March 23, 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: Draft Proposed Decision, Schedule for Comments, and Notice of Hearing
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 Draft Proposed Decision for the above-captioned matter is enclosed for your review and comment.

Written Comments

Written comments may be filed on the Draft Proposed Decision no later than **5:00 pm on April 13, 2023**. Please note that all representations of fact submitted to the Commission must be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge, information, or belief. (Cal. Code Regs., tit. 2, § 1187.5.) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over an objection in civil actions. (Cal. Code Regs., tit. 2, § 1187.5.) The Commission's ultimate findings of fact must be supported by substantial evidence in the record.[1]

You are advised that comments filed with the Commission are required to be electronically filed (e-filed) in an unlocked legible and searchable PDF file, using the Commission's Dropbox. (Cal. Code Regs., tit. 2, § 1181.3(c)(1).) Refer to http://www.csm.ca.gov/dropbox_procedures.php on the Commission's website for electronic filing instructions. If e-filing would cause the filer undue hardship or significant prejudice, filing may occur by first class mail, overnight delivery or personal service only upon approval of a written request to the executive director. (Cal. Code Regs., tit. 2, § 1181.3(c)(2).)

If you would like to request an extension of time to file comments, please refer to section 1187.9(a) of the Commission's regulations.

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[1] Government Code section 17559(b), which provides that a claimant or the state may commence a proceeding in accordance with the provisions of section 1094.5 of the Code of Civil Procedure to set aside a decision of the Commission on the ground that the Commission's decision is not supported by substantial evidence in the record.

Commission on State Mandates
980 9th Street, Suite 300 Sacramento, CA 95814 | www.csm.ca.gov | tel (916) 323-3562 | email: csminfo@csm.ca.gov

Hearing

This matter is set for hearing on **Friday, May 26, 2023**, at 10:00 a.m. via Zoom. The Proposed Decision will be issued on or about May 12, 2023.

Please notify Commission staff not later than the Wednesday prior to the hearing that you or a witness you are bringing plan to testify and please specify the names and email addresses of the people who will be speaking for inclusion on the witness list and so that detailed instructions regarding how to participate as a witness in this meeting on Zoom can be provided to them. When calling or emailing, please 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 would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

Sincerely,

Heather Halsey
Executive Director

Hearing Date: May 26, 2023
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ITEM _

TEST CLAIM

DRAFT 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. According to the claimant, as of January 1, 2018, 255 schools had requested lead sampling from the claimant's public water system.[3]

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

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[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 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.

[3] Exhibit A, Test Claim, filed January 11, 2018, page 71 (Declaration of Doug Campbell).

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."[4] 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.

As described herein, staff finds that the test claim statute imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 and therefore recommends that the Commission approve 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.[5] The State Board and the Department of Finance (Finance) filed comments on the Test Claim on August 13, 2018.[6] The claimant filed rebuttal comments on November 9, 2018.[7] 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.[8]

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.

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.[9]

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[4] Exhibit X (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.

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

[6] 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.

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

[8] Exhibit X (9), Commission on State Mandates, Decision on *Lead Sampling in Schools: Public Water System No. 3710020*, 17-TC-03, adopted March 22, 2019, page 1.

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

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 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."	*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 effective date of the Order.[13] Therefore, the Test Claim is timely filed. 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

[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.

[11] Government Code section 17551(c).

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

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

Issue	Description	Staff Recommendation
		permit has a later effective date, the potential period of reimbursement for this claim begins on the permit's effective date, or January 18, 2017.
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 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]	*Yes* – The test claim order newly requires the City of San Diego'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. However, beginning January 1, 2018, Health and Safety Code section 116277 required community water systems,[16] including 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

[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.

[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.

[16] "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).)

Issue	Description	Staff Recommendation
		by July 1, 2019.[17] 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. The activities required by the test claim order are mandated by the state on the claimant as an operator of a public water system. Although state law authorizes, but does not legally require, the claimant to provide water services or to operate as a public water system the claimant has submitted substantial evidence showing that it would suffer certain and severe penalties or other draconian measures if it decided to no longer provide water service to its residents or operate as a public water system in order to avoid

[17] Exhibit X (4), Health and Safety Code section 116277(f)(2) (as added by Stats. 2017, ch. 746) (AB 746) 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).

