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RECEIVED
October 28, 2024
Commission on State Mandates

October 28, 2024

Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Re: City of Dublin and Alameda Countywide Clean Water Program Comments on Draft Proposed Decision in Test Claim 10-TC-02 (Consolidated with 10-TC03 and 10- TC-05), California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074, Provisions C.2.b., C.2.c., C.2.e., C.2.f., C.8.b., C.8.c., C.8.d., C.8.e.i., ii., and vi., C.8.f., C.8.g.vi., vii., C.8.h., C.10.a., C.10.b., C.10.c., C.10.d., C.11.f., and C.12.f.

Dear Ms. Halsey:

I am writing as Claimant Representative for Claimant City of Dublin in pending consolidated Test Claims Test Claim 10-TC-02, 10-TC-03 and 10-TC-05 ("Consolidated Test Claims"), and on behalf of the Alameda Countywide Clean Water Program ("ACCWP") as an interested member of the public,[1] to provide comments on the Draft Proposed Decision for the Consolidated Test Claims, dated July 9, 2024. Like the City of Dublin and other claimants in this matter, the ACCWP entities are subject to expensive unfunded permit conditions imposed by the State in their stormwater discharge permit. The City of Dublin and ACCWP entities are collectively referred to herein as the "Dublin Claimants." The requirements in the ACCWP entities' stormwater permit at issue in the Consolidated Test Claims are estimated to collectively cost at least $12,088,210 for all -permittees. (Claimant Santa Clara County's Amended Narrative Statement In Support of Test Claim 10-TC-03 at 37.)

[1] The ACCWP is a consortium of stormwater agencies made up of Alameda County, the cities of Alameda, Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Piedmont, Pleasanton, San Leandro, Union City, the Alameda County Flood Control and Water Conservation District, and the Zone 7 Water Agency.

We appreciate the Commission staff's effort and the careful and thorough analysis reflected in the Draft Proposed Decision. We agree with the Draft Decision that the requirements under Sections C.8.d.iii., C.8.e.vi., C.8.g.ii., vii., C.10.a.i, ii, iii, C.10.b.i., C.10.c., C.10.d.i.,

ii., C.11.f., and C.12.f. of Order No. R2-2009-0074 are new programs or higher levels of service. We disagree, however, with the Draft Decision's conclusions that Sections C.2.b., C.2.c., C.2.e.,C.2.f, C.8.b., C.8.c., C.8.h., C.8.d.i., C.8.d.ii., C.8.e.i., C.8.e.ii., C.8.e.iii., C.8.e.iv., C.8.e.v, C.8.g.i., C.8.g.iii., C.8.g.v., and C.8.g.vi. are not reimbursable state mandates. The Dublin Claimants do not further address these issues at this time in this comment letter, but join in the comments of Santa Clara County and San Jose Claimants which demonstrate that Sections C.2.b., C.2.c., C.2.e.,C.2.f, C.8.b, C.8.c. C.8.d.i and C.8.d.ii of Order No. R2-2009-0074 impose new programs or higher levels of service and because public entities are legally and practically compelled to construct and maintain their public property.

The comments of the Dublin Claimants are as follows:

I. Summary of Comments

SB231 Does Not Apply to Sections C.8, C.10, C.12 and C.13 of Order No. R2-2009-0074 ("Permit"). Under Article XIII B, Section 6, of the California Constitution, new programs or higher levels of service mandated by the state on local agencies are subject to subvention unless subject to an exception, including whether the local agency has the authority to levy property-related fees to fund the mandate. The California Supreme Court has held that a state agency asserting an exception to subvention "***bears the burden of demonstrating that it applies***." (*Department of Finance* v. *Comm. on State Mandates* (2016) 1 Cal.5th 749, 772 ("*Department of Finance I")* [emphasis added].) This means that state agencies opposing subvention have the burden of showing, by a preponderance of the evidence in the record, that an exception applies. (See, e.g., Cal. Evid. Code § 115 ["Burden of proof" means "the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court…. Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence"].)

In the Second Appellate District's subsequent decision in *Department of Finance v. Comm. of State Mandates* (2021) 59 Cal.App.5th 546, at pages 568-69 ("*Department of Finance II*"), related to Los Angeles County's stormwater permit, the court further clarified that state agencies have the burden of proof to show local agencies have both the procedural and substantive authority to

levy property-related fees[2] ("Not only have the state agencies failed to cite to the record or authority to support the point that a fee imposed on property owners adjacent to transit stops could satisfy the substantive constitutional requirements, but common sense dictates that the vast majority of persons who would use and benefit from trash receptacles at transit stops are not the owners of adjacent properties but rather pedestrians, transit riders, and other members of the general public; any benefit to property owners in the vicinity of bus stops would be incidental"). In particular, in order to meet the substantive obligation, the court in *Department of Finance II* held that state agencies must prove that a fee or charge imposed on a parcel or upon a person as an incident of property ownership:

- "[does] not exceed the proportional cost of the service attributable to the parcel,"
- is for a service that "is actually used by, or immediately available to, the owner of the property in question," or
- is not imposed "for general governmental services … where the service is available to the public at large in substantially the same manner as it is to property owners." (*Department of Finance II,* 59 Cal.App.5th at 568-69.)

Here, and as shown more fully below in this comment letter, SB231 does not apply to Sections C.8., C.10, C.11.f and C.12.f because (1) the Draft Proposed Decision fails to acknowledge the San Francisco Regional Water Quality Control Board ("Regional Board") and the California Department of Finance ("Finance") (collectively, "State Agencies") have to carry the burden of proof required by the California Supreme Court in *Department of Finance I*, (2) the Draft Proposed Decision ***cites no evidence in the record*** that the State Agencies have established each of the three elements listed above for each permit section at issue to successfully assert the fee authority exception claim and (3) as a matter of fact and law, the State Agencies cannot meet their burden of proof.

Accordingly, the Dublin Claimants respectfully request the Commission (1) reconsider applicability of SB231 to Sections C.8.d.iii., C.8.e.vi., C.8.g.ii., vii., C.10.a.i, ii, iii, C.10.b.i., C.10.c., C.10.d.i., ii., C.11.f., and C.12.f. in light of the

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[2] While the California Supreme Court decision *Department of Finance I* related to the federal mandate exception to subvention, *Department of Finance II* confirmed the burden proof announced by the Supreme court also applies to the fee authority exception.

controlling authority cited herein as it compels the conclusion that the State Agencies have not come close to carrying their burden of proof as required under *Department of Finance I* and *Department of Finance II* and (2) delete all language and findings in the Draft Proposed Decision that limit reimbursable expenditures under these sections to pre-2018 costs.

II. The Draft Proposed Decision Improperly Finds That SB231 Applies to Sections C.8.d.iii., C.8.e.vi., C.8.g.ii., vii., C.10.a.i, ii, iii, C.10.b.i., C.10.c., C.10.d.i., ii., C.11.f., and C.12.f. of the Permit, and Assumed Local Agencies Have the Substantive Authority to Levy Fees

A. The Draft Proposed Decision

The Draft Proposed Decision found that activities associated with conducting a geomorphic Study (Section C.8.d.iii.), developing a design for a sediment delivery estimate/sediment budget (Section C.8.e.vi.), citizen monitoring participation (Section C.8.f.), and monitoring/reporting and notice requirements are new activities are mandated by the state and impose a new program or higher level of service (Sections C.8.g.ii., vii.). (pp. 174-283.) The Draft Proposed Decision also found that activities associated with the short term trash load reduction plan (Section C.10.a.i.), the baseline trash load and trash load reduction tracking method (Section C.10.ii.), minimum full trash capture (Section C.10.a.iii.), submitting selected trash hot spots to the Regional Board by July 1, 2010 (C.10.b.ii.), and submitting the long term trash reduction plan (Section C.10.c.) are new activities are mandated by the state and impose a new program or higher level of service. (pp. 283, 290-335.) Additionally, the Draft Proposed Decision found that activities associated with mercury and PCB pilot studies (Sections C.11.f. and C.12.f.) are new activities are mandated by the state and impose a new program or higher level of service. (pp. 335-350.) The Draft Proposed Decision further found that from December 1, 2009, through December 31, 2017, Government Code section 17556(d) does not apply and there are costs mandated by the state for new state-mandated requirements under the sections identified above. (pp. 374 et seq.)

