STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

September 6, 2023

Mr. Kris Cook
Department of Finance
915 L Street, 10th Floor
Sacramento, CA 95814

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

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

Re: Proposed Decision
Lead Sampling in Schools: Public Water System No. 3710020, 17-TC-03-R
On Remand from *City of San Diego v. Commission on State Mandates*, Court of Appeal, Third Appellate District, Case No. C092800; Judgment and Writ of Mandate issued by the Sacramento County Superior Court, Case No. 34-2019-80003169-CU-WM-GDS; Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017
City of San Diego, Claimant

Dear Mr. Cook 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, September 22, 2023, in person at 10:00 a.m., at Park Tower, 980 9th Street, Second Floor Conference Room, Sacramento, California, 95814**.

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 Wednesday prior to the hearing. Please also include the names of the people who will be speaking for inclusion on the witness list. 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.

If you plan to file any written document for Commission member review, please note that Commission staff will include written comments filed at least 15 days in advance of the hearing in the Commissioners' hearing binders. Additionally, staff will transmit written comments filed between 15 and five days prior to a meeting to the Commission members, if possible. However, comments filed less than five days prior to a meeting or submitted at the meeting will not be included in the Commissioners' hearing binders and the commenter shall provide 12 paper copies of the comments to Commission staff at the meeting for such late filings. Commission staff shall provide copies of late comments submitted at the hearing to the Commission members and shall place a copy on a table for public review at the hearing (Cal. Code Regs., tit. 2, § 1181.10(b)(1)). Please also file the PDF document via the Commission's dropbox at https://csm.ca.gov/dropbox.shtml prior to the hearing.

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.

Sincerely,

Heather Halsey
Executive Director

Hearing Date: September 22, 2023
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ITEM 4

TEST CLAIM

PROPOSED DECISION

On Remand from *City of San Diego v. Commission on State Mandates*, Court of Appeal, Third Appellate District, Case No. C092800; Judgment and Writ of Mandate issued by the Sacramento County Superior Court, Case No. 34-2019-80003169-CU-WM-GDS

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

Lead Sampling in Schools: Public Water System No. 3710020

17-TC-03-R

City of San Diego, Claimant

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*.[1] 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,[2] beginning January 18, 2017, to submit to the State Water Resources Control Board's (State 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.

On April 29, 2022, the Third District Court of Appeal issued an unpublished opinion in *City of San Diego v. Commission on State Mandates*, Court of Appeal, Third Appellate

[1] 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 City of San Diego permit.

[2] 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.

District, Case No. C092800, 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."[3] The Court directed the Commission on State Mandates (Commission) to set aside its original Decision and to issue a new Decision consistent with its ruling, and remanded the claim back to the Commission to determine the remaining mandate issues.

Following receipt of the comments on the Draft Proposed Decision and further review of the record, staff finds that the test claim statute does ***not*** impose reimbursable state-mandated program within the meaning of article XIII B, section 6 and Government Code section 17514 and recommends that the Commission deny this Test Claim.

Procedural History

The State 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.[4] The State Board and the Department of Finance (Finance) filed comments on the Test Claim on August 13, 2018.[5] The claimant filed rebuttal comments on November 9, 2018.[6] 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.[7]

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 new program or higher level of service. 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.

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[3] Exhibit K (2), *City of San Diego v. Commission on State Mandates* (Apr. 29, 2022, Third District Court of Appeal, Case No. C092800) (nonpub. opn.), page 13.

[4] Exhibit A, Test Claim, filed January 11, 2018, page 1.

[5] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018; Exhibit C, Finance's Comments on the Test Claim, filed August 13, 2018.

[6] Exhibit D, Claimant's Rebuttal Comments, filed November 9, 2018.

[7] Exhibit K (10), Commission on State Mandates, Test Claim Decision on *Lead Sampling in Schools: Public Water System No. 3710020*, 17-TC-03, adopted March 22, 2019, page 1.

On January 27, 2023, the Commission adopted the Order setting aside its March 22, 2019 Decision. On March 23, 2023, Commission staff issued the Draft Proposed Decision.[8] Both the claimant and the State Board filed comments on the Draft Proposed Decision on May 4, 2023.[9]

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 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."[10]

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?	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	*Timely filed with a potential period of reimbursement beginning January 18, 2017* – The effective date of the test claim order is January 18, 2017.[12] The claimant filed the Test Claim on January 11, 2018, less than 12 months after the

[8] Exhibit H, Draft Proposed Decision, issued March 23, 2023.

[9] Exhibit I, Claimant's Comments on the Draft Proposed Decision, filed May 4, 2023; Exhibit J, State Water Resources Control Board's Comments on the Draft Proposed Decision, filed May 4, 2023.

[10] *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.

[12] Exhibit A, Test Claim, filed January 11, 2018, page 104 (test claim order).

Issue	Description	Staff Recommendation
	of a statute or executive order, whichever is later."[11] 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."	effective date of the order.[13] The Test Claim is timely filed. The potential period of reimbursement under Government Code section 17557 begins on July 1, 2016. However, because the test claim order has a later effective date, the potential period of reimbursement for this claim begins on the order's effective date, January 18, 2017.
Does the test claim order impose a state-mandated program on the claimant?	Activities required by a statute or executive order must be mandated by the state for reimbursement to be required under article XIII B, section 6. 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 or article XIII B, section 6.[14] Even where a local government is not legally compelled to perform required activities, it may be	*No* – The claimant is not legally compelled to comply with the test claim order since the claimant's participation in the underlying program to provide water service is not mandated by state law.[16] Moreover, the record does not contain substantial evidence showing that the claimant will face certain and severe penalties or other draconian consequences, as is required for a finding of practical compulsion, if it

[11] Government Code section 17551(c).

[13] Exhibit A, Test Claim, filed January 11, 2018, page 1.

[14] *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.

[16] Article XI, section 9(a) of the California Constitution; *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274; Government Code section 38742.

Issue	Description	Staff Recommendation
	practically compelled to do so. Practical compulsion may be found if there is a clear showing in the law or substantial evidence in the record that a failure to perform the activities at issue will result in certain and severe penalties or other draconian consequences, such that the local government has no choice but to comply.[15]	decides not to participate in the underlying program and provide water service to City residents. While a long history of operating a public water system is a factor that supports a finding of practical compulsion, that is just one factor and is insufficient on its own to establish that the claimant is practically compelled to comply with the test claim order.[17] Further, the record does not support the claimant's assertion that if it ceased operating its water system, it would face immediate repayment of bonds and other financing secured over the years to maintain the water system in good working order totaling nearly one billion dollars. And finally, while Health and Safety Code section 116625 gives the State Board the authority to suspend or revoke the claimant's

[15] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816; *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 754; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 76.

[17] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 76 (a finding of practical compulsion "must depend on such factors as the nature and purpose of the…program; whether its design suggests an intent to coerce; *when state and/or local participation began*; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal," emphasis added). See also, *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.

Issue	Description	Staff Recommendation
		operating permit for noncompliance with the test claim order, the statute is permissive not mandatory, meaning that the State Board is authorized but not required to enforce a permit violation.

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."[18] Section 1183.1(c) of the Commission's regulations defines 12 months as 365 days.[19]

The effective date of the order is January 18, 2017.[20] The claimant filed the Test Claim on January 11, 2018, less than 12 months after the effective date of the order.[21] 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 order 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 Does Not Impose a Reimbursable State-Mandated Program Within the Meaning of Article XIII B, Section 6 of the California Constitution.

The test claim order newly requires the claimant's public water system, beginning January 18, 2017, to submit to the State Board's Division of Drinking Water a list of all public and private K-12 schools it serves and to sample and test drinking water in any K-12 school it serves for the presence of lead, upon the request of a school

[18] Government Code section 17551(c).

[19] California Code of Regulations, title 2, section 1183.1(c).

[20] Exhibit A, Test Claim, filed January 11, 2018, page 104 (test claim order).

[21] Exhibit A, Test Claim, filed January 11, 2018, page 1.

representative made prior to November 1, 2019. However, beginning January 1, 2018, Health and Safety Code section 116277 required a community water system,[22] which includes the claimant's public water system, serving any public school constructed or modernized *before* January 1, 2010, that did not previously request lead testing, to test for lead in the school's potable water system by July 1, 2019.[23] Section 116277 does not require a school to first submit a written request to trigger the duty to test a school's drinking water for lead. Therefore, 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.

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."[24] The court did not decide the separate issue of whether the *Lead Sampling in Schools* program is mandated by the State.[25] The Court directed the Commission to set aside its original Decision and to issue a new Decision consistent with its ruling, and remanded the claim back to the Commission to determine the remaining mandate issues. Accordingly, staff finds that the test claim order imposes a new program or higher level of service.

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[22] "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).)

[23] Exhibit K (5), 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, filed January 11, 2018, page 106 (test claim order).

[24] Exhibit K (2), *City of San Diego v. Commission on State Mandates* (Apr. 29, 2022, Third District Court of Appeal, Case No. C092800) (nonpub. opn.), page 13.

[25] Whether a statute or executive order imposes a state mandate is a separate required element to reimbursement. *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874. The sole issue before the appellate court was whether the lead sampling requirements in the test claim order constituted a new program or higher level of service. The court of appeal's decision does not prevent the Commission from now exercising its sole and exclusive authority to make a finding on the separate required element of whether the test claim order imposes a state mandate. *Kinlaw v. State of California* (1991) 53 Cal.3d 326, 335; Government Code section 17551, 17552.

Staff finds, however, that the test order does not impose a state-mandated program on the claimant pursuant to article XIII B, section 6. Although a test claim statute or executive order may contain new requirements, the determination of whether those requirements are mandated by the state depends on whether the claimant's participation in the underlying program is voluntary or compelled.[26]

The claimant is not legally compelled to comply with the test claim order since the claimant's participation in the underlying program to provide water service is not mandated by state law.[27] Under Article XI, section 9(a) of the California Constitution, a "municipal corporation" *may* be established to operate public works to furnish light, water, power, heat, transportation, or means of communication.[28] The courts have interpreted article XI, section 9 (previously section 19) as granting authority rather than imposing a duty.[29] 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."

The courts have acknowledged the possibility that a state mandate may be found in the absence of legal compulsion when a statute or executive induces compliance through the imposition of certain and severe, or other draconian consequences that leave the local entity no reasonable alternative but to comply.[30] The claimant argues that it is practically compelled and, thus, mandated by the state to comply with the test claim order for the following reasons:

- The claimant cannot take back a decision made more than 120 years ago to provide water because "[c]ities must provide for the health, safety, and welfare of their residents, and simply put, people cannot survive without water."

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[26] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 731.

[27] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 10 ("the City is not legally obligated to provide water service under State law"); Exhibit J, State Water Resources Control Board's Comments on the Draft Proposed Decision, filed May 4, 2023, page 2 ("the City is not legally compelled to comply with the lead testing requirements in [the test claim order]").

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

[29] *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274.

[30] *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; *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1367.

- If the claimant ceased operating its water system, it would face immediate repayment of bonds and other financing secured over the years to maintain the water system in good working order totaling nearly one billion dollars.
- If the claimant fails to comply with the test claim order, the State Board could suspend or revoke its operating permit, which would prevent the claimant from operating its water system and leave 1.3 million residents without water service.[31]

The Draft Proposed Decision found that the claimant was "practically compelled" and therefore mandated by the state to comply with the new requirements imposed by the test claim order based on the fact that the claimant has provided water continuously for over 120 years to its now more than 1.3 million residents, with its six largest consumers being federal, state, and local agencies. The Draft Proposed Decision further found that "the claimant incorporated its municipal water 'agency' on July 21, 1901, when the voters approved the issuance of bonds to purchase the distribution system from a private water company, [fn. omitted] and that subsequent 'bonds and other financing secured over the years to maintain the water system in good working order,' totaling approximately $890 million as of November 2018, would immediately come due if the claimant sought to discontinue service [fn. omitted]."[32]

After further review and consideration, staff finds that the record does not contain substantial evidence showing that the claimant will face certain and severe penalties or other draconian consequences, as is required for a finding of practical compulsion, if it decides not to participate in the underlying program and provide water service to City residents. While a long history of operating a public water system is a factor that supports a finding of practical compulsion under *City of Sacramento v. State of California*, the duration of participation in a voluntary program is just one factor and is insufficient on its own to establish that the claimant is practically compelled to comply with the test claim order.[33]

Moreover, the record does not support the claimant's assertion that if it ceased operating its water system, it would face immediate repayment of bonds and other

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[31] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 9-11; Exhibit I, Claimant's Comments on the Draft Proposed Decision, filed May 4, 2023, page 1.

[32] Exhibit H, Draft Proposed Decision, issued March 23, 2023, page 52.

[33] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 76 (a finding of practical compulsion "must depend on such factors as the nature and purpose of the…program; whether its design suggests an intent to coerce; *when state and/or local participation began*; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal," emphasis added). See also, *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.

financing secured over the years to maintain the water system in good working order totaling nearly one billion dollars. In *Kern High School Dist.*, the Supreme Court described the financial consequences to the state and its residents in *City of Sacramento* as "so onerous and punitive" that they amounted to "certain and severe federal penalties…including double taxation and other draconian measures."[34] The penalties in that case, double taxation on all of the State's businesses, were immediate and so "draconian," that "the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses.[35]

The evidence does not support that finding here. As explained in this Decision, the claimant is not the debt-holder on the bond funds, and the funds received from the bonds and the Drinking Water State Revolving Fund loans for the improvements to its water system are paid from the Water Utility Fund and, thus, the claimant's general fund is generally not at risk.[36] In the event of default, the principal amount of the debt owing *may* come immediately due, but that is not certain to occur.[37] The State, as the holder of the senior debt from the Drinking Water State Revolving Fund, has priority over the bond debt holders, and is not required to make such a demand. And the bond debt holders have discretion whether to vote collectively to have the debt declared immediately due and payable.[38] Furthermore, the claimant has express contractual discretion to transfer the water system to another water supplier for fair market value, the proceeds of which are used to pay off the debt.[39]

And finally, while Health and Safety Code section 116625 gives the State Board the authority to suspend or revoke the claimant's operating permit for noncompliance with

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[34] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 749 (internal quotation marks omitted).