Issue	Description	Staff Recommendation
		compliance with the test claim order:[18] namely, more than 1.3 million residents will lose access to safe and clean drinking water and the claimant will be in default and face immediate repayment on more than $890 million in debt secured to maintain its water system.[19] Thus, staff finds that the claimant is practically compelled to continue to operate as a public water system, and as such, is mandated to comply with the requirements imposed by the test claim order.
Does the test claim order impose a new program or higher level of service?	On April 29, 2022, the Third District Court of Appeal issued an unpublished opinion in *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.[20]	*Yes* – by order of the Third District Court of Appeal, the test claim order imposes a new program or higher level of service in that "the provision of drinking water to schools is a peculiarly governmental function and the mandated testing of this water for lead is

[18] *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; Government Code section 17559.

[19] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed January 11, 2019, pages 8-11; 56-59 (Declaration of Raymond C. Palmucci, Deputy City Attorney designated to review and approve information pertaining to the City's Water Fund); 112 (Financial Statement regarding Subordinated Water Revenue Bonds, Series 2018A); 648-716 (2009 Amended and Restated Master Installment Purchase Agreement).

[20] Exhibit X (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.

Issue	Description	Staff Recommendation
		plainly a service to the public."[21]
Does the test claim order result in increased costs mandated by the state?	Article XIII B, section 6 of the California Constitution and Government Code section 17561(a) require reimbursement for all costs mandated by the state. Government Code section 17564(a) requires that no payment be made unless the claim exceeds $1,000. In addition, a finding of costs mandated by the state means that none of the exceptions identified in Government Code section 17556 apply.[22] The State Board and the Department of Finance contend that lead testing in K-12 schools provides a direct benefit to the water system as a whole and each ratepayer, and thus, the claimant may set water rates on property owners sufficient to pay for the costs of compliance with the permit amendment within the meaning of Government Code section 17556(d).[23]	*Yes* – The evidence in the record shows that the claimant's costs to comply with the mandated test claim activities exceed $1,000.[24] However, staff finds that the requirement to not release lead sampling data for 60 days unless to comply with the California Public Records Act falls within the scope of the exemption in article XIII B, section 6(a)(4) and is therefore not subject to the reimbursement requirement of article XIII B, section 6. Staff also finds that there are costs mandated by the state for the remaining activities and that the claimant does not have fee authority sufficient as a matter of law to pay for these activities within the meaning of Government Code section 17556(d). The service being provided is not a property-related service so a property-related fee may not be imposed pursuant to Proposition 218

[21] Exhibit X (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.

[22] Government Code section 17556.

[23] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, pages 15-16; Exhibit C, Finance's Comments on the Test Claim, filed August 13, 2018, page 2.

[24] Exhibit A, Test Claim, filed January 11, 2018, pages 79 (Declaration of Rex Ragucos), 2767-2768.

Issue	Description	Staff Recommendation
	Government Code section 17556(d) provides that the Commission shall not find costs mandated by the state if it finds that, as a matter of law, the "local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."	and the test claim permit prohibits the claimant from imposing fees on the schools requesting service.[25] Additionally, Proposition 26 prohibits the claimant from charging new or increased fees for the mandated activities on all ratepayers.

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."[26] Section 1183.1(c) of the Commission's regulations defines 12 months as 365 days.[27]

The effective date of the order is January 18, 2017.[28] The claimant filed the Test Claim on January 11, 2018, less than 12 months after the effective date of the order.[29] 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

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

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

[26] Government Code section 17551(c).

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

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

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

permit has a later effective date, the potential period of reimbursement for this claim begins on the permit's effective date, or January 18, 2017.

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

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

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

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.

However, beginning January 1, 2018, Health and Safety Code section 116277 required a community water system,[30] 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.[31] 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.

The activities required by the test claim order are mandated by the state on the claimant as an operator of a public water system. Because state law authorizes, but does not legally require, the claimant to provide water services or to operate as a public water system, the requirements imposed by the test claim order result from the claimant's "voluntary or discretionary decision to undertake an activity" and therefore cannot be said to be legally compelled.[32] Nonetheless, the claimant has submitted substantial evidence showing that it would suffer certain and severe penalties or other draconian measures if it decided to no longer provide water service to its

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[30] "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).)