However, according to the Draft Proposed Decision, beginning January 1, 2018, "when property-related fees are subject only to the voter protest provisions of article XIII D, section 6 of the California Constitution, then Government Code section 17667(d) applies, and there are no costs mandated by the state." The Draft Proposed Decision makes this finding based on an application of SB231,

which amended Government Code sections 53750 and 53751[3] and purports to define "sewer" to include stormwater sewers subject only to the voter protest provisions of article XIII D, thus purporting to broaden the authority of local agencies levy property-related fees for stormwater-infrastructure.[4] The Draft Proposed Decision's *entire* analysis in its 384 pages in applying SB231 to the permit sections at issue is as follows

> The Commission is required to presume statutes are constitutional. Article III, section 3.5 of the California Constitution prohibits administrative agencies, such as the Commission, from refusing to enforce a statute or from declaring a statute unconstitutional (as requested by the claimants)….
>
> The Commission also finds, pursuant to the decision of the Third District Court of Appeal, Government Code

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[3] SB231 and Government Code sections 53750 and 53751 are attached hereto as Exhibit A.

[4] A cloud hangs over the constitutionality of SB231. The rationale for SB231 was *Howard Jarvis Taxpayers Assn. v. City of Salinas* (2002) 98 Cal.App.4th 1351 ("*City of Salinas*"), which held that the exclusion from the majority taxpayer vote requirement for property-related fees for "sewer services" in article Xlll D, section 6(c) of the California Constitution did not cover storm sewers or storm drainage fees. In 2017, fifteen years after *City of Salinas*, the Legislature enacted SB 231. The final word as to the validity of any statute purporting to interpret the California Constitution is left to the courts and, for this reason, the ultimate validity of SB 231 is not before the Commission. The Dublin Claimants, therefore, reserve the right to argue that it would be error, however, for the Commission to cite SB231 to deny Claimants a subvention of funds for costs expended after January 1, 2018. This is so because in seeking to overrule *City of Salinas,* SB231 attempts to reinterpret the Constitution in contradiction of the intent of the voters when they adopted Proposition 218. Because the Constitution cannot be modified by a legislative enactment, SB231 is unconstitutional on its face. (*County of Los Angeles v. Comm. on State Mandates* (2007) 150 Cal.App.4th 898, 921.) In fact, in *Dept. of Finance v. Comm. on State Mandates* (2022) 85 Cal.App.5th 535, 568 ("*San Diego Appeal*"), the court held that in adopting Proposition 218, the voters understood "sewer" or "sewer services" be limited to sanitary sewers and not to stormwater infrastructure. However, the court in the *San Diego Appeal* did not go as far to find SB231 unconstitutional. Given the uncertainty regarding the constitutionality of SB231, the Commission should be particularly cautious in its broad application as set forth in the Draft Proposed Decision.

> sections 53750 and 53751, absent a clear and unequivocal statement to the contrary, operate *prospectively* beginning January 1, 2018.
>
> Accordingly, the claimants do not have fee authority sufficient as a matter of law to cover the costs of the new state-mandated activities from December 1, 2009, through December 31, 2017, when voter approval of stormwater fees is required, and there are costs mandated by the state during that time. However, reimbursement is not required to the extent the claimants received fee revenue and used that revenue to pay for the state-mandated activities, or used any other revenues, including but not limited to grant funding, assessment revenue, and federal funds, that are *not* the claimants' proceeds of taxes [note omitted].
>
> Pursuant to Government Code sections 53750 and 53751 and *Paradise Irrigation District*, there are no costs mandated by the state beginning January 1, 2018.

(pp. 377-378.)

B. The Second Appellate District's Decision in *Department of Finance II*

Department of Finance II, supra, 59 Cal.App.5th 546, involved the Los Angeles Regional Water Quality Control Board's stormwater permit that required the local agencies in Los Angeles County to install and maintain trash receptacles at transit stops, among other requirements. Like in the Proposed Draft Decision here, in *Department of Finance II* the Second Appellate District held that local governments are entitled to subvention for stormwater permit trash reduction requirements in the stormwater permit for the County of Los Angeles because they were new requirements or higher levels of service. The Proposed Draft Decision cites *Department of Finance II* in its analysis regarding Sections C.10.a.i., C.10.a.ii., C.10.a.iii., C.10.b.i., C.10.c., C.10.d.i. and C.10.d.ii.[5]

The Court of Appeal in *Department of Finance II* then addressed the issue of whether the local agencies have the authority to levy fees to fund the state-mandated programs under Government Code section 17556(d). The Court found that the local agencies have the authority to impose a regulatory fee if (1) the amount of the fee does not exceed the reasonable costs of providing the

[5] See, e.g., pp. 21, 42, 88-89, 91.

services for which it is charged; (2) the fee is not levied for unrelated revenue purposes; and (3) the amount of the fee bears a reasonable relationship to the burdens created by the fee payers' activities or operations or the benefits the fee payers receive from the regulatory activity.

With regard to the trash receptacle requirements, the Court of Appeal first noted the Commission's finding that "[b]ecause the trash receptacles are required to be placed at transit stops that would typically be on city property (sidewalks) or transit district property (for bus, metro, or subway stations), there are no entities on which the [local governments] would have authority to impose the fees." In response, the state agencies argued that transit agencies or transit riders could be charged under Government Code section 54999.7(a), which states that public agencies providing public utility service may impose a fee for their service "provided to [another] public agency." The Court disagreed, finding the local governments' "installation and maintenance of trash receptacles at transit stops pursuant to the permit is not a service 'provided to a public agency' within the meaning of the statute" because the receiving public agency "is [not] a public utility customer that solicited and uses the services for which it is charged."

The state agencies next argued that the local governments could levy a fee on the property owners "in the vicinity of the trash receptacles" "in accordance with the burdens created and benefits enjoyed by each parcel." In rejecting this argument, the Court of Appeal first notes that Article XIII D of the California Constitution provides both procedural and substantive hurdles to such fees. Procedurally, Article XIII D sets forth protest procedures and voter approval for fees and charges. *Substantively, under Article XIII D, a fee or charge may not be imposed on a parcel or upon a person as an incident of property ownership unless, among other requirements, the fee or charge "[does] not exceed the proportional cost of the service attributable to the parcel," the fee or charge is for a service that "is actually used by, or immediately available to, the owner of the property in question," and it is not imposed "for general governmental services … where the service is available to the public at large in substantially the same manner as it is to property owners.*" The Court found that "[e]ven if we assume that a fee imposed on adjacent property owners for trash collection at transit stops could overcome the procedural hurdles,"[6] *the state agencies have failed to*

[6] According to the court, "[t]he state agencies discuss at some length how the procedural requirements under article XIII D of the California Constitution do not apply to fees for sewer and refuse collection services and, if they do apply, they do not negate the local government's authority to impose fees and charges to pay for the trash receptacle. (See Cal. Const., art XIII D, § 6, subd. (d); [Govt

meet their burden to show the local agencies have the substantive authority to impose a fee on property owners:[7]

> Not only have the *state agencies failed to cite to the record or authority to support the point that a fee imposed on property owners adjacent to transit stops could satisfy* the substantive constitutional requirements, but common sense dictates that the vast majority of persons who would use and benefit from trash receptacles at transit stops are not the owners of adjacent properties but rather pedestrians, transit riders, and other members of the general public; any benefit to property owners in the vicinity of bus stops would be incidental. Even if the state agencies could establish that the need for the trash receptacles is in part attributable to adjacent property owners and that the property owners would use the trash receptacles (see Cal. Const., art. XIII D, § 6, subd. (b)(3)–(4)), the placement of the receptacles at public transit stops makes the "service available to the public at large in substantially the same manner as it is to property owners" (*id.*, art. XIII D, § 6, subd. (b)(3)). *The state agencies, therefore, failed to establish that the local governments could impose on property owners adjacent to transit stops a fee that could satisfy these constitutional requirements*.