[35] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 74.

[36] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 111-114, 118, 121, 190 (Official Statement), 672 (Master Agreement, section 5.02); Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), pages 12, 13, 36, 38.

[37] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 684 (Master Agreement); Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), pages 15, 31-32.

[38] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 684-685.

[39] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 678 (Master Agreement).

the test claim order, the statute is permissive not mandatory, meaning that the State Board is authorized but not required to enforce a permit violation.

Accordingly, staff finds that the test claim order does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 and denies the Test Claim.

Conclusion

Based on the forgoing analysis, staff finds that the test claim order does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Staff Recommendation

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

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 Notice of Entry of Judgement and Writ of Mandate Remanding the Matter for Reconsideration, served December 1, 2022	Case No.: 17-TC-03-R *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*, Court of Appeal, Third Appellate District, Case No. C092800; Judgment and Writ of Mandate issued by the Sacramento County Superior Court, Case No. 34-2019-80003169-CU-WM-GDS (*Adopted September 22, 2023*)

DECISION

The Commission in State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on September 22, 2023. [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:

Member	**Vote**
Lee Adams, County Supervisor	
Jennifer Holman, Representative of the Director of the Office of Planning and Research	
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	
Renee Nash, School District Board Member	

Member	Vote
Sarah Olsen, Public Member	
Lynn Paquin, Representative of the State Controller, Vice Chairperson	
Spencer Walker, Representative of the State Treasurer	

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 Board) to the City of San Diego's public water system, Order No. 2017PA-SCHOOLS. The test claim order is one of over 1,100 permit amendments simultaneously issued to privately- and publicly-owned public water systems, *which is applicable to the City of San Diego only*.[40, 41]

The test claim order newly requires the claimant's public water system, beginning January 18, 2017, to submit to the State Board's Division of Drinking Water a list of all public and private K-12 schools it serves and to sample and test drinking water in any K-12 school it serves for the presence of lead, upon the request of a school representative made prior to November 1, 2019 with the following limitation: 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.[42]

On April 29, 2022, the Third District Court of Appeal issued an unpublished opinion in *City of San Diego v. Commission on State Mandates*, Court of Appeal, Third Appellate District, Case No. C092800, 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

[40] 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.

[41] 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.

[42] Beginning January 1, 2018, Health and Safety Code section 116277 required a community water system, which includes the claimant's public water system, serving any public school constructed or modernized *before* January 1, 2010, that did not previously request lead testing, to test for lead in the school's potable water system by July 1, 2019. Section 116277 does not require a school to first submit a written request to trigger the duty to test a school's drinking water for lead.

governmental function and the mandated testing of this water for lead is plainly a service to the public."[43] The Court directed the Commission to set aside its original Decision and to issue a new Decision consistent with its ruling, and remanded the claim back to the Commission to determine the remaining mandate issues.

The Commission finds that the test order does not impose a reimbursable state-mandated program pursuant to article XIII B, section 6. Although a test claim statute or executive order may contain new requirements, the determination of whether those requirements are mandated by the state depends on whether the claimant's participation in the underlying program is voluntary or compelled.[44]

The claimant is not legally compelled to comply with the test claim order since the claimant's participation in the underlying program to provide water service is not mandated by state law.[45] Under Article XI, section 9(a) of the California Constitution, a "municipal corporation" *may* be established to operate public works to furnish light, water, power, heat, transportation, or means of communication.[46] The courts have interpreted article XI, section 9 (previously section 19) as granting authority rather than imposing a duty.[47] 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."

The courts have acknowledged the possibility that a state mandate may be found in the absence of legal compulsion when a statute or executive induces compliance through the imposition of certain and severe, or other draconian consequences that leave the local entity no reasonable alternative but to comply.[48] The claimant argues that it is

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[43] Exhibit K (2), *City of San Diego v. Commission on State Mandates* (Apr. 29, 2022, Third District Court of Appeal, Case No. C092800) (nonpub. opn.), page 13.

[44] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 731.

[45] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 10 ("the City is not legally obligated to provide water service under State law"); Exhibit J, State Water Resources Control Board's Comments on the Draft Proposed Decision, filed May 4, 2023, page 2 ("the City is not legally compelled to comply with the lead testing requirements in [the test claim order]").

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

[47] *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274.

[48] *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; *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1367.

practically compelled and, thus, mandated by the state to comply with the test claim order for the following reasons:

- The claimant cannot take back a decision made more than 120 years ago to provide water because "[c]ities must provide for the health, safety, and welfare of their residents, and simply put, people cannot survive without water."
- If the claimant ceased operating its water system, it would face immediate repayment of bonds and other financing secured over the years to maintain the water system in good working order totaling nearly one billion dollars.
- If the claimant fails to comply with the test claim order, the State Board could suspend or revoke its operating permit, which would prevent the claimant from operating its water system and leave 1.3 million residents without water service.[49]

The Commission finds that the record does *not* contain substantial evidence showing that the claimant will face certain and severe penalties or other draconian consequences, as is required for a finding of practical compulsion, if it decides not to participate in the underlying program and provide water service to City residents. While a long history of operating a public water system is a factor that supports a finding of practical compulsion under *City of Sacramento v. State of California*, the duration of participation in a voluntary program is just one factor and is insufficient on its own to establish that the claimant is practically compelled to comply with the test claim order.[50]

Moreover, the record does not support the claimant's assertion that if it ceased operating its water system, it would face immediate repayment of bonds and other financing secured over the years to maintain the water system in good working order totaling nearly one billion dollars. In *Kern High School Dist*., the Supreme Court described the financial consequences to the state and its residents in *City of Sacramento* as "so onerous and punitive" that they amounted to "certain and severe federal penalties…including double taxation and other draconian measures."[51] The penalties in that case, double taxation on all of the State's businesses, were immediate

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[49] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 9-11; Exhibit I, Claimant's Comments on the Draft Proposed Decision, filed May 4, 2023, page 1.

[50] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 76 (a finding of practical compulsion "must depend on such factors as the nature and purpose of the…program; whether its design suggests an intent to coerce; *when state and/or local participation began*; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal," emphasis added). See also, *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.

[51] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 749 (internal quotation marks omitted).

and "draconian," that "the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses.[52]

The evidence does not support that finding here. As explained in this Decision, the claimant is not the debt-holder on the bond funds, and the funds received from the bonds and the Drinking Water State Revolving Fund loans for the improvements to its water system are paid from the Water Utility Fund and, thus, the claimant's general fund is generally not at risk.[53] In the event of default, the principal amount of the debt owing *may* come immediately due, but that is not certain to occur.[54] The State, as the holder of the senior debt from the Drinking Water State Revolving Fund, has priority over the bond debt holders, and is not required to make such a demand. And the bond debt holders have discretion whether to vote collectively to have the debt declared immediately due and payable.[55] Furthermore, the claimant has express contractual discretion to transfer the water system to another water supplier for fair market value, the proceeds of which are used to pay off the debt.[56]

And finally, while Health and Safety Code section 116625 gives the State Board the authority to suspend or revoke the claimant's operating permit for noncompliance with the test claim order, the statute is permissive not mandatory, meaning that the State Board is authorized but not required to enforce a permit violation.

Accordingly, the Commission finds that the test claim order does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 and denies the Test Claim.

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[52] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 74.

[53] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 111-114, 118, 121, 190 (Official Statement), 672 (Master Agreement, section 5.02); Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), pages 12, 13, 36, 38.

[54] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 684 (Master Agreement); Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), pages 15, 31-32.

[55] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 684-685.

[56] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 678 (Master Agreement).

COMMISSION FINDINGS

I. Chronology

01/18/2017 Permit Amendment No. 2017PA-SCHOOLS for City of San Diego PWS 3710020 was adopted by the State Board's Division of Drinking Water.[57]

01/11/2018 The claimant filed the Test Claim.[58]

08/13/2018 The State Board filed comments on the Test Claim.[59]

08/13/2018 Finance filed comments on the Test Claim.[60]

11/09/2018 The claimant filed its rebuttal comments.[61]

12/21/2018 Commission staff issued the Draft Proposed Decision.[62]

01/11/2019 The State Board filed comments on the Draft Proposed Decision.[63]

01/11/2019 The claimant filed comments on the Draft Proposed Decision.[64]

03/22/2019 The Commission heard the Test Claim and voted 6-1 to deny the claim.

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.

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[57] Exhibit A, Test Claim, filed January 11, 2018, page 14.

[58] Exhibit A, Test Claim, filed January 11, 2018.

[59] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018.

[60] Exhibit C, Finance's Comments on the Test Claim, filed August 13, 2018.

[61] Exhibit D, Claimant's Rebuttal Comments, filed November 9, 2018.

[62] Exhibit E, Draft Proposed Decision, issued December 21, 2018.

[63] Exhibit F, State Water Resources Control Board's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019.

[64] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019.

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.

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

03/23/2023 Commission staff issued the Draft Proposed Decision.[65]

05/04/2023 The claimant and the State Board filed comments on the Draft Proposed Decision.[66]

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."[67] 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."[68] 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.[69] Low levels of lead exposure can lead to reduced IQ and attention span, learning disabilities, poor classroom performance,

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[65] Exhibit H, Draft Proposed Decision, issued March 23, 2023.

[66] Exhibit I, Claimant's Comments on the Draft Proposed Decision, filed May 4, 2023; Exhibit J, State Water Resources Control Board's Comments on the Draft Proposed Decision, filed May 4, 2023.

[67] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6).

[68] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6).

[69] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6).

hyperactivity, behavioral problems, impaired growth and hearing loss.[70] Higher lead levels can cause severe neurological problems and ultimately death.[71]

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."[72] 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.[73] In 1984, burning leaded gasoline was the largest source of lead emissions in the air, and so the Environmental Protection Agency (EPA) phased out and eventually banned leaded gasoline.[74] 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."[75] 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.[76]

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[70] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools).

[71] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6).

[72] Exhibit K (9), U.S. Department of Health and Human Services, Public Health Service Agency for Toxic Substances and Disease Registry, *Public Health Statement: Lead, CAS #: 7439-92-1*, August 2007, page 2.

[73] Exhibit K (7), 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.

[74] Exhibit K (9), U.S. Department of Health and Human Services, Public Health Service Agency for Toxic Substances and Disease Registry, *Public Health Statement: Lead, CAS #: 7439-92-1*, August 2007, page 4.

[75] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools).

[76] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed

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.[77] 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.'"[78] 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."[79] 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."[80] 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,[81] which acknowledged the potential dangers of lead exposure, especially in children, and required the State Department of Health Services to assess the risk factors of schools and "determine the likely extent and distribution of lead exposure to children from paint on the school, soil in play areas at the school, drinking water at the tap, and other potential sources identified by the department for this purpose.[82] The Act did not

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August 13, 2018, pages 163-164 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools).

[77] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, page 164 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools).

[78] Exhibit K (9), U.S. Department of Health and Human Services, Public Health Service Agency for Toxic Substances and Disease Registry, *Public Health Statement: Lead, CAS #: 7439-92-1*, August 2007, pages 3-4.

[79] Exhibit K (9), U.S. Department of Health and Human Services, Public Health Service Agency for Toxic Substances and Disease Registry, *Public Health Statement: Lead, CAS #: 7439-92-1*, August 2007, page 4.

[80] Exhibit K (9), U.S. Department of Health and Human Services, Public Health Service Agency for Toxic Substances and Disease Registry, *Public Health Statement: Lead, CAS #: 7439-92-1*, August 2007, page 4.

[81] Education Code section 32240 et seq.

[82] Education Code section 32242.

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.[83] 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.[84] U.S. EPA states that there are over 170,000 public water systems providing drinking water to Americans, to which the Act applies.[85]

Under authority provided in the federal Act, U.S. EPA promulgated health-based standards for lead and copper in drinking water, known as the federal Lead and Copper Rule (LCR).[86] The federal action level "is exceeded if the concentration of lead in more than 10 percent of tap water samples collected during any monitoring period…is greater than 0.015 mg/L [15 ppb]."[87] The number of samples required depends on the size of the drinking water system, and any history of prior exceedances.[88] The primary mechanisms described in the LCR to control and minimize lead in drinking water are "optimal corrosion control treatment," which includes monitoring and adjusting the chemistry of drinking water supplies to prevent or minimize corrosion of lead or copper plumbing materials; source water treatment; replacement of lead service lines; and

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[83] Exhibit K (13), U.S. EPA, Office of Water, *Understanding the Safe Drinking Water Act*, June 2004, https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf (accessed on February 21, 2023), page 1.

[84] 42 U.S.C. § 300f(4).

[85] Exhibit K (13), U.S. EPA, Office of Water, *Understanding the Safe Drinking Water Act*, June 2004, https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf (accessed on February 21, 2023), page 2.

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

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

[88] See Exhibit K (6), U.S. EPA, *Lead and Copper Rule: A Quick Reference Guide*, June 2008, page 1 (Chart showing the number of sample sites required under standard sampling or reduced sampling, according to the size of the drinking water system).

public education.[89] The LCR also includes monitoring and reporting requirements for public water systems.[90]

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."[91] 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 establishment of drinking water standards and public health goals greater emphasis and visibility within the state.[92]

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.[93] The State Board issues drinking water supply permits to all California "public

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[89] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, page 6; Title 40, Code of Federal Regulations, section 141.80(d-g).

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

[91] Health and Safety Code section 116270.

[92] Health and Safety Code section 116270.

