-3819  
lromero@lemongrove.ca.gov

**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

**Tammi Royales**, Director of Finance, *City of La Mesa*  
8130 Allison Avenue, PO Box 937, La Mesa, CA 91944-0937

Phone: (619) 463-6611  
findir@cityoflamesa.us

**Brittany Ruiz**, Interim Director of Finance, *City of Rancho Palos Verdes*  
30940 Hawthorne Blvd., Rancho Palos Verdes, CA 90275  
Phone: (310) 544-5304  
bruiz@rpvca.gov

**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

**Pete Salazar**, Interim Finance Director/City Treasurer, *City of El Cerrito*  
10890 San Pablo Ave, El Cerrito, CA 95430-2392  
Phone: (510) 215-4335  
psalazar@ci.el-cerrito.ca.us

**Janelle Samson**, Director of Finance, *City of Palmdale*  
38300 Sierra Highway, Suite D, Palmdale, CA 93550  
Phone: (661) 267-5440  
jsamson@cityofpalmdale.org

**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

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

**Kim Sao**, Finance Director, *City of Paramount*  
16400 Colorado Avenue, Paramount, CA 90723  
Phone: (562) 220-2200  
ksao@paramountcity.com

**Lori Sassoon**, City Manager, *City of Norco*  
2870 Clark Avenue, Norco, CA 92860  
Phone: (951) 270-5617  
LSassoon@ci.norco.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

**Donna Schwartz**, City Clerk, *City of Huntington Park*  
6550 Miles Avenue, Huntington park, CA 90255-4393  
Phone: (323) 584-6231  
DSchwartz@hpcga.gov

**Cindy Sconce**, Director, *Government Consulting Partners*  
5016 Brower Court, Granite Bay, CA 95746  
Phone: (916) 276-8807  
cindysconcepcp@gmail.com

**Kelly Sessions**, Director of Administrative Services, *City of San Ramon*  
Finance Department, 7000 Bollinger Canyon Road, Building #2, San Ramon, CA 94583  
Phone: (925) 973-2500  
ksessions@sanpabloca.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@lahabracalifornia.gov

**Terry Shea**, Finance Director, *City of Canyon Lake*  
31516 Railroad Canyon Road, Canyon Lake, CA 92584  
Phone: (951) 244-2955  
terry@ramscpa.net

**Camille Shelton**, Chief Legal Counsel, *Commission on State Mandates*  
980 9th Street, Suite 300, Sacramento, CA 95814  
Phone: (916) 323-3562  
camille.shelton@csm.ca.gov

**Carla Shelton**, Senior Legal Analyst, *Commission on State Mandates*  
980 9th Street, Suite 300, Sacramento, CA 95814  
Phone: (916) 323-3562  
carla.shelton@csm.ca.gov

**Stephanie Sikkema**, Finance Director, *City of West Covina*  
1444 West Garvey Street South, West Covina, CA 91790  
Phone: (626) 939-8438  
ssikkema@westcovina.org

**Chet Simmons**, City Manager, *City of Los Alamitos*  
3191 Katella Ave., Los Alamitos, CA 90720  
Phone: (562) 431-3538  
csimmons@cityoflosalamitos.org

**Kim Sitton**, Director of Finance, *City of Corona*  
400 South Vicentia Ave., Corona, CA 92882  
Phone: (951) 279-3532  
Kim.Sitton@CoronaCA.gov

**Ryan Smith**, Director of Finance, *City of Fountain Valley*  
10200 Slater Avenue, Fountain Valley, CA 92708  
Phone: (714) 593-4501  
Ryan.Smith@fountainvalley.org

**Laura Snideman**, City Manager, *City of Calistoga*  
1232 Washington Street, Calistoga, CA 94515  
Phone: (707) 942-2802  
LSnideman@ci.calistoga.ca.us

**Eugene Solomon**, City Treasurer, *City of Redondo Beach*  
415 Diamond Street, Redondo Beach, CA 90277  
Phone: (310) 318-0657  
eugene.solomon@redondo.org

**Greg Sparks**, City Manager, *City of Eureka*  
531 K Street, Eureka, CA 95501



Phone: (707) 441-4144  
cityclerk@ci.eureka.ca.gov

**Kenneth Spray**, Finance Director, *City of Millbrae*  
621 Magnolia Avenue, Millbrae, CA 94030  
Phone: (650) 259-2433  
kspray@ci.millbrae.ca.us