Code] §§ 53750, subd. (k), 53751, subd. (*l*); *Paradise Irrigation*, *supra*, 33 Cal.App.5th at p. 194, 244 Cal.Rptr.3d 769)." (*Department of Finance II,* 59 Cal.App.5th at 568.) Government Code sections 53750 and 53751 were the statutory provisions amended by SB231. *Thus, the court found that for SB231 to apply, the State Agencies have the burden of proof to show that local agencies have* ***both*** *the procedural and substantive authority to levy property related fees apply.*

[7] As noted in the summary of this comment, in a prior 2016 subvention decision relating to the County of Los Angeles' stormwater permit, the California Supreme Court previously found that a party claiming the applicability of federal mandate exception to subvention "bears the burden of demonstrating that it applies." (*Department of Finance I, supra*, 1 Cal.5th at 772*.)* The Second Appellate District's subsequent 2021 subvention decision regarding the County of Los Angeles' stormwater permit, *Department of Finance II*, supra, 59 Cal.App.5th 546*,* applied that burden to the State Agencies' claimed fee authority exception to subvention.

> (*Department of Finance II,* 59 Cal.App.5th at 568-69 [emphasis added].)

Third, the Court of Appeal addressed whether Health and Safety Code section 5471(a) provides the necessary authority. That section provides that "any entity shall have power, by an ordinance or resolution approved by a two-thirds vote of the members of the legislative body thereof, to prescribe, revise and collect, fees, tolls, rates, rentals, or other charges for services and facilities furnished by it, either within or without its territorial limits, in connection with its water, sanitation, storm drainage, or sewerage system." The Court rejected the State Agencies' argument that this provision provides the necessary authority: "To the extent a fee enacted under [section 5471] is imposed on transit agencies or property owners, it cannot survive scrutiny for the reasons explained above [with respect to section 54999.7(a) and Article XIII D]; and no cogent argument has been made as to how a fee could be imposed on pedestrians or transit riders who would be the primary users and beneficiaries of the trash receptacles." Because the state agencies could point to no authority that permits the local agencies to levy fees to pay for the trash receptacle requirements, the Court held the costs of this requirement are subject to subvention under section 6 and must be reimbursed.

Thus, the Court of Appeal in *Department of Finance II* confirmed that the expansion of the exception to subvention under SB231 is not applied as an absolute legal bar as the Proposed Draft Decision implies, but that the State Agencies have an affirmative burden of proof to demonstrate that local agencies have the substantive authority – both as a matter of law and fact – to levy fees on property owners for the permit requirement.

C. The State Agencies Have Not and Cannot Meet Their Burden to show that Local Agencies Have the Authority to Levy Fees on Property Owners for Sections C.8.d.iii., C.8.e.vi., C.8.g.ii., vii., C.10.a.i, ii, iii, C.10.b.i., C.10.c., C.10.d.i., ii., C.11.f. and C.12.f.

1. As a Matter of Law, the State Agencies Have Not Met Their Burden

As described above, the Proposed Draft Decision applies SB231 uniformly to all sections for which it finds a new program or higher level of service: Sections C.8.d.iii., C.8.e.vi., C.8.g.ii., vii., C.10.a.i, ii, iii, C.10.b.i., C.10.c., C.10.d.i., ii., C.11.f. and C.12.f., without any recognition or application of the State Agencies' burden to show an exception to subvention applies – here, a substantive basis to levy a property-related fee as required by the Second Appellate District's 2022

decision in *Department of Finance II* (as noted above, this burden was articulated by the California Supreme Court's 2016 decision in *Department of Finance I").*

Furthermore, in their responses to the consolidated Test Claims at issue in the Draft Proposed Decision as demonstrated in the table below, the State Agencies do not even attempt to meet their burden to show a substantive basis to levy a property-related fee as demanded by *Department of Finance* and *Department of Finance I.*

Date	State Agency	Discussion Re Trash Receptacles
May 17, 2011 (three nearly identical letters addressing 10-TC-02, 10-TC-03, 10-TC 05)	Finance	None of the letters address authority to levy fees on property owners.
May 17, 2011 (format corrected September 2, 2016	Regional Board	"…. the Board believes that the local agencies possess fee authority within the meaning of section 17556, subdivision (d), of the Government Code such that no reimbursement by the state is required. All of the Claimants have the ability to charge fees to businesses to cover inspection costs. Depending on the circumstances, there may be limitations concerning the percent of voters or property owners who must approve assessments under California law, but cities and counties can and do assess fees on residents and businesses to fund their storm water programs. The cities and the County have failed to show that they must use tax monies to pay for these requirements. Any "additional" costs that could conceivably be considered additional to the federal mandate would be de minimis and would not require payment from tax monies. While the Claimants estimate the costs to implement the challenged provisions to be substantial over the Permit's term, the Permit continues and refines many of the requirements of Claimants' prior permits" (p. 24 of 66; see also pp. 48 through 55 of 66 [lengthy discussion on C.10 trash provisions at of that does not address the substantive authority to levy fees whatsoever].) **Response:** The Regional Board simply relies on the conclusory statement that does not attempt to meet its burden of proof demonstrating local agencies have the substantive authority to levy fees on property owners. This

Date	State Agency	Discussion Re Trash Receptacles
		is inadequate. As stated above, "burden of proof" means the State Agencies have "the obligation … to establish *by evidence* a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Cal. Evid. Code § 115.)
Dec. 20, 2016 (Response to request for add'l briefing)	Regional Board	"…. Similarly, the MRP claimants are not required to use taxes to pay for the costs of the programs, and can levy fees, such as inspection fees. The claimants have the ability to charge fees to cover development program costs. In addition, the claimants may impose the cost of storm drain connections on new development. (See, e.g., Att. 11, San Jose website [describing fee schedule for storm drain connections].) *For other Provisions, cities can and do adopt fees from their residents and businesses that fund their stormwater programs. For example, the City of Alameda has adopted fees for implementation of their programs. (See, e.g., Att. 12, Alameda website [describing stormwater fee structure].) Indeed, Palo Alto recently raised its stormwater fee this year. (See Att. 13, Mercury News article.)* "*Claimants have not demonstrated that they are precluded from establishing or raising fees.* Whether circumstances make it impractical to assess fees is not relevant to the inquiry. (*Connell v. Sup. Ct.* (1997) 59 Cal.App.4th 382, 398 [where statute on its face authorized water districts to levy fees sufficient to pay the costs associated with a regulatory change, there was no right to reimbursement]; *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 812 ["to the extent a local agency … 'has the authority' to charge for the mandated program or increased level of service, that charge cannot be recovered as a state mandated cost"].) Claimants have not submitted evidence demonstrating the fiscal impact or funding sources used to comply with the contested provisions of the MRP. Claimants must establish that they are required to use tax monies to pay for implementation of permit provisions. (Gov. Code §§ 17553, subd. (b)(1)(F) [test claim must identify funding sources, including general purpose funds available for this purpose, special funds and fee authority]; and Gov. Code § 17556, subd. (d).)" (pp.19-21.) --- **Response:** As shown above, the only attempt to show that local agencies have the substantive authority to levy property-related fees is a reference to newspaper article that vaguely states that one agency "has adopted fees for