[93] 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

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."[94]

The courts have called the California Safe Drinking Water Act "a remedial act intended to protect the public from contamination of its drinking water."[95] Accordingly, the Act does not create affirmative rights, including rights to the delivery of water: the only mandatory duty on local government is to review on a monthly basis water quality monitoring data submitted to the local government by water suppliers within its jurisdiction in order to detect exceedances of water quality standards.[96] Nothing in the Act requires state or local government to assume responsibility to ensure that every resident of California receives water from a public water system, or to test or monitor the public water systems within its jurisdiction, or take corrective or enforcement actions when pollutants are detected. The focus of the Act is "to ensure that the water *delivered* by public water systems of this state shall at all times be pure, wholesome, and potable,"[97] and the monitoring and corrosion control requirements are aimed at the water systems themselves, whether publicly or privately owned.

The State has also adopted a Lead and Copper Rule, substantially similar to the federal rule, which requires all operators of drinking water systems to monitor and sample at a number of sample sites determined by the size of the system, primarily residential sample sites.[98] If lead levels above 0.015 mg/L (15 ppb) are detected, the water system

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the city may prescribe under its organic law." Article XII asserts government regulatory authority, via the Public Utilities Commission, over "private corporations or persons that own, operate, control, of 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.

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

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

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

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

[98] See California Code of Regulations, title 22, section 64670 et seq.; Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, pages 5-6; California Code of Regulations, title 22, section 64676 (Sample Site Selection).

is expected to take corrective action, beginning with corrosion control treatment measures, then source water treatment, lead service line replacement, and public education.[99] Approximately 500 schools within California are themselves permitted as a "public water system," because they have their own water supply, such as a well.[100] Those entities also are required to test their taps for lead and copper under the LCR; however, most schools are served by community water systems that are not required to test for lead specifically at the school's taps.[101]

C. The Test Claim Permit Amendment

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.[102]

In September 2015, the Legislature passed SB 334 as a potential solution to the gap in regulation, which would have, had it been enacted, required school districts with water sources or drinking water supplies that do not meet U.S. EPA standards to close access to those drinking water sources; provide alternative drinking water sources if the school did not have the minimum number of drinking fountains required by law; and provide access to free, fresh, and clean drinking water during meal times in the food service areas of the schools under its jurisdiction.[103] SB 334 was vetoed by then-Governor Brown, whose veto message expressed concern that the bill could create a very

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

[100] Exhibit A, Test Claim, filed January 11, 2018, page 118 (State Water Resources Control Board's *Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).

[101] Exhibit A, Test Claim, filed January 11, 2018, page 118 (State Water Resources Control Board's *Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).

[102] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, 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").

[103] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, page 148 (SB 334, Legislative Counsel's Digest).

expensive reimbursable state mandate.[104] The veto message instead directed the State Board to examine the scope of the potential problem by incorporating water quality testing in schools as part of the state's LCR.[105]

Accordingly, the State Board adopted the Permit Amendment (the test claim order) at issue here, as well as over 1,100 other nearly identical (but for the individual public water system information) permit amendments 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;

[104] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, page 145 (Governor's Veto Message).

[105] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, 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.[106]

The order further states that the water system may not use any lead samples collected under the order to satisfy federal or state LCR requirements; the water system must keep records of all schools requesting testing or lead-related assistance and provide those records to DDW upon request; and the water system's annual Consumer Confidence Report shall include a statement summarizing the number of schools requesting lead sampling.[107]

The order requires the claimant to provide testing to both private and public K-12 schools, upon request of the school. Under the 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 12th grade," when a request for one-time assistance is made in writing by an authorized school representative.[108] "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."[109]

The State 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.[110]

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

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[106] Exhibit A, Test Claim, filed January 11, 2018, pages 105-107 (test claim order).

[107] Exhibit A, Test Claim, filed January 11, 2018, page 108 (test claim order).

[108] Exhibit A, Test Claim, filed January 11, 2018, pages 105-106 (test claim order).

[109] Exhibit A, Test Claim, filed January 11, 2018, pages 105-106 (test claim order).

[110] Exhibit A, Test Claim, filed January 11, 2018, page 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*), emphasis in original.

systems[111] 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.[112] The section became inoperative July 1, 2019, and was repealed effective January 1, 2020.[113] 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 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.

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[111] "Community water systems" are public water systems that supply water to the same population year-round. (See Health and Safety Code section 116275(i).)

[112] Exhibit K (5), Health and Safety Code section 116277 (as added by Stats. 2017, ch. 746) (AB 746).

[113] Exhibit K (5), Health and Safety Code section 116277(g) (as added by Stats. 2017, ch. 746) (AB 746).

(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.[114]

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.[115] 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.[116]

The State 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 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.[117]

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[114] Exhibit K (5), Health and Safety Code section 116277 (as added by Stats. 2017, ch. 746) (AB 746).

[115] Exhibit K (5), Health and Safety Code section 116277(a) – (d) (as added by Stats. 2017, ch. 746) (AB 746); see also Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, page 7.

[116] Exhibit K (5), Health and Safety Code section 116277(e) (as added by Stats. 2017, ch. 746) (AB 746); see also Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, page 7.

[117] Exhibit K (8), State Water Resources Control Board, *Lead Sampling in Schools*, https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/leadsamplinginschools.html (accessed on January 30, 2023), page 1.

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.[118]

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."[119]

III. Positions of the Parties[120]

A. City of San Diego

The claimant alleges that the test claim order 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.[121] The claimant provides a detailed description of each of the new activities it was required to perform under the test claim order, which are not in dispute.[122] The claimant asserts that no prior federal or state law requires the activities described, and that the claimant does not receive any dedicated state or federal funds, or any other non-local agency funds dedicated to this program.[123]

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[118] Exhibit K (3), Concurrence in Senate Amendments, Analysis of AB 746, as amended September 8, 2017, page 3.

[119] Exhibit K (3), Concurrence in Senate Amendments, Analysis of AB 746, as amended September 8, 2017, page 2.

[120] Because the Commission finds that the test claim order does not impose a state-mandated program on the claimant, the Commission makes no findings on whether the test claim order results in increased costs mandated by the state or the applicability of Government Code section 17556(d). For further discussion of the parties' positions on those issues, refer to the two Draft Proposed Decisions, (Exhibits E and H).

[121] Exhibit A, Test Claim, filed January 11, 2018, page 14.

[122] Exhibit A, Test Claim, filed January 11, 2018, pages 18-50.

[123] Exhibit A, Test Claim, filed January 11, 2018, pages 16-17; 52-53.

The claimant provides argument and evidence that the City's operation of a public water system is not discretionary, in large part due to its long history of doing so, and because of the substantial investment that would be lost and substantial bond liability that would immediately come due if the City elected to discontinue such service.[124] The claimant asserts that these facts constitute practical compulsion within the meaning of *Department of Finance v. Commission* (*Kern High School Dist.*) (2003) 30 Cal.4th 727.[125]

The claimant asserts that the test claim order imposes a new program or higher level of service, that it has incurred increased costs mandated by the state, and that the exceptions in Government Code section 17556 do not apply.[126]

The claimant filed comments on the Draft Proposed Decision agreeing with the draft proposed finding that the claimant is practically compelled to comply with the test claim order because if it failed to comply, "then the State Water Board could suspend or revoke its operating permit, which would have dire consequences…its 1.3 million residents would be left without water service."[127] Furthermore, if the claimant discontinued water service, the claimant would face "severe financial consequences," namely "a default on the City's approximately $890 million debt from bonds and other financing."[128]

B. Department of Finance

Finance asserts that reimbursement is not required under article XIII B, section 6.[129] The test claim order does not result in increased costs mandated by the state because the order does not impose a new program or higher level of service and the claimants have fee authority sufficient to cover the alleged mandated costs of the claimed activities.[130] Finance did not comment on the whether the test claim order imposes a

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[124] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 8-11.

[125] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 10.

[126] Exhibit D, Claimant's Rebuttal Comments, filed November 9, 2018, pages 2-9, 58. 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.

[127] Exhibit I, Claimant's Comments on the Draft Proposed Decision, filed May 4, 2023, page 1.

[128] Exhibit I, Claimant's Comments on the Draft Proposed Decision, filed May 4, 2023, page 2.

[129] Exhibit C, Finance's Comments on the Test Claim, filed August 13, 2018, page 2.

[130] Exhibit C, Finance's Comments on the Test Claim, filed August 13, 2018, page 2.

state-mandated program on the claimant under a theory of legal or practical compulsion.

C. State Water Resources Control Board

The State Board contends that the test claim order is not an unfunded state mandate.[131] The State Board argues that the test claim order does not impose a state-mandated program on the claimant and challenges the finding in the Draft Proposed Decision that the claimant is practically compelled to comply with the test claim order.[132] The State Board argues that *City of Sacramento v. State of California*, *Coast Community College Dist. v. Commission on State Mandates*, and *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) do not support a finding of practical compulsion here and that "[b]y finding that the City is practically compelled to comply with the test claim order, the Commission creates new law in an area where the Supreme Court has expressed caution."[133] The State Board contends that because the claimant is not required to operate a public water system, "the severe consequences and penalties the City claims will occur…may be avoided by transferring its public water system to another entity," and the claimant "has provided no evidence that an appropriate financing package could not be created" to address the claimant's outstanding bond debt.[134] Unlike the local agencies in *City of Sacramento*, who could not avoid the federal unemployment insurance requirements, the voluntary nature of operating a public water system means that the claimant has "a true choice" and is therefore not practically compelled to comply with the test claim order.[135]

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…

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[131] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, page 8.

[132] Exhibit J, State Water Resources Control Board's Comments on the Draft Proposed Decision, filed May 4, 2023, page 1.

[133] Exhibit J, State Water Resources Control Board's Comments on the Draft Proposed Decision, filed May 4, 2023, pages 1-2.

[134] Exhibit J, State Water Resources Control Board's Comments on the Draft Proposed Decision, filed May 4, 2023, page 3.

[135] Exhibit J, State Water Resources Control Board's Comments on the Draft Proposed Decision, filed May 4, 2023, page 3.

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."[136] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[137]

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

- A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[138]
- 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.[139]
- 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.[140]
- 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.[141]

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

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

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

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

[139] *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).

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

[141] *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.

the California Constitution.[142] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[143] 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."[144]

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."[145] The effective date of the order is January 18, 2017.[146] The claimant filed the Test Claim on January 11, 2018, less than 12 months after the effective date of the order.[147] 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 order 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 Does Not Impose 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 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.[148] Under the order, upon request, the claimant must take samples to

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[142] *Kinlaw v. State of California* (1991) 53 Cal.3d 326, 335.

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

[144] *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).

[145] Government Code section 17551(c).

[146] Exhibit A, Test Claim, filed January 11, 2018, page 104 (test claim order).

[147] Exhibit A, Test Claim, filed January 11, 2018, page 1.

[148] Exhibit A, Test Claim, filed January 11, 2018, page 107 (test claim order) states that the water system is responsible for the following costs:

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).

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" and remanded the claim back to the Commission to determine the remaining issues.[149] The court interpreted "peculiar" to mean "particularly" but not "exclusively" associated with government, and explained that a function can be "peculiar to" government even if it is not exclusive to government. The court used as an example *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, where the Second District Court of Appeal "found that 'the installation and maintenance of trash receptacles at transit stops' is a 'governmental function that provides services to the public,' even though it acknowledged that 'collecting trash at transit stops' is 'typically,' but not exclusively, 'within the purview of government agencies.'"[150] The court did not decide the separate

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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.

[149] Exhibit K (2), *City of San Diego v. Commission on State Mandates* (Apr. 29, 2022, Third District Court of Appeal, Case No. C092800) (nonpub. opn.), page 13. The Court stated 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 Commission to consider in the first instance whether reimbursement is appropriate on these facts following remand.

Exhibit K (2), *City of San Diego v. Commission on State Mandates* (Apr. 29, 2022, Third District Court of Appeal, Case No. C092800) (nonpub. opn.), page 2.

[150] Exhibit K (2), *City of San Diego v. Commission on State Mandates* (Apr. 29, 2022, Third District Court of Appeal, Case No. C092800) (nonpub. opn.), pages 9-10.

issue of whether the *Lead Sampling in Schools* program is mandated by the State.[151] Accordingly, the Commission finds that the test claim order imposes a new program or higher level of service.

Nonetheless, for the reasons discussed below, the Commission finds that the test claim order does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution,.

1. The Test Claim Order Imposes New Requirements on the City of San Diego.

a. The new requirements imposed by the test claim order beginning January 1, 2017.

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

1. Submit to the State 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;[152]
2. If a school representative requests lead sampling assistance in writing by November 1, 2019:[153]

[151] Whether a statute or executive order imposes a state mandate is a separate required element to reimbursement. *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874. The Commission's March 22, 2019 decision did not address the state mandate element. While the court of appeal's decision uses the term "mandated" to describe the lead sampling activities required by the test claim order ("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" [Exhibit K (2), *City of San Diego v. Commission on State Mandates* (Apr. 29, 2022, Third District Court of Appeal, Case No. C092800) (nonpub. opn.), page 13, emphasis added]), the sole issue before that court was whether the lead sampling requirements in the test claim order constituted a new program or higher level of service. Because the court did not have jurisdiction over and therefore did not decide the separate issue of whether the *Lead Sampling in Schools* program is mandated by the State, the court's decision does not prevent the Commission from now exercising its sole and exclusive authority to make a finding on the separate required element of whether the test claim order imposes a state mandate. *Kinlaw v. State of California* (1991) 53 Cal.3d 326, 335; Government Code section 17551, 17552.

[152] Exhibit A, Test Claim, filed January 11, 2018, page 105 (test claim order).