**Kelly Stachowicz**, Assistant City Manager, *City of Davis*  
23 Russell Blvd, Davis, CA 95616  
Phone: (560) 757-5602  
kstachowicz@cityofdavis.org

**Paul Steenhausen**, Principal Fiscal and Policy Analyst, *Legislative Analyst's Office*  
925 L Street, Suite 1000, , Sacramento, CA 95814  
Phone: (916) 319-8303  
Paul.Steenhausen@lao.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

**Katherine Stevens**, Director of Finance, *City of Rialto*  
150 South Palm Avenue, Rialto, CA 92376  
Phone: (909) 421-7242  
kstevens@rialtoca.gov

**Jana Stuard**, Finance Director, *City of Norwalk*  
12700 Norwalk Blvd, Norwalk, CA 90650  
Phone: (562) 929-5748  
jstuard@norwalkca.gov

**Lauren Sugayan**, Acting Finance Director, *City of Martinez*  
525 Henrietta Street, Martinez, CA 94553  
Phone: (925) 372-3579  
lsugayan@cityofmartinez.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

**Suzanne Sweitzer**, Director of Administrative Services, *Town of Tiburon*  
1505 Tiburon Boulevard, Tiburon, CA 94920  
Phone: (415) 435-7373  
ssweitzer@townoftiburon.org

**Michael Szczech**, Finance Director, *City of Piedmont*  
120 Vista Avenue, Piedmont, CA 94611  
Phone: (510) 420-3045  
mszczech@piedmont.ca.gov

**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

**Rose Tam**, Finance Director, *City of Baldwin Park*  
14403 East Pacific Avenue, Baldwin Park, CA 91706  
Phone: (626) 960-4011  
rtam@baldwinpark.com

**Stacey Tamagni**, Director of Finance / CFO, *City of Folsom*  
50 Natoma Street, Folsom, CA 95630  
Phone: (916) 461-6712  
stamagni@folsom.ca.us

**Christopher Tavarez**, Finance Director, *City of Hanford*  
315 North Douty Street, Hanford, CA 93230  
Phone: (559) 585-2500  
ctavarez@cityofhanfordca.com

**Jeri Tejeda**, Human Resources Director/Acting Finance Director, *City of Oakley*  
3231 Main Street, Oakley, CA 94561  
Phone: (925) 625-7010  
tejeda@ci.oakley.ca.us

**Julie Testa**, Vice Mayor, *City of Pleasanton*  
123 Main Street PO Box520, Pleasanton, CA 94566  
Phone: (925) 872-6517  
Jtesta@cityofpleasantonca.gov

**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 Consulting Group*  
2251 Harvard Street, Suite 134, Sacramento, CA 95815  
Phone: (916) 243-8913  
jolenetollenaar@gmail.com

**Joseph Toney**, Director of Administrative Services, *City of Simi Valley*  
2929 Tapo Canyon Road, Simi Valley, CA 93063  
Phone: (805) 583-6700  
adminservices@simivalley.org

**Kimberly Trammel**, Chief Financial Officer/Administrative Services Director, *City of Stockton*  
425 North El Dorado Street, Stockton, CA 95202  
Phone: (209) 937-8460  
Kimberly.Trammel@stocktonca.gov

**Colleen Tribby**, Finance Director, *City of Dublin*  
100 Civic Plaza, Dublin, CA 94568  
Phone: (925) 833-6640  
colleen.tribby@dublin.ca.gov

**Albert Trinh**, Finance Manager, *City of South Pasadena*  
1414 Mission Street, South Pasadena, CA 91030  
Phone: (626) 403-7250  
FinanceDepartment@southpasadenaca.gov

**Jeff Tschudi**, Finance Director, *City of Benicia*  
250 East L Street, Benicia, CA 94510

Phone: (707) 746-4225  
JTschudi@ci.benicia.ca.us

**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

**Mark Uribe**, Finance Director, *City of Camarillo*  
601 Carmen Drive, Camarillo, CA 93010  
Phone: (805) 388-5320  
muribe@cityofcamarillo.org

**Tameka Usher**, Director of Administrative Services, *City of Rocklin*  
3970 Rocklin Road, Rocklin, CA 95677  
Phone: (916) 625-5050  
tameka.usher@rocklin.ca.us