Date	State Agency	Discussion Re Trash Receptacles
		implementation of their programs." There is no attempt to describe the legal substantive authority for each of the provisions at issue as demanded by *Department of Finance*. Furthermore, the Regional Board incorrectly stated the burden of proof lies with the local agencies – this is simply wrong under *Department of Finance I and II*.
Dec 20, 2016 (Response to request for add'l briefing)	Finance	"Claimants argue they have no or inadequate fee authority to cover the alleged mandated costs incurred for monitoring trashload reduction and stormwater diversion studies. Finance believes claimants do have fee authority undiminished by Propositions 218 or 26. Notably, Proposition 26 specifically excludes assessments and property-related fees imposed in accordance with Proposition 218 from the definition of taxes (Art. XIIIC, § 1, subd. (e)(7)). Further, claimants have authority to impose property-related fees under their police power for alleged mandated permit activities whether or not it is politically feasible to impose such fees via voter approval as may be required by Proposition 218. Local governments can choose not to submit a fee to the voters and voters can indeed reject a proposed fee, but not with the effect of turning permit costs into state reimbursable mandates." "In *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal. App.4th 794, college districts challenged the State Controller's mandate claiming instructions that automatically reduced reimbursement claims by the amount the districts are statutorily authorized to charge for students for health fees, regardless of whether the districts chose to charge the fees or not. The court held that "[to] the extent a local agency or school district 'has the authority' to charge for the mandated program or increased level of service, that charge cannot be recovered as a state-mandated cost." (*Clovis* at p. 812.) The court reasoned that "this basic principle flows from common sense as well. As the Controller succinctly put it, 'Claimants can choose not to require these fees, but not at the state's expense.'" (*ibid.*) "The same reasoning applies to claimants here. They can choose not to put a fee to the voters, or the voters can reject a fee, but not at the state's expense. The application of Proposition 218 does not result in alleged mandate costs recoverable solely from tax proceeds. Sufficient fee authority exists, regardless of political feasibility. Under Government Code section 17556, subdivision (d), claimants have authority to impose fees sufficient to pay for permit activities and they are not eligible for mandate reimbursement."

Date	State Agency	Discussion Re Trash Receptacles
		Response: This argument is simply incorrect. As the Draft Proposed Decision acknowledges at page 366, the Third Appellate District in *Department of Finance v. Commission of State Mandates* (2022) 85 Cal.App.5th 535, 581 rejected these arguments. Further, any ability by local agencies to obtain voter approval to collect fees necessary to comply with MS4 permits does not relieve the State Agencies of their burden to show a substantive legal basis to levy fees on property owners as held by *Department of Finance II* as required to establish a valid claim to the fee authority exception. This burden has not been demonstrated by the State Agencies and, furthermore, cannot be demonstrated.
Dec 20, 2016 (Response to request for add'l briefing)	State Water Resources Control Board	Does not address authority to levy fees on property owners.

2. State Agencies Cannot Meet Their Burden to Cite a Substantive Basis to Levy Fees

For the reasons set forth below, the State Agencies cannot cite and have not cited any facts or authority to levy fees on property owners for the costly requirements under Sections C.8.d.iii., C.8.e.vi., C.8.g.ii., vii., C.10.a.i, ii, iii, C.10.b.i., C.10.c., C.10.d.i., ii., C.11.f. and C.12.f. and, therefore, the purported expansion of the exception under SB231 is not applicable to these provisions.

Provision	Discussion
Monitoring Requirements under C.8.d.iii., C.8.e.vi., C.8.g.ii. and C.8.g.vii.	
Conduct one geomorphic study during the permit term and report the results in the Integrated Monitoring Report (C.8.d.iii.)	According to the Regional Board in the Fact Sheet for Order No. R2-2009-0074, "[a]t present, various efforts are underway to improve geomorphic conditions in creeks, primarily through local watershed partnerships. In addition, local groups are undertaking green stormwater projects with the goal of minimizing the physical and chemical impacts of stormwater runoff on the receiving stream. Such efforts ultimately seek to improve the integrity of the

Provision	Discussion
	waterbodies that receive urban stormwater runoff. The purpose of the Geomorphic Project is to contribute to these ongoing efforts in each Stormwater Countywide Program area." (Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, at p. App I-6 – 1-72 [Order No. R2-2009-007].) As described above, various efforts are underway improve geomorphic conditions in creeks to improve the integrity of the waterbodies that receive urban stormwater runoff. The requirement contributes to that effort. The measure does not benefit specific property owners or even only the citizens of Dublin, but all Bay Area residents and, therefore, is a general government service and not for a service that "is actually used by, or immediately available to, the owner of the property in question." Accordingly. there is no substantive basis to levy property-related fees to pay for this requirement.
Develop a design for a robust sediment delivery estimate/sediment budget in local tributaries (C.8.e.vi.)	The objective of this monitoring is to develop a strong estimate of the amount of sediment entering the Bay from local tributaries and urban drainages. As above, this measure does not benefit specific property owners or even only the citizens of Dublin, but all Bay Area residents and, therefore, is a general government service and not for a service that "is actually used by, or immediately available to, the owner of the property in question." Accordingly, there is no substantive basis to levy property-related fees to pay for this requirement.
Monitoring reporting and notice requirements imposed by Sections C.8.g.ii., C.8.g.vii.	Under C.8.g.ii, Permittees shall submit an Electronic Status Monitoring Data Report no later than January 15 of each year, reporting on all data collected during the foregoing year. Under C.8.g.vii, permittees shall make electronic reports available through a regional data center and notify stakeholders and members of the general public about the availability of electronic and paper monitoring reports.

Provision	Discussion
	As above, this measure does not benefit specific property owners or even only the citizens of Dublin, but all Bay Area residents, and therefore is for a general government service and not for a service that "is actually used by, or immediately available to, the owner of the property in question." Accordingly, there is no substantive basis to levy property-related fees to pay for this requirement.
Trash Load Reduction Requirements under Sections C.10.a.i., C.10.a.ii., C.10.a.iii., C.10.b.i., C.10.c., C.10.d.i., C.10.d.ii.	
Short-Term Trash Load Reduction Plan (Section C.10.a.i.). Each permittee is required to submit a Short-Term Trash Load Reduction Plan, including an implementation schedule, to the Regional Board by February 1, 2012. The Plan shall describe control measures and best management practices, including any trash reduction ordinances, that are currently being implemented and the current level of implementation and additional control measures and best management practices that will be implemented, and/or an increased level of implementation designed to attain a 40 percent trash load reduction from its MS4 by July 1, 2014.	The measure is for a general government service and not for a service that "is actually used by, or immediately available to, the owner of the property in question" as this measure does not benefit specific property owners or even only the citizens of Dublin, but all Bay Area residents. As the Regional Board acknowledges in the Fact Sheet for Order No. R2-2009-0074, "[t]rash and litter are a pervasive problem near and in creeks and in San Francisco Bay. Controlling trash is one of the priorities for this Permit reissuance not only because of the trash discharge prohibition, but also because trash and litter cause particularly major impacts on our enjoyment of creeks and the Bay. There are also significant impacts on aquatic life and habitat in those waters and eventually to the global ocean ecosystem, where plastic often floats, persists in the environment for hundreds of years, if not forever, concentrates organic toxins, and is ingested by aquatic life. There are also physical impacts, as aquatic species can become entangled and ensnared and can ingest plastic that looks like prey, losing the ability to feed properly." (Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, at pp. App I-71 – 1-72 [Order No. R2-2009-007.)[8]

[8] We request the Commission take administrative notice that the City of Dublin does not border the San Francisco Bay.