[153] Exhibit A, Test Claim, filed January 11, 2018, page 105 (test claim order).

a. Respond in writing within 60 days and schedule a meeting with school officials to develop a sampling plan;[154]

b. Finalize a sampling plan and complete initial sampling within 90 days [or an alternative time schedule approved by DDW];[155]

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;[156]

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;[157]

e. Ensure samples are collected by an adequately trained water system representative;[158]

f. Submit the samples to an ELAP certified laboratory for analysis;[159]

g. Require the laboratory to submit the data electronically to DDW;[160]

h. Provide a copy of the results to the school representative;[161]

i. Within two business days of a result that shows an exceedance of 15 ppb, notify the school of the sample result;[162]

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;[163]

[154] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[155] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[156] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[157] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[158] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[159] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[160] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[161] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[162] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[163] Exhibit A, Test Claim, filed January 11, 2018, 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;[164]
- 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;[165]

k. Ensure that the water system receives the results of repeat lead samples from the laboratory in no more than 10 business days;[166]

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;[167]

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;[168]

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.[169] ***The water system is not responsible for the costs of any corrective action or maintenance***;[170]

o. Keep records of all requests for lead related assistance and provide the records to DDW, upon request;[171]

p. Include in the annual Consumer Confidence Report a statement summarizing the number of schools requesting lead sampling.[172]

Both the claimant and the State Board agree that these requirements are new, as compared against prior law.[173]

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[164] Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

[165] Exhibit A, Test Claim, filed January 11, 2018, page 107 (test claim order).

[166] Exhibit A, Test Claim, filed January 11, 2018, page 107 (test claim order).

[167] Exhibit A, Test Claim, filed January 11, 2018, page 107 (test claim order).

[168] Exhibit A, Test Claim, filed January 11, 2018, page 107 (test claim order).

[169] Exhibit A, Test Claim, filed January 11, 2018, page 108 (test claim order).

[170] Exhibit A, Test Claim, filed January 11, 2018, page 108 (test claim order).

[171] Exhibit A, Test Claim, filed January 11, 2018, page 108 (test claim order).

[172] Exhibit A, Test Claim, filed January 11, 2018, page 108 (test claim order).

[173] See Exhibit A, Test Claim, filed January 11, 2018, 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 Resources Control Board's Comments on the

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. 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 through 12th grade," when a request for one-time assistance is made in writing by an authorized school representative by November 1, 2019.[174] "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."[175]

The State 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.

Test Claim, filed August 13, 2018, 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).

[174] Exhibit A, Test Claim, filed January 11, 2018, pages 105-106 (test claim order).

[175] Exhibit A, Test Claim, filed January 11, 2018, pages 105-106 (test claim order).

> 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.[176]

From January 1, 2018 through July 1, 2019, however, Health and Safety Code section 116277 required a community water system[177] serving any public school constructed or modernized prior to January 1, 2010, to test for lead in the school's potable water system[178] 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.

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"[179] and does *not* apply if the "schoolsite was constructed or modernized after January 1, 2010."[180] Section 116277 defines "local educational agency" as "a school district, county office of education, or charter school located in a public facility."[181] 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 Board's summary of Health and Safety Code section 116227

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[176] Exhibit A, Test Claim, filed January 11, 2018, page 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*), emphasis in original.

[177] "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).)

[178] Exhibit K (5), 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, filed January 11, 2018, page 106 (test claim order).

[179] Exhibit K (5), Health and Safety Code section 116277(a)(1) (as added by Stats. 2017, ch. 746) (AB 746).

[180] Exhibit K (5), Health and Safety Code section 116277(e)(1) (as added by Stats. 2017, ch. 746) (AB 746).

[181] Exhibit K (5), Health and Safety Code section 116277(f)(1) (as added by Stats. 2017, ch. 746) (AB 746).

agrees that the requirements of section 116227 apply only to public schools.[182] 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.[183]

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.

Finally, the test claim order requires the claimant to submit to the State 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.[184] Section 116277 was not effective until

[182] Exhibit K (8), State Water Resources Control Board, *Lead Sampling in Schools*, 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.").

[183] Exhibit K (5), 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.

[184] Exhibit A, Test Claim, filed January 11, 2018, page 105 (test claim order). The effective date of Health and Safety Code section 116277 is January 1, 2018.

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.

2. The Test Claim Order Does Not Impose a State-Mandated Program on the Claimant.

The courts have explained that even though the test claim statute or executive order may contain new requirements, the determination of whether those requirements are mandated by the state depends on whether the claimant's participation in the underlying program is voluntary or compelled.[185] When local government elects to participate in the underlying program, then reimbursement under article XIII B, section 6 is not required.[186]

The courts have identified two distinct theories for determining whether a program is compelled, or mandated by the state: legal compulsion and practical compulsion.[187] 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 or article XIII B, section 6.[188] In the recent case of *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815, the California Supreme Court reiterated the legal standards applicable to these two theories of mandate:

> 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.

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[185] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 731.

[186] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 743.

[187] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 807, 815.

[188] *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.

> 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.[189]
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> * * *
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> "[P]ractical compulsion," [is] a theory of mandate that 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.[190]

The Draft Proposed Decision found that while the claimant was not legally compelled to comply with the test claim order, the claimant was "practically compelled" and therefore mandated by the state to comply with the new requirements imposed by the test claim order. This finding was based on the fact that the claimant has provided water continuously for over 120 years to its now more than 1.3 million residents, with its six largest consumers being federal, state, and local agencies. The Draft Proposed Decision further found that "the claimant incorporated its municipal water 'agency' on July 21, 1901, when the voters approved the issuance of bonds to purchase the distribution system from a private water company, [fn. omitted] and that subsequent 'bonds and other financing secured over the years to maintain the water system in good working order,' totaling approximately $890 million as of November 2018, would immediately come due if the claimant sought to discontinue service [fn. omitted]."[191]

After further review and consideration, the Commission finds that the record does not contain substantial evidence showing that the claimant will face certain and severe penalties or other draconian consequences, as is required for a finding of practical compulsion, if it decides not to participate in the underlying program and provide water service to City residents. While a long history of operating a public water system is a factor that supports a showing of practical compulsion under *City of Sacramento v. State of California*, the duration of participation in a voluntary program is just one factor and is insufficient on its own to establish that the claimant is practically compelled to comply with the test claim order.[192]

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[189] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815 (internal quotation marks and citations omitted).

[190] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.

[191] Exhibit H, Draft Proposed Decision, issued March 23, 2023, page 52.

[192] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 76 (a finding of practical compulsion "must depend on such factors as the nature and purpose of the…program; whether its design suggests an intent to coerce; *when state and/or local participation began*; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of

Moreover, the record does not support the claimant's assertion that if it ceased operating its water system, it would face immediate repayment of bonds and other financing secured over the years to maintain the water system in good working order totaling nearly one billion dollars. In *Kern High School Dist*., the Supreme Court described the financial consequences to the state and its residents in *City of Sacramento* as "so onerous and punitive" that they amounted to "certain and severe federal penalties…including double taxation and other draconian measures."[193] The evidence does not support that finding here. As explained below, the California Constitution provides authority, but does not require local government to become a public water supplier. The claimant is not the debt-holder on the bond funds, and the funds received from the bonds and the Drinking Water State Revolving Fund loans for the improvements to its water system are paid from the Water Utility Fund and, thus, the claimant's general fund is generally not at risk. In the event of default, the principal amount of the debt owing *may* come immediately due, but that's not certain to occur. The State, as the holder of the senior debt from the Drinking Water State Revolving Fund, has priority over the bond debt holders, and is not required to make such a demand. And the bond debt holders have discretion whether to vote collectively to have the debt declared immediately due and payable. Furthermore, the claimant has express contractual discretion to transfer the water system to another water supplier for fair market value, the proceeds of which are used to pay off the debt.

And finally, while Health and Safety Code section 116625 gives the State Board the authority to suspend or revoke the claimant's operating permit for noncompliance with the test claim order, the statute is permissive not mandatory, meaning that the State Board is authorized but not required to enforce a permit violation.

Thus, the Commission finds that the test claim order does not impose a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

a. Because a local government agency is permitted but not required to operate a water system, the claimant is not legally compelled to comply with the test claim order.

The parties agree that the claimant is not legally compelled to comply with the test claim order since the claimant's participation in the underlying program to provide water service is not mandated by state law.[194] Under Article XI, section 9(a) of the California

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nonparticipation, noncompliance, or withdrawal," emphasis added). See also, *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816.

[193] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 749 (internal quotation marks omitted).

[194] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 10 ("the City is not legally obligated to provide water service under State law"); Exhibit J, State Water Resources Control Board's Comments on the

Constitution, a "municipal corporation" *may* be established to operate public works to furnish light, water, power, heat, transportation, or means of communication.[195] The courts have interpreted article XI, section 9 (previously section 19) as granting authority rather than imposing a duty.[196] 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." When interpreting statutes and constitutional provisions, "shall" is mandatory, and "may" is permissive.[197]

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. Because state law authorizes, but does not require, the claimant to provide water services or to operate a public water system, the requirements imposed by the test claim order result from the claimant's "voluntary or discretionary decision to undertake an activity" and therefore are not legally compelled.[198]

b. <u>The record does not contain substantial evidence that the claimant will face certain and severe penalties or other draconian consequences for failure to comply with the test claim permit such that it has no reasonable alternative but to comply.</u>

The courts have acknowledged the possibility that a state mandate may be found in the absence of legal compulsion "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."[199] Indeed, case precedent establishes that where the plain language of the test claim

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Draft Proposed Decision, filed May 4, 2023, page 2 ("the City is not legally compelled to comply with the lead testing requirements in [the test claim order]").

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

[196] *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274.

[197] Government Code section 14.

[198] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815.

[199] *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); Department of Finance v. Commission on State Mandates (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1367 (practical compulsion requires a "concrete showing" that a failure to engage in the activities at issue will result in "severe adverse consequences").

order falls short of legal compulsion, practical compulsion may be found if there is a clear showing in the law or substantial evidence in the record that a failure to perform the program activities will result in certain and severe penalties or other draconian consequences, such that the local government agency has no true alternative but to comply.[200] However, where a local government agency participates "voluntarily," i.e., without legal or practical compulsion, in a program with a rule requiring increased costs, the program cannot be said to be mandated by the state.[201]

In *Coast Community College Dist.* (2022)*,* the Supreme Court reaffirmed the viability of practical compulsion as a theory of state mandate when it specifically directed the Court of Appeal to consider on remand whether community college districts were practically compelled to comply with the funding entitlement regulations at issue.[202] The Commission had denied reimbursement, finding that the regulations were not mandated by the state, and the trial court agreed. However, the Court of Appeal concluded that the districts were legally compelled to comply with the regulations on the basis that the they applied to the districts' underlying core functions, which state law compelled the districts to perform.[203] The Supreme Court reversed, holding that the standards set forth in the regulations were insufficient to legally compel the districts to adopt them.[204] The court explained that because the districts were not legally required to adopt the standards described in the regulations, and instead faced the risk of "potentially severe financial consequences" if they elected not to do so, legal compulsion was inapplicable. The court characterized the appellate court's ruling as premised upon a determination that the districts had no "true choice" but to comply with the regulations at issue, which

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[200] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816; *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1367; *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 754; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 76; Government Code section 17559.

[201] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1365–1366.

[202] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 822 ("Having now rejected the Court of Appeal's conclusion regarding legal compulsion, we find it 'appropriate to remand for the [court] to resolve ... in the first instance' whether the districts may be entitled to reimbursement under a theory of nonlegal compulsion").

[203] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 819.

[204] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 807.

the court explained "sound in *practical*, rather than *legal*, compulsion."[205] In drawing this distinction and remanding the case to the Court of Appeal to consider in the first instance whether the districts established practical compulsion, the court relied upon *City of Sacramento* for the proposition that practical compulsion exists where ""[t]he alternatives were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards".)[206]

In *City of Sacramento v. State of California* (1990), the Supreme Court addressed practical compulsion in the context of a 1976 federal law requiring states, for the first time, to provide unemployment insurance to public employees, characterized as employing "a 'carrot and stick' to induce state compliance."[207] The state could comply with federal law and obtain a federal tax credit and administrative subsidy — a carrot — or not comply and allow its businesses to face double unemployment taxation by both state and federal governments — a stick.[208] California passed a law conforming to the requirements of the federal law. The City of Sacramento and the County of Los Angeles challenged the state law asserting that it was a reimbursable state mandate.[209] The state opposed the request for reimbursement on the ground that the legislation imposed a federal mandate and, thus, reimbursement was not required.[210] The state argued that strict legal compulsion was not required to find a federal mandate and that California's failure to comply with the federal "carrot and stick" scheme was so substantial that the state had no realistic discretion to refuse.[211] The court agreed and found that the immediate penalty of double taxation for not complying with the federal law was "draconian," that "the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses," and that "[t]he alternatives were "so far beyond the realm of practical reality[,] that they left the state 'without discretion' to depart from federal standards."[212]

> As the drafters and adopters of article XIII B must have understood, certain regulatory standards imposed by the federal government under "cooperative federalism" schemes are coercive on the states and localities in every practical sense. The instant facts amply illustrate the point. Joint federal-state operation of a system of unemployment compensation has

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[205] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 807, emphasis in original.

[206] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 807.

[207] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 72.

[208] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 74.

[209] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58.

[210] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 65-66, 71.

[211] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 71.

[212] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 74.

> been a fundamental aspect of our political fabric since the Great Depression. California had afforded federally "certified" unemployment insurance protection to its workers for over 40 years by the time Public Law 94-566, chapter 2/78, and article XIII B were adopted. Every other state also operated such a system. If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty - full, double unemployment taxation by both state and federal governments. Besides constituting an intolerable expense against the state's economy on its face, this double taxation would place California employers at a serious competitive disadvantage against their counterparts in states which remained in federal compliance.
>
> Plaintiffs and their amici curiae suggest California could have chosen to terminate its own unemployment insurance system, thus leaving the state's employers faced only with the federal tax. However, we cannot imagine the drafters and adopters of article XIII B intended to force the state to such draconian ends.
>
> Here, the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses. The alternatives were so far beyond the realm of practical reality that they left the state "without discretion" to depart from federal standards. We therefore conclude that the state acted in response to a federal "mandate" for purposes of article XIII B.[213]

Thus, the court concluded that the state acted in response to a federal mandate for purposes of article XIII B, section 6, and reimbursement was not required.