[31] Exhibit X (4), 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).

[32] California Constitution, article XI, section 9(a); *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815.

residents or operate as a public water system in order to avoid compliance with the test claim order:[33] namely, more than 1.3 million residents will lose access to safe and clean drinking water and the claimant will be in default and face immediate repayment on more than $890 million in debt secured to maintain its water system.[34] Thus, the Commission finds that the claimant is practically compelled to continue to operate as a public water system, and as such, is mandated to comply with the requirements imposed by the test claim order.

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

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."[35]

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

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

To be reimbursable, the mandated activities must also result in increased costs mandated by the state. Article XIII B, section 6 of the California Constitution and Government Code section 17561(a) require reimbursement for all costs mandated by the state, unless there is an express exemption in article XIII B, section 6. Government Code section 17514 defines "costs mandated by the state" as any increased costs that a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) further requires that no claim nor payment shall be made unless the claim

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[33] *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; Government Code section 17559.

[34] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed January 11, 2019, pages 8-11; 56-59 (Declaration of Raymond C. Palmucci, Deputy City Attorney designated to review and approve information pertaining to the City's Water Fund); 112 (Financial Statement regarding Subordinated Water Revenue Bonds, Series 2018A); 648-716 (2009 Amended and Restated Master Installment Purchase Agreement).

[35] Exhibit X (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.

exceeds $1,000. In addition, a finding of costs mandated by the state means that none of the exceptions identified in Government Code section 17556 apply.[36]

There is substantial evidence in the record that the claimant's costs to comply with the mandated activities exceed $1,000.[37]

However, staff finds that the requirement to not release lead sampling data for 60 days, unless to comply with the California Public Records Act, falls within the scope of the exemption in article XIII B, section 6(a)(4) and is therefore not subject to the reimbursement requirement of article XIII B, section 6.

Staff further finds that there are costs mandated by the state within the meaning of Government Code sections 17514 and 17556 for the remaining activities.

The State Board contends that the *Lead Sampling* program directly benefits all ratepayers because it functionally extends the Lead and Copper rule and maintains or improves property values.[38] The State Board and Finance therefore conclude that lead testing in K-12 schools provides a direct benefit to the water system as a whole and each ratepayer, and thus, the claimant may set water rates on property owners sufficient to pay for the costs of compliance with the permit amendment within the meaning of Government Code section 17556(d).[39]

Staff finds, however, that the claimant does not have fee authority sufficient as a matter of law to pay for the mandated program within the meaning of Government Code section 17556(d). The service being provided is not a property-related service so a property-related fee may not be imposed pursuant to Proposition 218 and the test claim permit prohibits the claimant from imposing fees on the schools requesting service.[40] Additionally, Proposition 26 prohibits the claimant from charging new or increased fees for the mandated activities on ratepayers who do not receive the service.

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[36] Government Code section 17556.

[37] Exhibit A, Test Claim, filed January 11, 2018, pages 79 (Declaration of Rex Ragucos), 2767-2768.

[38] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, page 16.

[39] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, pages 15-16; Exhibit C, Finance's Comments on the Test Claim, filed August 13, 2018, page 2.

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

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

Article XIII D of the California Constitution defines "fees" or "charges" associated with property ownership as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service."[41] Article XIII D further defines a "property-related service" as "a public service having a *direct relationship* to property ownership."[42]

However, the courts have determined that a water service fee imposed because of a voluntary decision of a property owner is not imposed 'as an incident of property ownership' and therefore is not a property-related fee subject to the restrictions of article XIII D.[43] Here, because the claimant's performance of the mandated activities is only triggered by the voluntary decision of a school to request testing and is not a service provided simply as an incident to property ownership, any fee to cover the costs of the *Lead Sampling* program would not be a property-related fee subject to the limitations of article XIII D and therefore Proposition 218 does not apply here.