Provision	Discussion
	That these requirements benefit the public at large and not property owners is admitted by the Regional Board in its discussion of the costs of these programs: "Trash and litter are costly to remove from our aquatic resource environments. Staff from the California Coastal Commission report that the Coastal Cleanup Day budget statewide: $200,000-250,000 for staff Coastal Commission staff, and much more from participating local agencies. The main component of this event is the 18,000 volunteer hours which translates to $3,247,200 in labor, and so is equivalent to $3,250,000-3,500,000 per year to clean up 903,566 pounds of trash and recyclables at $3.60 to $3.90 per pound. This is one of the most cost-effective events because of volunteer labor and donations. The County of Los Angeles spends $20 million per year to sweep beaches for trash, according to Coastal Commission staff." (Exhibit A, Test Claim, 10-TC-02, filed October 13, 2010, at pp. App I-71 [Order No. R2-2009-0074].) For this reason, the State Agencies have not and cannot cite any substantive basis to levy fees on property owners for this requirement. As the court states in *Department of Finance*, "common sense dictates that the vast majority of persons who would use and benefit from trash receptacles at transit stops are not the owners of adjacent properties but rather pedestrians, transit riders, and other members of the general public; any benefit to property owners in the vicinity of bus stops would be incidental." The same applies here.
Baseline Trash Load and Trash Load Reduction Tracking Method (Section C.10.a.ii.). Each permittee, working collaboratively or individually, is required to determine the baseline trash load from its MS4 to establish the basis for trash load reductions and submit the determined load level to the Regional Board by February 1, 2012, along with documentation of the methodology used to determine the load level.	As stated above, this measure is for a general government service and not for a service that "is actually used by, or immediately available to, the owner of the property in question" as this measure does not benefit specific property owners or even only the citizens of Dublin, but all Bay Area residents. Therefore, for the same reasons as above, the State Agencies cannot cite any substantive

Provision	Discussion
	basis to levy fees on property owners for this requirement.
Minimum Full Trash Capture (Section C.10.a.iii.). Except as specified, permittees are required to install and maintain a mandatory minimum number of full trash capture devices by July 1, 2014, to treat runoff from an area equivalent to 30 percent of Retail/Wholesale Land that drains to MS4s within their jurisdictions.	Like the trash receptacles in *Department of Finance*, these devices benefit the general public and any benefit to property owners would be incidental. Thus, for the same reasons as above, this measure is for a general government service and not for a service that "is actually used by, or immediately available to, the owner of the property in question" and the State Agencies have not and cannot cite any substantive basis to levy fees on property owners for this requirement.
Trash Hot Spots (Section 10.b.i., ii., iii.). The Permittees are required to clean up selected Trash Hot Spots to a level of "no visual impact" at least one time per year for the term of the permit. Trash Hot Spots shall be at least 100 yards of creek length or 200 yards of shoreline length.	As above, this measure is for a general government service and not for a service that "is actually used by, or immediately available to, the owner of the property in question" as this measure does not benefit specific property owners or even only the citizens of Dublin, but all Bay Area residents. Any benefit to owners of specific parcels would be incidental and any fees imposed on those parcels would "exceed the proportional cost of the service attributable to the parcel[s]."
Long Term Trash Load Reduction Plan (Section 10.c.). Each Permittee is required to submit a Long-Term Trash Load Reduction Plan, including an implementation schedule, to the Regional Board by February 1, 2014. The Plan shall describe control measures and best management practices, including any trash reduction ordinances, that are being implemented and the level of implementation and additional control measures and best management practices that will be implemented, and "an increased level of implementation" designed to attain a 70 percent trash load reduction from its MS4 by July 1, 2017, and 100 percent by July 1, 2022.	Once again, these measures benefit the general public and any benefit to property owners in would be incidental. Thus, for the same reasons as above, the State Agencies have not and cannot cite any substantive basis to levy fees on property owners for this requirement.
Reporting (Section 10.d.i., ii.). In each Annual Report, each permittee is required to provide a summary of its trash load reduction actions (control measures and best	Once again, these measures benefit the general public and any benefit to property owners would be incidental. Thus, for the same reasons as above, the State Agencies

Provision	Discussion
management practices) including the types of actions and levels of implementation, the total trash loads and dominant types of trash removed by its actions, and the total trash loads and dominant types of trash for each type of action.	have not and cannot cite any substantive basis to levy fees on property owners for this requirement.
Mercury and PCB Pilot Programs under Sections C.11.f. and C.12.f.	
Sections C.11.f. and C.12.f. require the permittees to implement pilot programs to evaluate the reduction in mercury and PCB levels by diverting dry weather and first-flush stormwater flows to sanitary sewers, where they may be treated for these contaminants.	As described by the Regional Board in the Fact Sheet for Order No. R2-2009-0074, these programs are part of the program to implement the mercury and PCB TMDLs for San Francisco Bay and therefore for the improvement of water quality to the benefit of all Bay Area residents. As above, the benefits are to the general public and the State Agencies have not and cannot cite any substantive basis to levy fees on property owners for this requirements.

In sum, under *Department of Finance I* and *Department of Finance II*, the State Agencies have not – and indeed cannot – meet their burden to establish necessary elements of the fee authority exception for the requirements of Sections C.8.d.iii., C.8.e.vi., C.8.g.ii., vii., C.10.a.i, ii, iii, C.10.b.i., C.10.c., C.10.d.i., ii., C.11.f. and C.12.f. Thus, the application of SB231 to these provisions in the Draft Proposed Decision is clearly erroneous. Accordingly, the Dublin Claimants respectfully request the Commission (1) reconsider applicability of SB231 to these sections in light of the controlling authority cited herein as it compels the conclusion that the State Agencies have not come close to carrying their burden of proof as required under *Department of Finance I* and *Department of Finance II* and (2) delete all language and findings in the Draft Proposed Decision that limits reimbursable expenditures under these sections to pre-2018 costs.[9]

[9] Recent test claim Decisions adopted by the Commission similarly broadly and erroneously applied SB231 to stormwater mandates without holding the State Agencies to their burden of proof. (See, e.g., Decision, California Regional Water Quality Control Board, San Diego Region, Order No. R9-2009-0002, 10-TC-11 (adopted October 11, 2023) at p. 373-76; California Regional Water Quality

Thank you for your consideration of our comments.

I declare under penalty of perjury that the foregoing, signed on October 28, 2024, is true and correct to the best of my personal knowledge, information, or belief.