The court further explained that the practical compulsion determination "must depend on such factors as the nature and purpose of the…program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal."[214]

In *Kern High School Dist.*, the California Supreme Court addressed an amendment to state open meeting laws to require school site councils and advisory bodies formed under state and federal grant programs to post a notice and an agenda of their meetings.[215] The court rejected the school districts' "assertion that they have been legally compelled to incur notice and agenda costs, and hence entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which

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[213] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 73-74.

[214] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 76.

[215] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 730.

claimants have participated, without regard to whether claimant's participation in the underlying program is voluntary or compelled."[216] The court determined that school districts elected to participate in the school site council programs to receive funding associated with the programs and, thus, were not legally compelled to incur the notice and agenda costs.[217] The court stated that it would "not foreclose the possibility that a reimbursable state mandate under article XIII B, section 6, properly might be found in some circumstances in which a local entity is not legally compelled to participate in a program that requires it to expend additional funds."[218] However, the circumstances in *Kern High School Dist.* did not rise to the level of practical compulsion, since a school district that elects to discontinue participation in the grant programs does not face certain and severe penalties, such as double taxation or other draconian consequences, but simply must adjust to the withdrawal of grant money.[219]

In *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, the court determined that the Peace Officers Procedural Bill of Rights Act (POBRA), which imposed requirements on all law enforcement agencies, did not constitute a state-mandated program on school districts. The court found that because school districts are authorized, but not required, by state law to hire peace officers, there was no legal compulsion to comply with POBRA.[220] In considering whether the districts were practically compelled to comply, the court found that it was "not manifest on the face of the statutes cited nor is there any showing in the record that hiring its own peace officers, rather than relying upon the county or city in which it is embedded, is the only way as a practical matter to comply."[221] The court emphasized that practical compulsion requires a *concrete* showing that a failure to engage in the activities at issue will result in certain and severe penalties or other draconian consequences, leaving the districts no choice but to comply.[222]

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[216] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 731.

[217] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 744-745.

[218] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 752.

[219] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 754.

[220] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1368.

[221] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1367.

[222] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1367 ("The Commission submits that this case should be distinguished from *City of Merced* and *Kern High School Dist.* because the districts

Here, the claimant argues that it "has no practical alternative but to comply" with the test claim order,[223] based on the following factual allegations:

- The claimant cannot "take back a decision" made more than 120 years ago and stop providing water to its residents because "[c]ities must provide for the health, safety, and welfare of their residents, and simply put, people cannot survive without water."[224]
- If the claimant ceased operating its water system, it would face immediate repayment of bonds and other financing secured over the years to maintain the water system in good working order totaling nearly one billion dollars.[225]
- If the claimant fails to comply with the test claim order, the State Board could suspend or revoke its operating permit, which would prevent the claimant from operating its water system and leave 1.3 million residents without water service.[226]

These arguments are addressed below.

i. The claimant's long history of operating a public water system is one factor, but is insufficient on its own to establish that the claimant is practically compelled to comply with the test claim order.

In alleging that it is practically compelled and, thus, mandated by the state to comply with the new requirements imposed by the test claim order, the claimant relies on the fact that "[t]he City "decided" to become a municipal water agency on July 21, 1901, when San Diego voters approved the issuance of bonds to purchase the water

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"employ peace officers when necessary to carry out the essential obligations and functions established by law." However, the "necessity" that is required is facing " 'certain and severe ... penalties' such as 'double ... taxation' or other 'draconian' consequences."…That cannot be established in this case without a *concrete showing* that reliance upon the general law enforcement resources of cities and counties will result in such severe adverse consequences"). Emphasis added.

[223] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 9-11; see also Exhibit I, Claimant's Comments on the Draft Proposed Decision, filed May 4, 2023, page 1.

[224] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 9.

[225] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 10-11.

[226] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 10; Exhibit I, Claimant's Comments on the Draft Proposed Decision, filed May 4, 2023, page 1.

distribution system from a private water company."[227] In support, the claimant cites to a 1908 publication entitled *History of San Diego, 1542-1908*, which states, as alleged, "the system of [water] distribution within the city limits became the property of the municipality, a bond issue of $600,000 having been voted for its acquisition."[228] The claimant argues that because it began providing water to the City's residents prior to the 1911 Constitutional amendment specifically authorizing municipalities to provide water service,[229] "the City started providing water service *likely* before there was even a requirement to obtain a permit from the State to operate a municipal water system."[230] The City asserts that it "cannot take back a decision made almost 120 years ago and stop providing water to its [1.3 million] residents [including federal, state, and local agencies]."[231]

Indeed, the Third District Court of Appeal noted in its unpublished decision in this matter that "[m]unicipal authorities in San Diego, similarly, began supplying residents with water as early as 1834 when the Mexican government established the Pueblo of San Diego. (*City of San Diego v. Cuyamaca Water Co.* (1930) 209 Cal. 105, 111, 115 [" 'during the entire term of its existence,' " the " 'Pueblo of San Diego and the inhabitants thereof . . . enjoyed, asserted and exercised a preference or prior right to the use of the waters of [the] San Diego River for the benefit of said pueblo and the inhabitants thereof' "].).[232]

In *City of Sacramento*, the Supreme Court determined that a finding of practical compulsion *depends on a number of factors* to determine if practical compulsion applies, and not just when participation began. These factors include:

> the nature and purpose of the…program; whether its design suggests an intent to coerce; *when state and/or local participation began*; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any

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[227] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 9.

[228] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 89 (William E. Smythe, *History of San Diego, 1542-1908*, Part Four, Chapter 4: Water Development (1908)).

[229] The 1911 constitutional amendment refers to what is now article XI, section 9 of the California Constitution.

[230] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 9, emphasis added.

[231] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 9.

[232] Exhibit K (2), *City of San Diego v. Commission on State Mandates* (Apr. 29, 2022, Third District Court of Appeal, Case No. C092800) (nonpub. opn.), page 11.

other legal and practical consequences of nonparticipation, noncompliance, or withdrawal.[233]

In this respect, the State Board contends that even if the City has been providing water for a long time, there is no evidence of practical compulsion (certain and severe penalties or other draconian consequences) will occur if the claimant stopped providing water service since the City can transfer its public water system to another entity. The State Board urges the Commission to *not* find a state mandate as follows:

> Moreover, and this underscores the challenge in applying the practical compulsion theory to state mandates under article XIII B, section 6, the severe consequences and penalties the City claims will occur following noncompliance with the test claim order requirements may be avoided by transferring its public water system to another entity. As has been established, the City has no obligation to operate a public water system, regardless of how large or complex the public water system has become. Indeed, just as no federal or state law requires the City to operate a public water system, no federal or state law prohibits the City from transferring its public water system to another public or private entity. By transferring ownership of the water system, the customers would continue to receive drinking water and the City would avoid any penalties imposed by the State Water Board. In terms of the bond debt that may come due, the City has provided no evidence that an appropriate financing package could not be created to address any outstanding debt as part of a large commercial transaction.[234]

Thus, while the record shows that the claimant has a long history of providing water service to the residents of the City of San Diego, dating back to before the California Constitution was amended in 1911 to specify that both private and public entities are authorized to provide water service, that factor, alone, is not determinative.[235]

ii. The claimant has not provided substantial evidence showing with any certainty that it would face immediate repayment of its debt or other certain and severe consequences if it stopped operating its water system.

The claimant asserts it has no practical alternative to continuing to operate its public water system because if it discontinues water service, it will face severe financial consequences in the form of immediate repayment of nearly one billion dollars in debt

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[233] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 58, 76, emphasis added.

[234] Exhibit J, State Water Resources Control Board's Comments on the Draft Proposed Decision, filed May 4, 2023, page 3.

[235] The California Constitution was amended in 1911 to add what is now article XI, section 9.

incurred to maintain the water system.[236] The claimant offers the following facts and evidence in support:

1. As of November 15, 2018, the cumulative amount of water system financing debt was approximately $890 million, consisting of $78 million in senior obligations and $812 million in subordinate obligations.[237] Evidence cited: Official Statement, City of San Diego Subordinated Water Revenue Bonds, Series 2018A (Official Statement), page 5.[238]
2. Repayment of the water system financing debt is scheduled to run through 2050.[239] Evidence cited: Official Statement, City of San Diego Subordinated Water Revenue Bonds, Series 2018A, Debt Service Schedule, page 24.[240]
3. As a condition of receiving the water system financing, the claimant is required to operate and maintain its water system and dedicate net system revenues towards paying back the borrowed money plus interest.[241] Evidence cited: Official Statement, City of San Diego Subordinated Water Revenue Bonds, Series 2018A, pages 13-14; 2009 Amended and Restated Master Installment Purchase Agreement, sections 5.01, 6.07.[242]
4. Discontinuing water service would be considered an "Event of Default," upon which owners of 25 percent or more of the outstanding principal amount can "declare the entire unpaid principal amount thereof and the accrued interest thereon to be due and payable immediately," amounting to nearly one billion

[236] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 11.

[237] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 10-11.

[238] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 96-324 (Official Statement).

[239] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 11.

[240] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 96-324 (Official Statement).

[241] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 11.

[242] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 96-324 (Official Statement), 648-716 (Master Agreement).

dollars.[243] Evidence cited: 2009 Amended and Restated Master Installment Purchase Agreement, sections 8.01(b), 8.01(d).[244]

The Series 2018A bonds referenced above are Subordinated Water Revenue Bonds issued in 2018 by the Public Facilities Financing Authority, a joint powers agency formed by the claimant and others to finance public capital improvements, including improvements to the claimant's water system.[245] The official statement shows that as of November 15, 2018, the outstanding principal bond debt was $812,654,000, consisting of bonds issued by the Authority in 2012 and 2016, which are subordinate to senior obligations.[246] The City also has "senior obligations" of $78,332,490 in loans from the Drinking Water State Revolving Fund (the "Senior SRF Loans").[247] Thus, the total water system financing debt was approximately $890 million as of November 2018.

However, as explained below, the claimant's assertion that it "would face *immediate* repayment of bonds and other financing" in the amount of roughly $890 million is unsupported by the evidence.

With respect to the bond debt, the official notice for the 2018 bonds explains that the Public Facilities Financing Authority was established pursuant to the Third Amended and Restated Joint Exercise of Powers Agreement dated as of January 1, 2013.[248] That agreement provides that the bonds issued by the Authority, together with the interest and premium, if any, "shall not be deemed to constitute a debt of the City."[249] The Bonds shall be only special obligations of the Authority, and the Authority "shall under no circumstances be obligated to pay the Bonds or the respective project costs

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[243] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 11.

[244] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 648-716 (2009 Amended and Restated Master Installment Purchase Agreement (MIPA)).

[245] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 114; see also Gov. Code, § 6500 et seq.; *San Diegans for Open Government v. Public Facilities* (2021) 63 Cal.App.5th 168, 173.

[246] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 112, 190 (Official Statement).

[247] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 112, 190 (Official Statement).

[248] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 114 (Official Statement).

[249] Exhibit K (12), Third Amended and Restated Joint Exercise of Powers Agreement Creating the Public Facilities Financing Authority of the City of San Diego, pages 7-8.

except from revenues and other funds pledged therefor."[250] In addition, neither the City nor the Authority "shall be obligated to pay the principal of, premium, if any, or interest on the Bonds, or other costs incidental thereto, except from the revenues and funds pledged therefor . . ."[251] This language is consistent with the following statement in the 2018 bond package:

> The 2018 Bonds are limited obligations of the Authority payable solely from and secured solely by the Subordinated Revenues pledged therefor and amounts on deposit in the Subordinated Bonds Payment Fund established under the Indenture. The obligation of the City to make 2018 Subordinated Installment Payments under the 2018 Supplement does not constitute an obligation of the City for which the City is obligated to levy or pledge any form of taxation or for which the City has levied or pledged any form of taxation. Neither the full faith and credit of the Authority, the City, the County of San Diego (the "County"), the State of California (the "State"), or any political subdivision of the State nor the taxing power of the City, the County, the State, or any political subdivision of the State is pledged to the payment of the principal of or interest on the 2018 Bonds. The Authority has no taxing power. *Neither the 2018 Bonds nor the obligation of the City to make 2018 Subordinated Installment Payments constitutes an indebtedness of* the Authority, *the City*, the County, the State, or any political subdivision of the State within the meaning of any constitutional or statutory debt limitation or restriction.[252]

This type of transaction is authorized by the Joint Exercise of Powers Act (Government Code section 6500 et seq.), and has been upheld by the courts, including for the City of San Diego and the Public Facilities Financing Authority, as follows:[253]

> The Supreme Court in *Rider* and this court in *San Diegans* previously approved the type of financial transaction at issue here. (Citations omitted.) The Supreme Court explained that a joint powers agency, like the Financing Authority, has the power under state law to issue bonds in its own name. (Citations omitted.) It therefore need not comply with the limitations that would apply to City-issued bonds, such as voter approval: "[W]hen the Financing Authority issues bonds, it does so independently of

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[250] Exhibit K (12), Third Amended and Restated Joint Exercise of Powers Agreement Creating the Public Facilities Financing Authority of the City of San Diego, pages 7-8.

[251] Exhibit K (12), Third Amended and Restated Joint Exercise of Powers Agreement Creating the Public Facilities Financing Authority of the City of San Diego, page 8.

[252] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 111, 118 (Official Statement).

[253] See *Rider v. City of San Diego* (1998) 18 Cal.4th 1035, 1040; *San Diegans for Open Government v. Public Facilities Financing Authority of City of San Diego* (2021) 63 Cal.App.5th 168, 175.

any common powers delegated in the joint powers agreement, and therefore it is not subject to the limitations that would apply to the City, including the two-thirds vote requirements in the [California] Constitution and the City's charter." (Citation omitted.) "[T]he Financing Authority is a separate legal entity from the City [citation], and the Financing Authority's debts are not the City's debts [citation]." (Citations omitted.)