Proposition 26, which sought to broaden the definition of "tax," added article XIII C, section 1(e) to the California Constitution, to provide that "any levy, charge, or exaction of any kind imposed by a local government," is a "tax," and therefore requires voter approval under article XIII C,[44] unless one of seven exceptions applies:[45] Exceptions (1) and (2) (charges for benefits conferred and privileges granted, services and products provided *that are not provided to those not charged*) do not apply because the claimant is required to provide lead sampling services exclusively to "those not charged" (i.e., schools requesting lead sampling). Exception (3) (reasonable regulatory costs) does not apply because the claimant is not acting in a regulatory capacity in performing the mandated activities. Exceptions (4) (a charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property), (5) (a fine, penalty, or other monetary charge imposed by the judicial branch of

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[41] California Constitution, article XIII D, section 2(e).

[42] California Constitution, article XIII D, section 2(h), emphasis added.

[43] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal. 4th 409, 427; See also *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal. 4th 205, 215.

[44] California Constitution, article XIII C, section 2, which was added by Proposition 218 in 1996 states in pertinent part:

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

[45] California Constitution, article XIII C, section 1(e).

government or a local government, as a result of a violation of law), and (6) (a charge imposed as a condition of property development) do not apply based on their plain language. Exception (7), "assessments and property-related fees imposed in accordance with the provisions of Article XIII D" which was adopted by Proposition 218,[46] is inapplicable here because the service is not a property-related service, as discussed above. Testing water at school sites upon the request of a school, without any requirement for the claimant to remediate a lead exceedance, does not constitute "a public service having a direct relationship to property ownership."

Thus, because the test claim statute prohibits the claimant from imposing a fee for the service upon the schools and the claimant cannot impose a fee under Proposition 218 in accordance with the provisions of article XIII D (because the service is not "property related") or under Proposition 26 in accordance with the provisions of article XIII C (because it does not meet any of the exceptions to the definition of a tax), the claimant does not have fee authority sufficient to cover the costs of the mandated program.

Moreover, none of the other exceptions to costs mandated by the state in Government Code section 17556 apply. Therefore, the test claim permit results in increased costs mandated by the state.

Conclusion

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

1. Submit to the State 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;[47]
2. If an authorized school representative of a private or public K-12 school in the claimant's service area requests lead sampling assistance in writing by November 1, 2019:
   a. Respond in writing within 60 days and schedule a meeting with school officials to develop a sampling plan;[48]
   b. Finalize a sampling plan and complete initial sampling within 90 days [or an alternative time schedule approved by DDW];[49]

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[46] California Constitution, article XIII C, section 1(e)(7).

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

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

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

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;[50]

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;[51]

e. Ensure samples are collected by an adequately trained water system representative;[52]

f. Submit the samples to an ELAP certified laboratory for analysis;[53]

g. Require the laboratory to submit the data electronically to DDW;[54]

h. Provide a copy of the results to the school representative;[55]

i. Within two business days of a result that shows an exceedance of 15 ppb, notify the school of the sample result;[56]

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;[57]
    - Collect a third sample within 10 business days after notification that a resample result is less than or equal to 15 ppb;[58]
    - 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;[59]

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

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

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

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

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

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

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

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

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

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

k. Ensure that the water system receives the results of repeat lead samples from the laboratory in no more than 10 business days;[60]

l. Discuss the lead sample results with the school prior to releasing the sample results to the public, and within 10 days of receiving the results from the laboratory;[61]

m. Communicate with the school after lead sampling and assist the school with the interpretation of laboratory results and provide information regarding potential corrective actions if the results confirm lead levels above 15 ppb.[62] ***The water system is not responsible for the costs of any corrective action or maintenance***;[63]

n. Keep records of all requests for lead related assistance and provide the records to DDW, upon request;[64]

o. Include in the annual Consumer Confidence Report a statement summarizing the number of schools requesting lead sampling.[65]

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

Staff Recommendation

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

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

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

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

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

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

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

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

<table>
<tr>
<td>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</td>
<td>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 May 26, 2023)</td>
</tr>
</table>

DECISION

The Commission in State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on May 26, 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	
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	
Scott Morgan, Representative of the Director of the Office of Planning and Research	
Renee Nash, School District Board Member	
Sarah Olsen, Public Member	
Lynn Paquin, Representative of the State Controller, Vice Chairperson	

Member	Vote
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*.[66, 67]

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 governmental function and the mandated testing of this water for lead is plainly a service to the public."[68] 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 claim order imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

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.