Sincerely,

Gregory J. Newmark

5807447.5

Control Board, San Diego Region, Order No. R9-2010-0016, 11-TC-03 (adopted October 3, 2023) at pp.415-18; California Regional Water Quality Control Board, Santa Ana Region, Order No. R8-2010-0033, 10-TC-07 (adopted March 26, 2023) at pp.415-18.) The arguments raised in this comment letter were not raised by any party in these test claim matters and therefore were not before the Commission in those matters. As the California Supreme Court has stated, "[c]ases are not authority, of course, for issues not raised and resolved." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 943.) Furthermore, even if this issue had been raised, the Commission is not bound by prior erroneous findings. The Ninth Circuit stated, "as Justice Robert Jackson explained long ago, there is 'no reason why [we] should be consciously wrong today, because [we were] unconsciously wrong yesterday.'" (*California River Watch v. City of Vacaville* (9th Cir. 2022) 39 F.4th 624, 633, fn. 3, quoting *Massachusetts v. United States* (1948) 333 U.S. 611, 639–40 (Jackson, J., dissenting).) Indeed, the Chief Justice of the United States Supreme Court wrote just a few months ago that "part of 'judicial humility,' [citation], is admitting and in certain cases correcting our own mistakes, especially when those mistakes are serious [citation]." (*Loper Bright Enterprises v. Raimondo* (2024) __ U.S. __, 144 S.Ct. 2244, 2272.)

EXHIBIT A

SB-231 Local government: fees and charges. (2017-2018)

Date Published: 10/06/2017 09:00 PM

Senate Bill No. 231

CHAPTER 536

An act to amend Section 53750 of, and to add Section 53751 to, the Government Code, relating to local government finance.

[Approved by Governor October 06, 2017. Filed with Secretary of State October 06, 2017.]

LEGISLATIVE COUNSEL'S DIGEST

SB 231, Hertzberg. Local government: fees and charges.

Articles XIII C and XIII D of the California Constitution generally require that assessments, fees, and charges be submitted to property owners for approval or rejection after the provision of written notice and the holding of a public hearing. Existing law, the Proposition 218 Omnibus Implementation Act, prescribes specific procedures and parameters for local jurisdictions to comply with Articles XIII C and XIII D of the California Constitution and defines terms for these purposes.

This bill would define the term "sewer" for these purposes. The bill would also make findings and declarations relating to the definition of the term "sewer" for these purposes.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 53750 of the Government Code is amended to read:

53750. For purposes of Article XIII C and Article XIII D of the California Constitution and this article, the following words have the following meanings, and shall be read and interpreted in light of the findings and declarations contained in Section 53751:

(a) "Agency" means any local government as defined in subdivision (b) of Section 1 of Article XIII C of the California Constitution.

(b) "Assessment" means any levy or charge by an agency upon real property that is based upon the special benefit conferred upon the real property by a public improvement or service, that is imposed to pay the capital cost of the public improvement, the maintenance and operation expenses of the public improvement, or the cost of the service being provided. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment," and "special assessment tax."

(c) "District" means an area that is determined by an agency to contain all of the parcels that will receive a special benefit from a proposed public improvement or service.

(d) "Drainage system" means any system of public improvements that is intended to provide for erosion control, for landslide abatement, or for other types of water drainage.

(e) "Extended," when applied to an existing tax or fee or charge, means a decision by an agency to extend the stated effective period for the tax or fee or charge, including, but not limited to, amendment or removal of a sunset provision or expiration date.

(f) "Flood control" means any system of public improvements that is intended to protect property from overflow by water.

(g) "Identified parcel" means a parcel of real property that an agency has identified as having a special benefit conferred upon it and upon which a proposed assessment is to be imposed, or a parcel of real property upon which a proposed property-related fee or charge is proposed to be imposed.

(h) (1) "Increased," when applied to a tax, assessment, or property-related fee or charge, means a decision by an agency that does either of the following:

(A) Increases any applicable rate used to calculate the tax, assessment, fee, or charge.

(B) Revises the methodology by which the tax, assessment, fee, or charge is calculated, if that revision results in an increased amount being levied on any person or parcel.

(2) A tax, fee, or charge is not deemed to be "increased" by an agency action that does either or both of the following:

(A) Adjusts the amount of a tax, fee, or charge in accordance with a schedule of adjustments, including a clearly defined formula for inflation adjustment that was adopted by the agency prior to November 6, 1996.

(B) Implements or collects a previously approved tax, fee, or charge, so long as the rate is not increased beyond the level previously approved by the agency, and the methodology previously approved by the agency is not revised so as to result in an increase in the amount being levied on any person or parcel.

(3) A tax, assessment, fee, or charge is not deemed to be "increased" in the case in which the actual payments from a person or property are higher than would have resulted when the agency approved the tax, assessment, fee, or charge, if those higher payments are attributable to events other than an increased rate or revised methodology, such as a change in the density, intensity, or nature of the use of land.

(i) "Notice by mail" means any notice required by Article XIII C or XIII D of the California Constitution that is accomplished through a mailing, postage prepaid, deposited in the United States Postal Service and is deemed given when so deposited. Notice by mail may be included in any other mailing to the record owner that otherwise complies with Article XIII C or XIII D of the California Constitution and this article, including, but not limited to, the mailing of a bill for the collection of an assessment or a property-related fee or charge.

(j) "Record owner" means the owner of a parcel whose name and address appears on the last equalized secured property tax assessment roll, or in the case of any public entity, the State of California, or the United States, means the representative of that public entity at the address of that entity known to the agency.

(k) "Sewer" includes systems, all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate sewage collection, treatment, or disposition for sanitary or drainage purposes, including lateral and connecting sewers, interceptors, trunk and outfall lines, sanitary sewage treatment or disposal plants or works, drains, conduits, outlets for surface or storm waters, and any and all other works, property, or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters. "Sewer system" shall not include a sewer system that merely collects sewage on the property of a single owner.

(l) "Registered professional engineer" means an engineer registered pursuant to the Professional Engineers Act (Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code).

(m) "Vector control" means any system of public improvements or services that is intended to provide for the surveillance, prevention, abatement, and control of vectors as defined in subdivision (k) of Section 2002 of the Health and Safety Code and a pest as defined in Section 5006 of the Food and Agricultural Code.

(n) "Water" means any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water from any source.

SEC. 2. Section 53751 is added to the Government Code, to read:

53751. The Legislature finds and declares all of the following:

(a) The ongoing, historic drought has made clear that California must invest in a 21st century water management system capable of effectively meeting the economic, social, and environmental needs of the state.

(b) Sufficient and reliable funding to pay for local water projects is necessary to improve the state's water infrastructure.

(c) Proposition 218 was approved by the voters at the November 5, 1996, statewide general election. Some court interpretations of the law have constrained important tools that local governments need to manage storm water and drainage runoff.

(d) Storm waters are carried off in storm sewers, and careful management is necessary to ensure adequate state water supplies, especially during drought, and to reduce pollution. But a court decision has found storm water subject to the voter-approval provisions of Proposition 218 that apply to property-related fees, preventing many important projects from being built.

(e) The court of appeal in Howard Jarvis Taxpayers Ass'n v. City of Salinas (2002) 98 Cal.App.4th 1351 concluded that the term "sewer," as used in Proposition 218, is "ambiguous" and declined to use the statutory definition of the term "sewer system," which was part of the then-existing law as Section 230.5 of the Public Utilities Code.