In *San Diegans*, this court followed *Rider* even where, as here, the Financing Authority is under the control of the City. We explained, "*Rider* made clear that for purposes of the debt limitation provisions, when a financing authority created to issue bonds 'has a genuine separate existence from the City,' 'it does not matter whether or not the City "essentially controls" the [f]inancing [a]uthority.' " (Citations omitted.) "Under the Joint Exercise of Powers Act, the Financing Authority has a genuine separate existence from the City. [Citation.] The Successor Agency and the Housing Authority also have genuine separate existences from the City. [Citations.] In recognition of the separate status, the [Financing Authority's governing document] specifies that bonds are not a debt of the City, the Successor Agency, or the Housing Authority, and are only special obligations of the Financing Authority to be paid from revenues and other funds pledged therefor. This arrangement comports with *Rider.*" (Citation omitted.)

Along with its approval, the Supreme Court noted, "We are not naive about the character of this transaction. If the City had issued bonds ..., the two-thirds vote requirement would have applied. Here, the City and the Port District have created a financing mechanism that matches as closely as possible (in practical effect, if not in form) a City-financed project, but avoids the two-thirds vote requirement. Nevertheless, the law permits what the City and the Port District have done. Plaintiffs are correct that this conclusion allows local governments to burden taxpayers with potentially high costs that voters have not approved, but local governments impose similar burdens on taxpayers every time they enter into long-term leases involving property of substantial value. We have long held that the two-thirds vote requirement does not apply to these leases so long as the obligation to pay rent is contingent on continued use of the leased property." (Citations omitted.)[254]

Although the debt to the bond holder is that of the Authority's to be paid from "revenues and other funds pledged therefor," the 2018 bond package explains that the "revenues and other funds pledged therefor" are from the rates and charges for the City's water

[254] *San Diegans for Open Government v. Public Facilities Financing Authority of City of San Diego* (2021) 63 Cal.App.5th 168, 175-176, citing to *Rider v. City of San Diego* (1998) 18 Cal.4th 1035 and *San Diegans for Open Government v. City of San Diego* (2015) 242 Cal.App.4th 416.

service (the Water Utility Fund), which are paid to the Authority pursuant to a Master Installment Purchase Agreement (Master Agreement).[255] The Master Agreement is between the City of San Diego and the San Diego Facilities and Equipment Leasing Corporation and relates to installment payments from the net system revenues from the claimant's Water Utility Fund.[256] The San Diego Facilities and Equipment Leasing Corporation "is a nonprofit charitable corporation duly organized and existing under and by virtue of the laws of the State. The Corporation was organized to acquire, lease, and/or sell to the City real and personal property to be used in the municipal operations of the City. The Corporation was formed at the request of the City to assist in financings such as the installment purchase financing described [in the Official Statement] and is governed by its own Board of Directors."[257]

Under the Master Agreement, "the City agrees and covenants that all System Revenues shall be received by the City in trust and shall be deposited when and as received in the Water Utility Fund, which fund the City agrees and covenants to maintain so long as any Installment Payment Obligations remain unpaid, and all moneys in the Water Utility Fund shall be so held in trust and applied and used solely as provided herein."[258] Payments from the City for the bond debt are made to the nonprofit corporation, which then assigns its right to receive the installment payments to the Authority.[259] According to the 2018 bond package, the "City has covenanted to ensure that net revenues [from the Water Utility Fund] are equal to at least 1.1 times maximum annual debt service on all Obligations in each Fiscal Year."[260] In addition, the City agreed "to make Installment Payments solely from Net System Revenues [i.e. the Water Utility Fund] until such time as the Purchase Price for any Components has been paid in full (or provision for the payment thereof has been made pursuant to the Master Installment Purchase Agreement)."[261] Thus, since the revenues come solely from Water Utility Fund, the claimant's general fund revenues are not at risk.

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[255] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 111, 118, 121 (Official Statement).

[256] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 651 (Master Agreement).

[257] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 113 (Official Statement).

[258] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 672 (Master Agreement, section 5.02).

[259] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 113-114 (Official Statement).

[260] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 111 (Official Statement).

[261] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 121 (Official Statement).

The remaining $78,332,490 in outstanding indebtedness pertains to loans from the Drinking Water State Revolving Fund (DWSRF).[262] The claimant has not provided evidence explaining the nature of these funds. The DWSRF program was established by a 1996 amendment to the federal Safe Drinking Water Act.[263] As of July 1, 2014, the State Board implements the DWSRF program, which provides low-interest loans and other financial assistance to public water systems for infrastructure improvements using federal and state funds.[264] A publicly available DWSRF Funding Agreement between the State and the City of San Diego (Funding Agreement) shows that the claimant received a direct loan from the State for $18 million in DWSRF funds.[265] The Funding Agreement specifies that the DWSRF loan constitutes a "parity obligation" under the Master Installment Purchase Agreement, and thus, is considered a senior obligation to the bond debt.[266] Additionally, under the terms of the Funding Agreement, the claimant

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[262] As of November 15, 2018, there was $78,332,490 in senior obligations for loans from the Drinking Water State Revolving Fund. Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 112 (Official Statement).

[263] Exhibit K (4), Excerpt from State Water Resources Control Board, Policy for Implementing the Drinking Water State Revolving Fund: https://www.waterboards.ca.gov/drinking_water/services/funding/documents/srf/dwsrf_policy/dwsrf_policy_final.pdf (accessed on June 16, 2023), amended December 3, 2019, page 3.

[264] Exhibit K (4), Excerpt from State Water Resources Control Board, Policy for Implementing the Drinking Water State Revolving Fund: https://www.waterboards.ca.gov/drinking_water/services/funding/documents/srf/dwsrf_policy/dwsrf_policy_final.pdf (accessed on June 16, 2023), amended December 3, 2019, page 3. The statutory basis for the DWSRF is established in Health and Safety Code sections 116760 through 116762.60.

[265] Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), pages 12 ("This Agreement constitutes funding in the form of a loan and a grant made by State to Supplier [defined herein as City of San Diego] under the provisions of California Safe Drinking Water State Revolving Fund Law of 1997, Part 12, Chapter 4.5 (commencing with Section 116760), of Division 104 of Health and Safety Code"), 13 (Section 4, showing the loan amount is $18,000,000 and Section 4, showing the grant amount is $0).

[266] Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), pages 36 ("Supplier agrees that it shall not incur any additional indebtedness having any priority in payment over Supplier's obligations to State under this Agreement"), 38 ("The Loan, secured by the Collateral, shall constitute a "Parity Obligation" as defined in that certain Master Installment Purchase Agreement dated as of August 1, 1998, by and between Supplier and the San Diego Facilities and Equipment Leasing Corporation, as amended from time to time"). The Master

agreed "to repay the entire Principal Amount of the Loan, together with all interest thereon, as set forth in this Agreement, from Water Enterprise Fund rates, charges and assessments, and financing proceeds, and Supplier hereby pledges said Water Enterprise Fund rates, charges and assessments, and financing proceeds as collateral (the "Collateral") to secure repayment of the Loan."[267] Therefore, similar to the bond debt discussed above, the revenues used to repay the DWSRF loans come solely from the Water Utility [or Enterprise] Fund, and the claimant's general fund revenues are not at risk.

Under the terms of the Master Agreement, in the event of a default of a "parity obligation" or a default "in the performance of *any* of the agreements or covenants required herein to be performed by" the City, then the entire unpaid principal amount owing on the bond funds and the accrued interest on the debt *may* be due and payable immediately *if* there is a vote by a certain percentage of parity debt owners:

> SECTION 8.01. Events of Default and Acceleration of Maturities. If one or more of the following Events of Default shall happen, that is to say…
>
> (a) if default shall be made in the due and punctual payment of or on account of any *Parity Obligation* as the same shall become due and payable;
>
> (b) *if default shall be made by the City in the performance of any of the agreements or covenants required herein to be performed by it*…and such default shall have continued for a period of 60 days after the City shall have been given notice in writing of such default by the Corporation or any Trustee;
>
> [¶]…[¶]
>
> then, and in each and every such case during the continuance of such Event of Default, the Corporation shall upon the written request of the

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Agreement defines "parity obligations" as "(a) Parity Installment Obligations, (b) Obligations, the principal of and interest on which are payable on a parity with Parity Installment Obligations, and (c) Reserve Fund Obligations." Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 663 (Master Agreement), 673 (Master Agreement ["the City may not create any Obligations, the payments of which are senior or prior in right to the payment by the City of Parity Obligations"]); Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 112, 190 (Official Statement [""As of November 15, 2018, Senior Obligations consisted of $78,332,490 principal amount of loans from the Drinking Water State Revolving Fund (the "Senior SRF Loans"). There are no Outstanding Senior Bonds"]).

[267] Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), page 36.

> Owners of 25% or more of the *aggregate principal amount of all Series of Parity Installment Obligations Outstanding*, voting collectively as a single class, by notice in writing to the City, *declare the entire unpaid principal amount thereof and the accrued interest thereon to be due and payable immediately, and upon any such declaration the same shall become immediately due and payable*.[268]

Thus, under the terms of the Master Agreement, if the claimant defaults in performing any of its covenants, including payment and the covenant to operate and maintain its water system, the owners of 25 percent or more of "the aggregate principal amount of all Series of Parity Installment Obligations Outstanding" have the authority to have the debt declared immediately due and payable. As the Official Statement to the 2018 bond package explains, in an event of default, "the Holders…of 25% or more of the aggregate principal amount of all Series of Parity Installment Obligations Outstanding, or after all Parity Installment Obligations have been paid in full, the Holders…of 25% or more of the aggregate principal amount of all Series of Subordinated Obligations Outstanding (the "Required Holders"), voting collectively as a single class, by notice in writing to the City" have the ability to declare the outstanding debt due and payable immediately.[269] Put differently, "Holders of Parity Obligations will be entitled to receive payment thereof in full before the Holders of Subordinated Obligations are entitled to receive payment thereof."[270]

The Master Agreement's default and acceleration clause does not establish with any certainty that those funds will be due and payable immediately since the 25 percent or more owners have discretion whether to vote collectively to have the debt declared immediately due and payable, and no evidence has been submitted showing why that outcome is "certain" to occur.[271] Furthermore, the Official Statement's description of the potential outcomes following an event of default demonstrate not only the discretion of the debt holders in seeking immediate repayment, but the uncertainty of obtaining adequate remedies.

> The Indenture[272] provides that, upon and during the continuance of an Event of Default thereunder, the Trustee *may*, subject to certain

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[268] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 684 (Master Agreement), emphasis added.

[269] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 299 (Official Statement).

[270] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 300 (Official Statement).

[271] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 684 (Master Agreement).

[272] "Indenture" refers to the agreement by and between the Public Facilities Financing Authority of the City of San Diego (Authority) and U.S. Bank National Association

conditions, declare the principal of all Senior Bonds then Outstanding and the interest accrued thereon to be due and payable immediately. *So long as any Senior Bonds remain outstanding under the Indenture, no Owners of Subordinated Bonds shall have the right to declare an Event of Default, to declare any Subordinated Bonds immediately due and payable or to direct the Trustee or waive any Event of Default.* The foregoing notwithstanding, *the remedy of acceleration is subject to the limitations on legal remedies against public entities in the State, including a limitation on enforcement obligations against funds needed to serve the public welfare and interest.* Also, any remedies available to the Owners of the 2018 Bonds upon the occurrence of an Event of Default under the Indenture are in many respects dependent upon judicial actions, which are often subject to discretion and delay and could prove both expensive and time consuming to obtain.

Further, enforceability of the rights and remedies of the Owners of the 2018 Bonds, and the obligations incurred by the City, may become subject to the federal bankruptcy code and applicable bankruptcy, insolvency, receivership, reorganization, moratorium, or similar laws relating to or affecting the enforcement of creditor's rights generally, now or hereafter in effect, equity principles that may limit the specific enforcement under State law of certain remedies, the exercise by the United States of America of the powers delegated to it by the Constitution, the reasonable and necessary exercise, in certain exceptional situations, of the police powers inherent in the sovereignty of the State and its governmental bodies in the interest of serving a significant and legitimate public purpose, and the limitations on remedies against counties in the State. Bankruptcy proceedings, or the exercise of powers by the federal or State government, if initiated, could subject the Owners of the 2018 Bonds to judicial discretion and interpretation of their rights in bankruptcy or otherwise and consequently may entail risks of delay, limitation, or modification of their rights…

If the City fails to comply with its covenants under the 2018 Supplement to pay the 2018 Subordinated Installment Payments, *there can be no assurance of the availability of remedies adequate to protect the interests*

(Trustee) under which the 2018 bonds are secured and constitutes a valid and binding obligation of the City of the San Diego. Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 101, 108, 210 (Official Statement).

> *of the holders of Senior Bonds and, accordingly, the Subordinated Bonds*.[273]

As the Official Statement makes clear, "there can be *no assurance* of the availability of remedies adequate to protect the interests" of the debt holders.[274]

Because the $78,332,490 in loans from the Drinking Water State Revolving Fund constitute senior obligations, then in the event of default, the State would have repayment priority over the bond debt holders.[275] The Funding Agreement does not specify any events that automatically trigger an event of default, instead giving the State discretion to make that determination. Failure to operate and maintain the project "*may*, at the option of State, be considered a material breach of this Agreement and may be treated as a default under Article A-27, hereof."[276] Article A-27 provides that when an event of default occurs, the State shall give notice of and a 30-day period to cure the default.[277] If the claimant fails to timely cure the default to the State's satisfaction, then the State *may* do any or all of the following:

> (1) Declare that the aggregate amount of all Disbursements made by State, including any portion of the Grant, shall be deemed the Loan, and shall be repaid to State in accordance with the terms of this Agreement;

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[273] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 210 (Official Statement), emphasis added.