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[66] 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.

[67] 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.

[68] Exhibit X (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.

However, beginning January 1, 2018, Health and Safety Code section 116277 required a community water system,[69] 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.[70] 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.

The activities required by the test claim order are mandated by the state on the claimant as an operator of a public water system. Because state law authorizes, but does not legally require, the claimant to provide water services or to operate as a public water system, the requirements imposed by the test claim order result from the claimant's "voluntary or discretionary decision to undertake an activity" and therefore cannot be said to be legally compelled.[71] Nonetheless, the claimant has submitted substantial evidence showing that it would suffer certain and severe penalties or other draconian measures if it decided to no longer provide water service to its residents or operate as a public water system in order to avoid compliance with the test claim order:[72] namely, more than 1.3 million residents will lose access to safe and clean drinking water and the claimant will be in default and face immediate repayment on more than $890 million in debt secured to maintain its water system.[73] Thus, the Commission finds that the

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[69] "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).)

[70] Exhibit X (4), 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).

[71] California Constitution, article XI, section 9(a); *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815.

[72] *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; Government Code section 17559.

[73] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed January 11, 2019, pages 8-11; 56-59 (Declaration of Raymond C. Palmucci, Deputy City Attorney designated to review and approve information pertaining to the City's Water Fund); 112 (Financial Statement regarding Subordinated Water Revenue Bonds, Series 2018A); 648-716 (2009 Amended and Restated Master Installment Purchase Agreement).

claimant is practically compelled to continue to operate as a public water system, and as such, is mandated to comply with the requirements imposed by the test claim order.

To be reimbursable, the mandated activities must also result in increased costs mandated by the state. Article XIII B, section 6 of the California Constitution and Government Code section 17561(a) require reimbursement for all costs mandated by the state, unless there is an express exemption in article XIII B, section 6. The claimant's costs to comply with the mandated activities exceed $1,000.[74] However, the Commission finds that the requirement to not release lead sampling data for 60 days unless to comply with a request under the California Public Records Act for specific results falls within the scope of the exemption in article XIII B, section 6(a)(4) and is therefore not subject to the reimbursement requirement of article XIII B, section 6.

The Commission further finds there are costs mandated by the state for the remaining mandated activities.

The State Board contends that the *Lead Sampling* program directly benefits all ratepayers because it functionally extends the Lead and Copper rule and maintains or improves property values.[75] The State Board and the Department of Finance (Finance) therefore conclude that lead testing in K-12 schools provides a direct benefit to the water system as a whole and each ratepayer, and thus, the claimant may set water rates on property owners sufficient to pay for the costs of compliance with the permit amendment within the meaning of Government Code section 17556(d).[76]

The Commission finds, however, that the claimant does not have fee authority sufficient as a matter of law to pay for the mandated program within the meaning of Government Code section 17556(d). The service being provided is not a property related service so a property related fee may not be imposed pursuant to Proposition 218 and the test claim permit prohibits the claimant from imposing fees on the schools requesting service.[77] Moreover, Proposition 26 prohibits the claimant from charging new or increased fees for the mandated activities on ratepayers who do not receive the service.

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[74] Exhibit A, Test Claim, filed January 11, 2018, pages 79 (Declaration of Rex Ragucos), 2767-2768.

[75] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, page 16.

[76] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, pages 15-16; Exhibit C, Finance's Comments on the Test Claim, filed August 13, 2018, page 2.

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

a. Laboratory fees for all lead samples and reporting of the results to DDW and the school, and all laboratory coordination and instruction.

b. All water system staff time dedicated to the tasks required by the provisions in this permit amendment.

The courts have determined that a water service fee imposed because of a voluntary decision of a property owner is not imposed 'as an incident of property ownership' and therefore is not a property-related fee within the meaning of article XIII D.[78] Here, because the claimant's performance of the mandated activities is only triggered by the voluntary decision of a school to request testing, it is not a property-related service and the claimant cannot impose a property-related fee pursuant to Article XIII D to cover the costs of the *Lead Sampling* program.