(f) The court in Howard Jarvis Taxpayers Ass'n v. City of Salinas (2002) 98 Cal.App.4th 1351 failed to follow long-standing principles of statutory construction by disregarding the plain meaning of the term "sewer." Courts have long held that statutory construction rules apply to initiative measures, including in cases that apply specifically to Proposition 218 (see People v. Bustamante (1997) 57 Cal.App.4th 693; Keller v. Chowchilla Water Dist. (2000) 80 Cal.App.4th 1006). When construing statutes, courts look first to the words of the statute, which should be given their usual, ordinary, and commonsense meaning (People v. Mejia (2012) 211 Cal.App.4th 586, 611). The purpose of utilizing the plain meaning of statutory language is to spare the courts the necessity of trying to divine the voters' intent by resorting to secondary or subjective indicators. The court in Howard Jarvis Taxpayers Ass'n v. City of Salinas (2002) 98 Cal.App.4th 1351 asserted its belief as to what most voters thought when voting for Proposition 218, but did not cite the voter pamphlet or other accepted sources for determining legislative intent. Instead, the court substituted its own judgment for the judgment of voters.

(g) Neither the words "sanitary" nor "sewerage" are used in Proposition 218, and the common meaning of the term "sewer services" is not "sanitary sewerage." In fact, the phrase "sanitary sewerage" is uncommon.

(h) Proposition 218 exempts sewer and water services from the voter-approval requirement. Sewer and water services are commonly considered to have a broad reach, encompassing the provision of clean water and then addressing the conveyance and treatment of dirty water, whether that water is rendered unclean by coming into contact with sewage or by flowing over the built-out human environment and becoming urban runoff.

(i) Numerous sources predating Proposition 218 reject the notion that the term "sewer" applies only to sanitary sewers and sanitary sewerage, including, but not limited to:

(1) Section 230.5 of the Public Utilities Code, added by Chapter 1109 of the Statutes of 1970.

(2) Section 23010.3, added by Chapter 1193 of the Statutes of 1963.

(3) The Street Improvement Act of 1913.

(4) L.A. County Flood Control Dist. v. Southern Cal. Edison Co. (1958) 51 Cal.2d 331, where the California Supreme Court stated that "no distinction has been made between sanitary sewers and storm drains or sewers."

(5) Many other cases where the term "sewer" has been used interchangeably to refer to both sanitary and storm sewers include, but are not limited to, County of Riverside v. Whitlock (1972) 22 Cal.App.3d 863, Ramseier v. Oakley Sanitary Dist. (1961) 197 Cal.App.2d 722, and Torson v. Fleming (1928) 91 Cal.App. 168.

(6) Dictionary definitions of sewer, which courts have found to be an objective source for determining common or ordinary meaning, including Webster's (1976), American Heritage (1969), and Oxford English Dictionary (1971).

(j) Prior legislation has affirmed particular interpretations of words in Proposition 218, specifically Assembly Bill 2403 of the 2013–14 Regular Session (Chapter 78 of the Statutes of 2014).

(k) In Crawley v. Alameda Waste Management Authority (2015) 243 Cal.App.4th 396, the Court of Appeal relied on the statutory definition of "refuse collection services" to interpret the meaning of that phrase in Proposition 218, and found that this interpretation was further supported by the plain meaning of refuse. Consistent with this decision, in determining the definition of "sewer," the plain meaning rule shall apply in conjunction with the definitions of terms as provided in Section 53750.

(l) The Legislature reaffirms and reiterates that the definition found in Section 230.5 of the Public Utilities Code is the definition of "sewer" or "sewer service" that should be used in the Proposition 218 Omnibus Implementation Act.

(m) Courts have read the Legislature's definition of "water" in the Proposition 218 Omnibus Implementation Act to include related services. In Griffith v. Pajaro Valley Water Management Agency (2013) 220 Cal.App.4th 586, the Court of Appeal concurred with the Legislature's view that "water service means more than just supplying water," based upon the definition of water provided by the Proposition 218 Omnibus Implementation Act, and found that actions necessary to provide water can be funded through fees for water service. Consistent with this decision, "sewer" should be interpreted to include services necessary to collect, treat, or dispose of sewage, industrial waste, or surface or storm waters, and any entity that collects, treats, or disposes of any of these necessarily provides sewer service.

GOVERNMENT CODE - GOV

TITLE 5. LOCAL AGENCIES [50001 - 57607] *(Title 5 added by Stats. 1949, Ch. 81.)*

DIVISION 2. CITIES, COUNTIES, AND OTHER AGENCIES [53000 - 55821] *(Division 2 added by Stats. 1949, Ch. 81.)*

PART 1. POWERS AND DUTIES COMMON TO CITIES, COUNTIES, AND OTHER AGENCIES [53000 - 54999.7] *(Part 1 added by Stats. 1949, Ch. 81.)*

CHAPTER 4. Financial Affairs [53600 - 53997] *(Chapter 4 added by Stats. 1949, Ch. 81.)*

ARTICLE 4.6. Proposition 218 Omnibus Implementation Act [53750 - 53758] *(Article 4.6 added by Stats. 1997, Ch. 38, Sec. 5.)*

53750. For purposes of Article XIII C and Article XIII D of the California Constitution and this article, the following words have the following meanings, and shall be read and interpreted in light of the findings and declarations contained in Section 53751:

(a) "Agency" means any local government as defined in subdivision (b) of Section 1 of Article XIII C of the California Constitution.

(b) "Assessment" means any levy or charge by an agency upon real property that is based upon the special benefit conferred upon the real property by a public improvement or service, that is imposed to pay the capital cost of the public improvement, the maintenance and operation expenses of the public improvement, or the cost of the service being provided. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment," and "special assessment tax."

(c) "District" means an area that is determined by an agency to contain all of the parcels that will receive a special benefit from a proposed public improvement or service.

(d) "Drainage system" means any system of public improvements that is intended to provide for erosion control, for landslide abatement, or for other types of water drainage.

(e) "Extended," when applied to an existing tax or fee or charge, means a decision by an agency to extend the stated effective period for the tax or fee or charge, including, but not limited to, amendment or removal of a sunset provision or expiration date.

(f) "Flood control" means any system of public improvements that is intended to protect property from overflow by water.

(g) "Identified parcel" means a parcel of real property that an agency has identified as having a special benefit conferred upon it and upon which a proposed assessment is to be imposed, or a parcel of real property upon which a proposed property-related fee or charge is proposed to be imposed.

(h) (1) "Increased," when applied to a tax, assessment, or property-related fee or charge, means a decision by an agency that does either of the following:

(A) Increases any applicable rate used to calculate the tax, assessment, fee, or charge.

(B) Revises the methodology by which the tax, assessment, fee, or charge is calculated, if that revision results in an increased amount being levied on any person or parcel.

(2) A tax, fee, or charge is not deemed to be "increased" by an agency action that does either or both of the following:

(A) Adjusts the amount of a tax, fee, or charge in accordance with a schedule of adjustments, including a clearly defined formula for inflation adjustment that was adopted by the agency prior to November 6, 1996.

(B) Implements or collects a previously approved tax, fee, or charge, so long as the rate is not increased beyond the level previously approved by the agency, and the methodology previously approved by the agency is not revised so as to result in an increase in the amount being levied on any person or parcel.

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(j) "Record owner" means the owner of a parcel whose name and address appears on the last equalized secured property tax assessment roll, or in the case of any public entity, the State of California, or the United States, means the representative of that public entity at the address of that entity known to the agency.

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(n) "Water" means any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water from any source.
(Amended by Stats. 2017, Ch. 536, Sec. 1. (SB 231) Effective January 1, 2018.)