[274] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 210 (Official Statement), emphasis added.

[275] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 685 (Master Agreement ["Upon the occurrence and during the continuance of any Event of Default, Owners of Parity Obligations will be entitled to receive payment thereof in full before the Owners of Subordinated Obligations are entitled to receive payment thereof (except for any payment in respect of Subordinated Obligations from the Reserve Fund securing such Subordinated Obligations) and the Owners of the Subordinated Obligations will become subrogated to the rights of the Owners of Parity Obligations to receive payments with respect thereto"]).

[276] Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), page 15 (Section 12). See also pages 14 (Section 11), 23-24 (Article A-7), 24 (Article A-8), 25 (Article A-10(b)), 27 (Article A-15), 33 (Article A-32), 35 (Article A-36).

[277] Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), page 31 (Article A-27(b)).

(2) Declare Supplier's [City of San Diego's] obligations immediately due and payable, with or without demand or notice to Supplier, which Supplier expressly waives;

(3) Terminate any obligation of State to make further Disbursements;

(4) Exercise all rights and remedies available to a secured creditor after default, including, but not limited to, the rights and remedies of secured creditors under the California Uniform Commercial Code;

(5) Perform any of Supplier's obligations under this Agreement for Supplier's account;

(6) Notwithstanding the provisions of Section 5, hereof, commencing from the date of each Disbursement, apply the Rate of Interest specified in Section 9, hereof, to all Disbursements made by State, including any portion of the Grant; and/or

(7) Take any other action it deems necessary to protect its interests.[278]

Thus, if the claimant fails to operate and maintain that portion of the drinking water system funded by the DWSRF loan, the State has the authority, but not the obligation, to find an event of default and to declare the debt immediately due and payable. The Funding Agreement gives the State discretion at each phase of an event of default (finding breach, finding default, declaring immediately payment) and therefore does not establish with certainty that the DWSRF funds will be immediately due and payable if the claimant stops operating and maintaining its drinking water system.

Thus, the claimant cannot show it will face severe financial consequences "amounting to nearly one billion dollars"– with any *certainty*.

Moreover, the Master Agreement, in section 6.04(b)(2), allows the City, at its discretion, to dispose of the Water System if approved by City Council and upon receipt of the fair market value, the proceeds of which must be used to pay off parity and subordinated obligations as follows:

(b) The City may dispose of any of the works, plant properties, facilities or other parts of the Water System, or any real or personal property comprising a part of the Water System, only upon the approval of the City Council and consistent with one or more of the following:
[¶]

(2) the City in its discretion may carry out such a disposition if the City receives from the acquiring party an amount equal to the fair market value of the portion of the Water System disposed of. As used in this clause (2), "fair market value" means the most probable price that the portion being disposed of should bring in a competitive and open market under all

[278] Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), pages 31-32 (Article A-27(b)(1)-(b)(7)).

> conditions requisite to a fair sale, the willing buyer and willing seller each acting prudently and knowledgeably, and assuming that the price is not affected by coercion or undue stimulus. The proceeds of the disposition shall be used *(A) first,* promptly to redeem, or irrevocably set aside for the redemption of, Parity Obligations, and *second,* promptly to redeem, or irrevocably set aside for the redemption of, Subordinated Obligations....[279]

In *Kern High School Dist*., the Supreme Court described the financial consequences to the state and its residents in *City of Sacramento* as "so onerous and punitive" that they amounted to "certain and severe federal penalties…including double taxation and other draconian measures."[280]

The evidence does not support that finding here. Instead, the California Constitution provides authority, but does not require local government to become a public water supplier. The claimant is not the debt-holder on the bond funds, and the funds received from the bonds and the Drinking Water State Revolving Fund loans for the improvements to its water system are paid from the Water Utility Fund and, thus, its general fund is generally not at risk. In the event of default, the principal amount of the debt owing *may* come immediately due, but that's not certain to occur. The State, as the holder of the senior debt, has priority over the bond debt holders, and is not required to make such a demand. And the bond debt holders have discretion whether to vote collectively to have the debt declared immediately due and payable. Furthermore, the claimant has express contractual discretion to transfer the water system to another water supplier for fair market value, the proceeds of which are used to pay off the debt.

Therefore, there is not substantial evidence in the record showing with any certainty that the claimant would face immediate repayment of its debt, or other certain and severe or draconian consequences if it stopped operating its water system.

iii. Although Health and Safety Code section 116625 gives the State Board the authority to suspend or revoke a permit issued under the Safe Drinking Water Act, the claimant has not presented substantial evidence showing that the state, with certainty, would have imposed a severe penalty if the claimant did not comply with the test claim order.

In alleging that failure to comply with the test claim order *could* result in the State Board suspending or revoking the claimant's water system operating permit, the claimant cites to Health and Safety Code section 116625, which provides that the State Board *may*, pursuant to due process, suspend or revoke any permit issued under the Safe Drinking Water Act if it determines that the permittee is in noncompliance with the permit or other

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[279] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 678 (Master Agreement).

[280] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 749 (internal quotation marks omitted).

applicable law.[281] Section 116625 also gives the State Board the authority to temporarily suspend any permit prior to hearing if necessary to prevent "an imminent or substantial danger to health."[282] The State Board agrees that the claimant "must comply with the Permit Amendment in order to provide drinking water within its service area" and that the "permit is *subject to* revocation for failure to comply."[283]

By the claimant's own admission, however, the claimant faces the *possibility*, but not certainty, of suspension or revocation of its operating permit for noncompliance with the test claim permit.[284] While Health and Safety Code section 116625 gives the State Board authority to suspend or revoke the claimant's operating permit for noncompliance with the test claim order, the statute is permissive not mandatory, meaning that the State Board is authorized but not required to enforce a permit violation.

Furthermore, even if suspension or revocation were certain, the claimant has not shown "severe or draconian consequences," as discussed in the section above. The claimant instead states axiomatically that its entire water system would cease to exist, and that the residents, businesses, and public entities that rely upon it to supply safe drinking water would simply go without, thereby creating a health and safety crisis.[285]

Again, for practical compulsion to apply, there must be a clear showing in the law or substantial evidence in the record that the test claim order induces compliance through the imposition of certain and severe or other draconian consequences that leave the

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[281] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 10; Health and Safety Code section 116625(a).

[282] Health and Safety Code section 116625(b).

[283] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, pages 16-17 (emphasis added).

[284] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 10 ("Failure to comply with a drinking water permit *can* result in suspension or revocation of the permit, which would prevent the City from operating its water system"). Emphasis added.

[285] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, page 9 ("Cities must provide for the health, safety, and welfare of their residents, and simply put, people cannot survive without water. Many of the impacts of turning off the water for 1.3 million people are self-evident…The six largest water consumers in the City are federal (primarily military), state (university), and local agencies serving public purposes, with the City of San Diego being its own largest water customer. These public agencies could no longer function without water. Water is necessary for drinking, cooking, cleaning, firefighting and sanitation. Toilets cannot flush without water, and the absence of water would quickly lead to a health crisis. The City must continue to provide water service to protect the health, safety, and welfare of its residents").

local entity no reasonable alternative but to comply.[286] In *Kern High School Dist.*, the court rejected the claimants' argument that "the absence of a reasonable alternative to participation is a de facto [reimbursable state] mandate" and reasoned that the claimants were free to decide whether to continue to participate in optional programs, even though doing so caused them to incur additional program-related costs.[287]

The Commission finds that claimant has failed to submit substantial evidence showing that it is practically compelled by state law to comply with the requirements imposed by the test claim order. Therefore, the Commission finds that the test claim order does not impose a state-mandated program on the claimant.

Accordingly, the Commission makes no findings on whether the test claim order results in increased costs mandated by the state or the applicability of Government Code section 17556(d), as briefed by the parties.

V. Conclusion

Based on the forgoing analysis, the Commission finds that the test claim order does not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 and denies the Test Claim.

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[286] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816 ("'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"); *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); *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1367 (practical compulsion requires a "concrete showing" that a failure to engage in the activities at issue will result in "severe adverse consequences").

[287] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 752-753.

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.

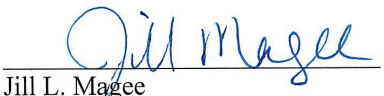
On September 6, 2023, I served the:

- **Current Mailing List dated August 25, 2023**
- **Proposed Decision issued September 6, 2023**

  Lead Sampling in Schools: Public Water System No. 3710020, 17-TC-03-R
  On Remand from *City of San Diego v. Commission on State Mandates*, Court of Appeal, Third Appellate District, Case No. C092800; Judgment and Writ of Mandate issued by the Sacramento County Superior Court, Case No. 34-2019-80003169-CU-WM-GDS; Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017
  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 September 6, 2023 at Sacramento, California.



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

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 8/25/23

Claim Number: 17-TC-03-R

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

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

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

Ron Ahlers, 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

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

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

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

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

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

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

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

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

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

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

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

Lincoln Bogard, Administrative Services Director, *City of Banning*
99 East Ramsey Street, Banning, CA 92220
Phone: (951) 922-3118
lbogard@banningca.gov

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

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

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

Jessica Brown, Chief Financial Officer, *City of Fontana*
8353 Sierra Avenue, Fontana, CA 92335
Phone: (909) 350-7679
jbrown@fontana.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

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

David Cain, Director of Finance, *City of El Segundo*
350 Main Street, El Segundo, CA 90245-3813
Phone: (310) 524-2315
dcain@elsegundo.org

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

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.com

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
achinncrs@aol.com

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

Vivian Chu, Finance Director, *City of Sausalito*
420 Litho Street, Sausalito, CA 94965
Phone: (415) 289-4150
vchu@sausalito.gov

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

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

Edgar Cisneros, City Administrator, *City of Commerce*
2535 Commerce Way, Commerce, CA 90040
Phone: (323) 722-4805
ecisneros@ci.commerce.ca.us

Michael Coleman, *Coleman Advisory Services*
2217 Isle Royale Lane, Davis, CA 95616
Phone: (530) 758-3952
coleman@muni1.com

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

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

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

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

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

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

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

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

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

Amy Cunningham, Administrative Services Director, *City of Novato*
922 Machin Avenue, Novato, CA 94945
Phone: (415) 899-8918
ACunningham@novato.org

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

Cindy Czerwin, Director of Administrative Services, *City of Watsonville*
250 Main Street, Watsonville, CA 95076
Phone: (831) 768-3450
cindy.czerwin@cityofwatsonville.org

Victor Damiani, Finance Director, *City of Seaside*
440 Harcourt Ave, Seaside, CA 93955
Phone: (831) 899-6718
vdamiani@ci.seaside.ca.us

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

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

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

Leticia Dias, Finance Director, *City of Ceres*
2220 Magnolia Street, Ceres, CA 95307
Phone: (209) 538-5757
leticia.dias@ci.ceres.ca.us

Ted Doan, Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Ted.Doan@dof.ca.gov

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

Brian Dossey, City Manager, *City of Colma*
1198 El Camino Real, Colma, CA 94014
Phone: (650) 997-8300
brian.dossey@colma.ca.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

Peggy Ducey, Interim City Manager, *City of Fort Bragg*
416 N Franklin Street, Fort Bragg, CA 94537
Phone: (707) 961-2823
pducey@fortbragg.com

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

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

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

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

Donna Ferebee, *Department of Finance*
915 L Street, Suite 1280, Sacramento, CA 95814
Phone: (916) 445-8918
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

Artie Fields, City Manager, *City of Inglewood*
1 Manchester Boulevard, Inglewood, CA 90301
Phone: (310) 412-5301
AFields@Cityofinglewood.org

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

Kristin Forier, Interim Finance Director, *City of Laguna Niguel*
30111 Crown Valley Parkway, Laguna Niguel, CA 92677
Phone: (949) 362-4361
kforier@cityoflagunaniguel.org

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

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

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

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

Art Galluccci, City Manager, *City of Cerritos*
18125 Bloomfield Ave, Cerritos, CA 90703
Phone: (562) 916-1310
agallucci@cerritos.us

Marlene Galvan, Deputy Finance Officer, *City of Fontana*
8353 Sierra Ave, Fontana, CA 92335
Phone: (909) 350-7671
Mgalvan@fontana.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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Heather Halsey, Executive Director, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
heather.halsey@csm.ca.gov

Sunny Han, Acting Chief Financial Officer, *City of Huntington Beach*
2000 Main Street, Huntington Beach, CA 92648
Phone: (714) 536-5630
Sunny.Han@surfcity-hb.org

Stephen Hannah, Director, City Support Services, *City of Palos Verdes Estates*
340 Palos Verdes Dr West, Palos Verdes Estates, CA 90274

Phone: (310) 378-0383
Shannah@Pvestates.org

Toni Hannah, Director of Finance, *City of Pacific Grove*
300 Forest Avenue, Pacific Grove, CA 93950
Phone: (831) 648-3100
thannah@cityofpacificgrove.org

Jared Hansen, Finance Director, *City of Manteca*
1001 West Center Street, Manteca, CA 95337
Phone: (209) 456-8730
jhansen@manteca.gov

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

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

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

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

Chris Hill, Principal Program Budget Analyst, *Department of Finance*
Local Government Unit, 915 L Street, Sacramento, CA 95814
Phone: (916) 445-3274
Chris.Hill@dof.ca.gov

Tiffany Hoang, Associate Accounting Analyst, *State Controller's Office*
Local Government Programs and Services Division, Bureau of Payments, 3301 C Street, Suite 740, Sacramento, CA 95816
Phone: (916) 323-1127
THoang@sco.ca.gov

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

Clay Holstine, City Manager, *City of Brisbane*
50 Park Place, Brisbane, CA 94005
Phone: (415) 508-2110
cholstine@brisbaneca.org