Article XIII D, section 2 defines "property-related service" as "a public service having a *direct relationship* to property ownership."[79] The State Water Board's bare assertions that the *Lead Sampling* program directly benefits all ratepayers because it functionally extends the Lead and Copper rule and maintains or improves property values are unavailing and unsupported by any evidence in the record. Testing water at school sites upon the request of a school, without any requirement for the claimant to remediate a lead exceedance, does not constitute "a public service having a direct relationship to property ownership."

Proposition 26, which sought to broaden the definition of "tax," added article XIII C, section 1(e) to the California Constitution, to provide that "any levy, charge, or exaction of any kind imposed by a local government," is a "tax," and therefore requires voter approval under article XIII C,[80] unless one of seven exceptions applies:[81] Exceptions (1) and (2) (charges for benefits conferred and privileges granted, services and products provided *that are not provided to those not charged*) do not apply because the claimant is required to provide lead sampling services exclusively to "those not charged" (i.e., schools requesting lead sampling). Exception (3) (reasonable regulatory costs) does not apply because the claimant is not acting in a regulatory capacity in performing the mandated activities. Exceptions (4) (a charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property), (5) (a fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law), and (6) (a charge imposed as a condition of property development) do not apply based on their plain language. Exception (7),

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[78] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal. 4th 409, 427.

[79] California Constitution, article XIII D, section 2(h).

[80] California Constitution, article XIII C, section 2, which was added by Proposition 218 in 1996 states in pertinent part:

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

[81] California Constitution, article XIII C, section 1(e).

"assessments and property-related fees imposed in accordance with the provisions of Article XIII D" which was adopted by Proposition 218 does not apply here, as discussed above, since the service is not a property-related service.[82] Article XIII D of the California Constitution defines "fees" or "charges" associated with property ownership as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service."[83] Article XIII D further defines a "property-related service" as "a public service having a *direct relationship* to property ownership."[84]

Thus, because the claimant is prohibited from imposing a fee on the schools requesting the service, may not impose a property-related fee in accordance with the provisions of article XIII D because it is not a "property-related service," and may not impose a fee under any of the exceptions under Proposition 26, the claimant does not have fee authority sufficient to cover the costs of the mandated program. Therefore, none of the exceptions to costs mandated by the state in Government Code section 17556 apply and the Commission finds that the test claim permit results in increased costs mandated by the state.

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

1. Submit to the State 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;[85]
2. If an authorized school representative of a private or public K-12 school in the claimant's service area requests lead sampling assistance in writing by November 1, 2019:
    a. Respond in writing within 60 days and schedule a meeting with school officials to develop a sampling plan;[86]
    b. Finalize a sampling plan and complete initial sampling within 90 days [or an alternative time schedule approved by DDW];[87]

[82] California Constitution, article XIII C, section 1(e)(7).

[83] California Constitution, article XIII D, section 2(e).

[84] California Constitution, article XIII D, section 2(h), emphasis added.

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

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

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

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;[88]

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;[89]

e. Ensure samples are collected by an adequately trained water system representative;[90]

f. Submit the samples to an ELAP certified laboratory for analysis;[91]

g. Require the laboratory to submit the data electronically to DDW;[92]

h. Provide a copy of the results to the school representative;[93]

i. Within two business days of a result that shows an exceedance of 15 ppb, notify the school of the sample result;[94]

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;[95]
- Collect a third sample within 10 business days after notification that a resample result is less than or equal to 15 ppb;[96]
- 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;[97]

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

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

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

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

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

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

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

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

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

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

k. Ensure that the water system receives the results of repeat lead samples from the laboratory in no more than 10 business days;[98]

l. Discuss the lead sample results with the school prior to releasing the sample results to the public, and within 10 days of receiving the results from the laboratory;[99]

m. Communicate with the school after lead sampling and assist the school with the interpretation of laboratory results and provide information regarding potential corrective actions if the results confirm lead levels above 15 ppb.[100] ***The water system is not responsible for the costs of any corrective action or maintenance***;[101]

n. Keep records of all requests for lead related assistance and provide the records to DDW, upon request;[102]

o. Include in the annual Consumer Confidence Report a statement summarizing the number of schools requesting lead sampling.[103]

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

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.[104]
01/11/2018	The claimant filed the Test Claim.[105]
08/13/2018	The State Board filed comments on the Test Claim.[106]
08/13/2018	Finance filed comments on the Test Claim.[107]

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

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

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

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

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

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

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

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

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

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

11/09/2018	The claimant filed its rebuttal comments.[108]
12/21/2018	Commission staff issued the Draft Proposed Decision.[109]
01/11/2019	The State Board filed comments on the Draft Proposed Decision.[110]
01/11/2019	The claimant filed comments on the Draft Proposed Decision.[111]
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.
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.[112]

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.