GOVERNMENT CODE - GOV

TITLE 5. LOCAL AGENCIES [50001 - 57607] *(Title 5 added by Stats. 1949, Ch. 81.)*

DIVISION 2. CITIES, COUNTIES, AND OTHER AGENCIES [53000 - 55821] *(Division 2 added by Stats. 1949, Ch. 81.)*

PART 1. POWERS AND DUTIES COMMON TO CITIES, COUNTIES, AND OTHER AGENCIES [53000 - 54999.7] *(Part 1 added by Stats. 1949, Ch. 81.)*

CHAPTER 4. Financial Affairs [53600 - 53997] *(Chapter 4 added by Stats. 1949, Ch. 81.)*

ARTICLE 4.6. Proposition 218 Omnibus Implementation Act [53750 - 53758] *(Article 4.6 added by Stats. 1997, Ch. 38, Sec. 5.)*

53751. The Legislature finds and declares all of the following:

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(b) Sufficient and reliable funding to pay for local water projects is necessary to improve the state's water infrastructure.

(c) Proposition 218 was approved by the voters at the November 5, 1996, statewide general election. Some court interpretations of the law have constrained important tools that local governments need to manage storm water and drainage runoff.

(d) Storm waters are carried off in storm sewers, and careful management is necessary to ensure adequate state water supplies, especially during drought, and to reduce pollution. But a court decision has found storm water subject to the voter-approval provisions of Proposition 218 that apply to property-related fees, preventing many important projects from being built.

(e) The court of appeal in Howard Jarvis Taxpayers Ass'n v. City of Salinas (2002) 98 Cal.App.4th 1351 concluded that the term "sewer," as used in Proposition 218, is "ambiguous" and declined to use the statutory definition of the term "sewer system," which was part of the then-existing law as Section 230.5 of the Public Utilities Code.

(f) The court in Howard Jarvis Taxpayers Ass'n v. City of Salinas (2002) 98 Cal.App.4th 1351 failed to follow long-standing principles of statutory construction by disregarding the plain meaning of the term "sewer." Courts have long held that statutory construction rules apply to initiative measures, including in cases that apply specifically to Proposition 218 (see People v. Bustamante (1997) 57 Cal.App.4th 693; Keller v. Chowchilla Water Dist. (2000) 80 Cal.App.4th 1006). When construing statutes, courts look first to the words of the statute, which should be given their usual, ordinary, and commonsense meaning (People v. Mejia (2012) 211 Cal.App.4th 586, 611). The purpose of utilizing the plain meaning of statutory language is to spare the courts the necessity of trying to divine the voters' intent by resorting to secondary or subjective indicators. The court in Howard Jarvis Taxpayers Ass'n v. City of Salinas (2002) 98 Cal.App.4th 1351 asserted its belief as to what most voters thought when voting for Proposition 218, but did not cite the voter pamphlet or other accepted sources for determining legislative intent. Instead, the court substituted its own judgment for the judgment of voters.

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(h) Proposition 218 exempts sewer and water services from the voter-approval requirement. Sewer and water services are commonly considered to have a broad reach, encompassing the provision of clean water and then addressing the conveyance and treatment of dirty water, whether that water is rendered unclean by coming into contact with sewage or by flowing over the built-out human environment and becoming urban runoff.

(i) Numerous sources predating Proposition 218 reject the notion that the term "sewer" applies only to sanitary sewers and sanitary sewerage, including, but not limited to:

(1) Section 230.5 of the Public Utilities Code, added by Chapter 1109 of the Statutes of 1970.

(2) Section 23010.3, added by Chapter 1193 of the Statutes of 1963.

(3) The Street Improvement Act of 1913.

(4) L.A. County Flood Control Dist. v. Southern Cal. Edison Co. (1958) 51 Cal.2d 331, where the California Supreme Court stated that "no distinction has been made between sanitary sewers and storm drains or sewers."

(5) Many other cases where the term "sewer" has been used interchangeably to refer to both sanitary and storm sewers include, but are not limited to, County of Riverside v. Whitlock (1972) 22 Cal.App.3d 863, Ramseier v. Oakley Sanitary Dist. (1961) 197 Cal.App.2d 722, and Torson v. Fleming (1928) 91 Cal.App. 168.

(6) Dictionary definitions of sewer, which courts have found to be an objective source for determining common or ordinary meaning, including Webster's (1976), American Heritage (1969), and Oxford English Dictionary (1971).

(j) Prior legislation has affirmed particular interpretations of words in Proposition 218, specifically Assembly Bill 2403 of the 2013–14 Regular Session (Chapter 78 of the Statutes of 2014).

(k) In Crawley v. Alameda Waste Management Authority (2015) 243 Cal.App.4th 396, the Court of Appeal relied on the statutory definition of "refuse collection services" to interpret the meaning of that phrase in Proposition 218, and found that this interpretation was further supported by the plain meaning of refuse. Consistent with this decision, in determining the definition of "sewer," the plain meaning rule shall apply in conjunction with the definitions of terms as provided in Section 53750.

(l) The Legislature reaffirms and reiterates that the definition found in Section 230.5 of the Public Utilities Code is the definition of "sewer" or "sewer service" that should be used in the Proposition 218 Omnibus Implementation Act.

(m) Courts have read the Legislature's definition of "water" in the Proposition 218 Omnibus Implementation Act to include related services. In Griffith v. Pajaro Valley Water Management Agency (2013) 220 Cal.App.4th 586, the Court of Appeal concurred with the Legislature's view that "water service means more than just supplying water," based upon the definition of water provided by the Proposition 218 Omnibus Implementation Act, and found that actions necessary to provide water can be funded through fees for water service. Consistent with this decision, "sewer" should be interpreted to include services necessary to collect, treat, or dispose of sewage, industrial waste, or surface or storm waters, and any entity that collects, treats, or disposes of any of these necessarily provides sewer service.

(Added by Stats. 2017, Ch. 536, Sec. 2. (SB 231) Effective January 1, 2018.)

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 October 29, 2024, I served the:

- **Current Mailing List dated September 26, 2024**
- **Claimant's (City of Dublin) and Alameda Countywide Clean Water Program's Comments on the Draft Proposed Decision filed October 28, 2024**
- **Claimant's (City of San Jose) Comments on the Draft Proposed Decision filed October 28, 2024**
- **Claimant's (County of Santa Clara) Comments on Draft Proposed Decision filed October 28, 2024**
- **Water Boards' Comments on Draft Proposed Decision filed October 28, 2024**

  California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074, 10-TC-02, 10-TC-03, and 10-TC-05
  California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074, Sections C.2.b, C.2.c, C.2.e, C.2.f, C.8.b., C.8.c., C.8.d.i, C.8.d.ii., C.8.d.iii., C.8.e.i., C.8.e.ii., C.8.e.iii., C.8.e.iv., C.8.e.v., C.8.e.vi., C.8.f., C.8.g.i. (first sentence only), C.8.g.ii., C.8.g.iii., C.8.g.v., C.8.g.vi., C.8.g.vii., C.8.h, C.10.a.i., C.10.a.ii., C.10.a.iii., C.10.b.i., C.10.b.ii., C.10.b.iii., C.10.c., C.10.d.i., C.10.d.ii., C.11.f., and C.12.f., Adopted October 14, 2009 and Effective December 1, 2009
  Cities of Dublin and San Jose, and County of Santa Clara, Claimants

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on October 29, 2024 at Sacramento, California.

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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 9/26/24

Claim Number: 10-TC-02, 10-TC-03, and 10-TC-05

Matter: California Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2009-0074, Provisions C.2.b, C.2.c, C.2.e, C.2.f, C.8.b, C.8.c, C.8.d, C.8.e.i, ii, and vi, C.8.f, C.8.g, C.8.h, C.10.a, C.10.b, C.10.c, C.10.d, C.11.f, and C.12.f

Claimants: City of Dublin
City of San Jose
County of Santa Clara

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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

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