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

**Matthew Vespi**, Chief Financial Officer, *City of San Diego*  
202 C Street, 9th Floor, San Diego, CA 92101  
Phone: (619) 236-6218  
mvespi@sandiego.gov

**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

**Nicholas Walker**, Finance Director, *City of Lakeport*  
225 Park Street, Lakeport, CA 95453  
Phone: (707) 263-5615  
nwalker@cityoflakeport.com

**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

**Kevin Werner**, City Administrator, *City of Ripon*  
Administrative Staff, 259 N. Wilma Avenue, Ripon, CA 95366  
Phone: (209) 599-2108  
kwerner@cityofripon.org

**Cindy Wheeler**, Finance Director, *City of Anderson*  
1887 Howard Street, Anderson, CA 96007  
Phone: (530) 378-6626  
cwheeler@ci.anderson.ca.us

**Adam Whelen**, Director of Public Works, *City of Anderson*  
1887 Howard St., Anderson, CA 96007  
Phone: (530) 378-6640  
awhelen@ci.anderson.ca.us

**Isaac Whippy**, City Manager, *City of Fort Bragg*  
416 N Franklin Street, Fort Bragg, CA 94537  
Phone: (707) 961-2825  
IWhippy@fortbragg.com

**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

**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

**Yuri Won**, Attorney, Office of Chief Counsel, *State Water Resources Control Board*  
San Francisco Bay Regional Water Quality Control Board, 1001 I Street, 22nd Floor, Sacramento, CA 95814  
Phone: (916) 327-4439  
Yuri.Won@waterboards.ca.gov

**Harry Wong**, Director of Finance, *City of Lynwood*  
11330 Bullis Road, Lynwood, CA 90262  
Phone: (310) 603-0220  
hwong@lynwood.ca.us

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

**Paul Wood**, Interim City Manager, *City of Greenfield*  
599 El Camino Real, Greenfield, CA 93927  
Phone: 8316745591  
pwood@ci.greenfield.ca.us

**Kevin Woodhouse**, City Manager, *City of Pacifica*  
170 Santa Maria Avenue, Pacifica, CA 94044  
Phone: (650) 738-7409  
woodhousek@ci.pacificaca.us

**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

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

**Curtis Yakimow**, Town Manager, *Town of Yucca Valley*  
57090 Twentynine Palms Highway, Yucca Valley, CA 92284  
Phone: (760) 369-7207  
townmanager@yucca-valley.org

**Kaily Yap**, Budget Analyst, *Department of Finance*  
Local Government Unit, 915 L Street, Sacramento, CA 95814  
Phone: (916) 445-3274  
Kaily.Yap@dof.ca.gov

**Siew-Chin Yeong**, Director of Public Works, *City of Pleasanton*  
3333 Busch Road, Pleasanton, CA 94566  
Phone: (925) 931-5506  
syeong@cityofpleasantonca.gov

**Bobby Young**, *City of Costa Mesa*  
77 Fair Drive, Costa Mesa, CA 92626  
Phone: N/A  
Bobby.Young@costamesaca.gov

**Stephanie Yu**, Assistant Chief Counsel, *State Water Resources Control Board*  
Office of Chief Counsel, 1001 I Street, Sacramento, CA 95814  
Phone: (916) 341-5157  
stephanie.yu@waterboards.ca.gov

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

**Luis Zamora**, Confidential Executive Assistant to the City Attorney, *City and County of San Francisco*  
Office of the City Attorney, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102  
Phone: (415) 554-4748  
Luis.A.Zamora@sfcityatty.org

**Thomas Zeleny**, Chief Deputy County Counsel, *County of Napa*  
Office of Napa County Counsel, 1195 Third Street, Suite 301, Napa, CA 94559  
Phone: (707) 253-4521  
thomas.zeleny@countyofnapa.org

**Helmholt Zinser-Watkins**, Associate Governmental Program Analyst, *State Controller's Office*  
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 700,

Sacramento, CA 95816  
Phone: (916) 324-7876  
HZinser-watkins@sco.ca.gov

**Jeffery Zuba**, Finance and Administrative Services Director, *Town of San Anselmo*  
525 San Anselmo Ave, San Anselmo, CA 94960  
Phone: (415) 258-4600  
jzuba@townofsananselmo.org