Mike Howard, Director of Finance, *City of Soledad*
248 Main Street, Soledad, CA 93960
Phone: (831) 674-5562
mhoward@cityofsoledad.com

Lewis Humphries, Finance Director, *City of Newman*
Finance Department, 938 Fresno Street, Newman, CA 95360
Phone: (209) 862-3725
lhumphries@cityofnewman.com

Diego Ibanez, Director of Finance, *City of Tulare*
411 E Kern Ave., Tulare, CA 93274
Phone: (559) 684-4255
dibanez@tulare.ca.gov

Heather Ippoliti, Administrative Services Director, *City of Healdsburg*
401 Grove Street, Healdsburg, CA 95448
Phone: (707) 431-3307
hippoliti@ci.healdsburg.ca.us

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

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

Heather Jennings, Director of Finance, *City of Santee*
10601 Magnolia Avenue, Building #3, Santee, CA 92071
Phone: (619) 258-4100
hjennings@cityofsanteeca.gov

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

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

Talika Johnson, Director, *City of Azusa*
213 E Foothill Blvd, Azusa, CA 91702
Phone: (626) 812-5203
tjohnson@ci.azusa.ca.us

Sarah Johnson-Rios, Assistant City Manager/Admin Services Director, *City of Morro Bay*
595 Harbor Street, Morro Bay, CA 93442
Phone: (805) 772-6217
sjohnson-rios@morrobayca.gov

Susan Jones, Finance Manager, *City of Pismo Beach*
Finance, 760 Mattie Road, Pismo Beach, CA 93449
Phone: (805) 773-7012
swjones@pismobeach.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@cityofranchocordova.org

Will Kaholokula, Finance Director, *City of San Gabriel*
425 South Mission Drive, San Gabriel, CA 91776
Phone: (626) 308-2812
wkaholokula@sgch.org

Dennis Kauffman, Finance Director, *City of Roseville*
311 Vernon Street, Roseville, CA 95678
Phone: (916) 774-5313
dkauffman@roseville.ca.us

Naomi Kelly, City Administrator, *City and County of San Francisco*
City Hall, Room 362, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102
Phone: (415) 554-4851
city.administrator@sfgov.org

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

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

Rafaela King, Finance Director, *City of Monterey*
735 Pacific Street, Suite A, Monterey, CA 93940
Phone: (831) 646-3940
King@monterey.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

Jennifer King, Acting Finance Director, *City of Tustin*
300 Centennial Way, Tustin, CA 92780
Phone: (714) 573-3079
jking@tustinca.org

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

John Kunkel, Interim City Manager, *City of Huron*
36311 Lassen Avenue, PO Box 339, Huron, CA 93234

Phone: (559) 945-2241
John@cityofhuron.com

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

Tamara Layne, *City of Rancho Cucamonga*
10500 Civic Center Drive, Rancho Cucamonga, CA 91730
Phone: (909) 477-2700
Tamara.Layne@cityofrc.us

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

Linda Leaver, Finance Director, *City of Crescent City*
377 J Street, Crescent City, CA 95531
Phone: (707) 464-7483
lleaver@crescentcity.org

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

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

Shally Lin, Director of Finance - Interim, *City of Fountain Valley*
10200 Slater Avenue, Fountain Valley, CA 92708
Phone: (714) 593-4418
Shally.Lin@fountainvalley.org

Gilbert A. Livas, City Manager, *City of Downey*
11111 Brookshire Ave, Downey, CA 90241-7016
Phone: (562) 904-7102
glivas@downeyca.org

Rudolph Livingston, Finance Director, *City of Ojai*
PO Box 1570, Ojai, CA 93024
Phone: N/A
livingston@ojaicity.org

Juan Lopez, Finance Director, *City of Marina*
211 Hillcrest Avenue, Marina, CA 93933
Phone: (831) 884-1221
jlopez@cityofmarina.org

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

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

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

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

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
Finance1@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

Pio Martin, Finance Manager, *City of Firebaugh*
Finance Department, 1133 P Street, Firebaugha, CA 93622
Phone: (559) 659-2043
financedirector@ci.firebaugh.ca.us

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

Elizabeth McGinnis, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
Elizabeth.McGinnis@csm.ca.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

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

Paul Melikian, *City of Reedley*
1717 Ninth Street, Reedley, CA 93654
Phone: (559) 637-4200
paul.melikian@reedley.ca.gov

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

Olga Mendoza, *City of Ceres*
2220 Magnolia Street, Ceres, CA 95307
Phone: (209) 538-5766
olga.mendoza@ci.ceres.ca.us

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

Dawn Merchant, *City of Antioch*
P.O. Box 5007, Antioch, CA 94531
Phone: (925) 779-7055
dmerchant@ci.antioch.ca.us

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

Brett Miller, Director of Administrative Services, *City of Hollister*
375 Fifth Street, Hollister, CA 95023
Phone: (831) 636-4301
brett.miller@hollister.ca.gov

Leyne Milstein, Director of Finance, *City of Sacramento*
915 I Street, 5th Floor, Sacramento, CA 98514
Phone: (916) 808-5845
lmilstein@cityofsacramento.org

Greg Minor, City Administrator, *City of Oakland*
1 Frank H Ogawa Plaza, Oakland, CA 94612
Phone: (510) 238-3301
gminor@oaklandca.gov

April Mitts, Finance Director, *City of St. Helena*
1480 Main Street, Saint Helena, CA 94574
Phone: (707) 968-2751
amitts@cityofsthelena.org

Kevin Mizuno, Finance Director, *City of Clayton*
Finance Department, 600 Heritage Trail, Clayton, CA 94517
Phone: (925) 673-7309
kmizuno@ci.clayton.ca.us

Bruce Moe, City Manager, *City of Manhattan Beach*
1400 Highland Ave., Manhattan Beach, CA 90266
Phone: (310) 802-5302
bmoe@citymb.info

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

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

Debbie Moreno, *City of Anaheim*
200 S. Anaheim Boulevard, Anaheim, CA 92805
Phone: (716) 765-5192
DMoreno@anaheim.net

Isaac Moreno, Finance Director, *City of Turlock*
156 South Broadway, Suite 230, Turlock, CA 95380
Phone: (209) 668-6071
IMoreno@turlock.ca.us

Walter Munchheimer, Interim Administrative Services Manager, *City of Marysville*
Administration and Finance Department, 526 C Street, Marysville, CA 95901
Phone: (530) 749-3901
wmunchheimer@marysville.ca.us

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

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@morgan-hill.ca.gov

Andy Nichols, *Nichols Consulting*
1857 44th Street, Sacramento, CA 95819
Phone: (916) 455-3939
andy@nichols-consulting.com

Dale Nielsen, Director of Finance/Treasurer, *City of Vista*
Finance Department, 200 Civic Center Drive, Vista, CA 92084
Phone: (760) 726-1340
dnielsen@ci.vista.ca.us

David Noce, Accounting Division Manager, *City of Santa Clara*
1500 Warburton Ave, Santa Clara, CA 95050
Phone: (408) 615-2341
dnoce@santaclaraca.gov

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

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

Nick Pegueros, Administrative Services Director, *City of Saratoga*
13777 Fruitvale Avenue, Saratoga, CA 94025
Phone: (408) 868-1221
npegueros@saratoga.ca.us

David Persselin, Finance Director, *City of Fremont*
3300 Capitol Ave, Fremont, CA 94538
Phone: (510) 494-4790
DPersselin@fremont.gov

Marie Peterson, Interim Finance Director, *City of Patterson*
1 Plaza Circle, Patterson, CA 95363
Phone: (209) 895-8047
mpeterson@ci.patterson.ca.us

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

Bret M. Plumlee, City Manager, *City of Los Alamitos*
3191 Katella Ave., Los Alamitos, CA 90720
Phone: (562) 431-3538 ext.
bplumlee@cityoflosalamitos.org

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

Tim Potanovic, Interim City Manager, *City of Corning*
794 Third Street, Corning, CA 96021
Phone: (530) 824-7020
tpotanovic@corning.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

Rajneil Prasad, Deputy Finance Director, *City of Napa*
955 School Street, PO Box 660, Napa, CA 94559
Phone: (707) 257-9510
rprasad@cityofnapa.org

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

Tim Przybyla, Finance Director, *City of Oakley*
Finance Department, 3231 Main Street, Oakley, CA 94561
Phone: (925) 625-7010
przybyla@ci.oakley.ca.us

Marc Puckett, Interim Director of Finance, *City of Barstow*
220 East Mountain View Street, Barstow, CA 92311
Phone: (760) 255-5117
mpuckett@barstowca.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

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

Karan Reid, Finance Director, *City of Concord*
1950 Parkside Drive, Concord, CA 94519
Phone: (925) 671-3178
karan.reid@cityofconcord.org

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

Rachelle Rickard, City Manager, *City of Atascadero*
Finance Department, 6500 Palma Ave, Atascadero, CA 93422
Phone: (805) 461-7612
rrickard@atascadero.org

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

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
rrockwell@indio.org

Paul Rodrigues, Director of Finance, *City of Pittsburg*
65 Civic Avenue, Pittsburg, CA 94565
Phone: (925) 252-4848
prodrigues@pittsburgca.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

David Rowlands, City Manager, *City of Fillmore*
250 Central Avenue, Fillmore, CA 93015
Phone: (805) 524-1500
drowlands@ci.fillmore.ca.us

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

Leticia Salcido, *City of El Centro*
1275 Main Street, El Centro, CA 92243

Phone: N/A
lsalcido@ci.el-centro.ca.us

Robert Samario, *City of Santa Barbara*
P.O. Box 1990, Santa Barbara, CA 93102-1990
Phone: (805) 564-5336
BSamario@SantaBarbaraCA.gov

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

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

Robin Scattini, Finance Manager, *City of Carmel*
PO Box CC, Carmel, CA 93921
Phone: (831) 620-2019
rscattini@ci.carmel.ca.us

Jay Schengel, Finance Director/City Treasurer, *City of Clovis*
1033 5th Street, Clovis, CA 93612
Phone: (559) 324-2113
jays@ci.clovis.ca.us

Donna Schwartz, City Clerk, *City of Huntington Park*
6550 Miles Avenue, Huntington park, CA 90255-4393
Phone: (323) 584-6231
DSchwartz@hpca.gov

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

Tami Scott, Administrative Services Director, *Cathedral City*
Administrative Services, 68700 Avenida Lalo Guerrero, Cathedral City, CA 92234
Phone: (760) 770-0356
tscott@cathedralcity.gov

Kelly Sessions, 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@lahabraca.gov

Terry Shea, Finance Director, *City of Canyon Lake*
31516 Railroad Canyon Road, Canyon Lake, CA 92587
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, *Commission on State Mandates*
980 9th Street, Suite 300, Sacramento, CA 95814
Phone: (916) 323-3562
carla.shelton@csm.ca.gov

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

Stephanie Sikkema, Finance Director, *City of West Covina*
1444 West Garvey Street South, West Covina, CA 91790
Phone: (626) 939-8438
ssikkema@westcovina.org

Kim Sitton, Director of Finance, *City of Corona*
400 South Vicentia Ave., Corona, CA 92882
Phone: (951) 279-3532
Kim.Sitton@CoronaCA.gov

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

Laura Snideman, City Manager, *City of Calistoga*
1232 Washington Street, Calistoga, CA 94515
Phone: (707) 942-2802
LSnideman@ci.calistoga.ca.us

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

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

Kent Steffens, City Manager, *City of Sunnyvale*
456 West Olive Avenue, Sunnyvale, CA 94086
Phone: (408) 730-7911
ksteffens@ci.sunnyvale.ca.us

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

Edmund Suen, Finance Director, *City of Foster City*
610 Foster City Blvd., Foster City, CA 94404
Phone: (650) 853-3122
esuen@fostercity.org

Karen Suiker, City Manager, *City of Trinidad*
409 Trinity Street, PO Box 390, Trinidad, CA 95570
Phone: (707) 677-3876
citymanager@trinidad.ca.gov

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

Leo Tacata, Finance Director, *City of Rohnert Park*
130 Avram Avenue, Rohnert Park, CA 94928-1180
Phone: (707) 588-2247
ltacata@rpcity.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

Lynn Theissen, Finance Director, *City of Chico*
411 Main St., Chico, CA 95927
Phone: (530) 879-7300
lynn.theissen@chicoca.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

Evelyn Tseng, *City of Newport Beach*
100 Civic Center Drive, Newport Beach, CA 92660
Phone: (949) 644-3127
etseng@newportbeachca.gov

Stefanie Turner, Finance Director, *City of Rancho Santa Margarita*
Finance Department, 22112 El Paseo, Rancho Santa Margarita, CA 92688
Phone: (949) 635-1808
sturner@cityofrsm.org

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

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

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

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

Norman Veloso, Director of Finance, *City of San Pablo*
1000 Gateway Avenue, San Pablo, CA 94806
Phone: (510) 215-3021
NormanV@sanpabloca.gov

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

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

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

Nicholas Walker, Finance Director, *City of Lakeport*
225 Park Street, Lakeport, CA 95453
Phone: (707) 263-5615
nwalker@cityoflakeport.com

Joe Ware, Finance Director, *City of Lemon Grove*
3232 Main Street, Lemon Grove, CA 91945
Phone: (619) 825-3803
jware@lemongrove.ca.gov

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

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

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

Chris Woidzik, Finance Director, *City of Avalon*
Finance Department, 410 Avalon Canyon Rd., Avalon, CA 90704
Phone: (310) 510-0220
Scampbell@cityofavalon.com

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.pacifica.ca.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

Bobby Young, *City of Costa Mesa*
77 Fair Drive, Costa Mesa, CA 92626
Phone: N/A
Bobby.Young@costamesaca.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

Bill Zenoni, Finance Director, *City of Emeryville*
1333 Park Ave., Emeryville, CA 94608
Phone: (510) 596-4352
bill.zenoni@emeryville.org

Helmholst 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