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

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

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

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

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

A. Lead as an Environmental Health Risk

Lead is toxic and has "no known value to the human body."[113] 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."[114] 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.[115] Low levels of lead exposure can lead to reduced IQ and attention span, learning disabilities, poor classroom performance, hyperactivity, behavioral problems, impaired growth and hearing loss.[116] Higher lead levels can cause severe neurological problems and ultimately death.[117]

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."[118] 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.[119] 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.[120] 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."[121] Sources include: lead-based paint; lead in the air from industrial

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[113] Exhibit X (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6).

[114] Exhibit X (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6).

[115] Exhibit X (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6).

[116] Exhibit X (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools).

[117] Exhibit X (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6).

[118] Exhibit X (8), 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.

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

[120] Exhibit X (8), 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.

[121] Exhibit X (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools).

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.[122]

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.[123] 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.'"[124] 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."[125] 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."[126] 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,[127] 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.[128] The

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[122] Exhibit X (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, pages 163-164 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools).

[123] Exhibit X (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 164 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools).

[124] Exhibit X (8), 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.

[125] Exhibit X (8), 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.

[126] Exhibit X (8), 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.

[127] Education Code section 32240 et seq.

[128] Education Code section 32242.

Act did not specifically require testing of drinking water, but only required the Department to assess risk factors, of which drinking water was one.

B. Prior Law on Drinking Water

1. Federal Law

In 1974 Congress passed the federal Safe Drinking Water Act, authorizing U.S. EPA to set health-based standards for drinking water supplies, which U.S. EPA, the states, and drinking water systems work together to meet.[129] 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.[130] U.S. EPA states that there are over 170,000 public water systems providing drinking water to Americans, to which the Act applies.[131]

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).[132] 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]."[133] The number of samples required depends on the size of the drinking water system, and any history of prior exceedances.[134] 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 public education.[135] The LCR also includes monitoring and reporting requirements for public water systems.[136]

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[129] Exhibit X (10), 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.

[130] 42 U.S.C. § 300f(4).

[131] Exhibit X (10), 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.

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

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

[134] See Exhibit X (5), 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).

[135] 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).

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

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."[137] 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.[138]

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.[139] The State Board issues drinking water supply permits to all California "public water systems," which may be privately or government owned and which are defined the same as under the federal Act as "a system for the provision of water for human consumption through pipes or other

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[137] Health and Safety Code section 116270.

[138] Health and Safety Code section 116270.

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

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."[140]

The courts have called the California Safe Drinking Water Act "a remedial act intended to protect the public from contamination of its drinking water."[141] 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.[142] 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,"[143] 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.[144] If lead levels above 0.015 mg/L (15 ppb) are detected, the water system is expected to take corrective action, beginning with corrosion control treatment measures, then source water treatment, lead service line replacement, and public education.[145] Approximately 500 schools within California are themselves permitted as a "public water system," because they have their own water supply, such as a well.[146] Those entities also are required to test their taps for lead and copper under the

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[140] 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).

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

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

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

[144] 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).

[145] 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).

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

LCR; however, most schools are served by community water systems that are not required to test for lead specifically at the school's taps.[147]

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.[148]

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.[149] SB 334 was vetoed by then-Governor Brown, whose veto message expressed concern that the bill could create a very expensive reimbursable state mandate.[150] 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.[151]

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;

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

[148] 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").

[149] Exhibit X (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 148 (SB 334, Legislative Counsel's Digest).

[150] Exhibit X (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 145 (Governor's Veto Message).

[151] Exhibit X (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 145 (Governor's Veto Message).

- Finalize a sampling plan and complete initial sampling within 90 days, or develop an alternative time schedule if necessary;
- Collect one to five samples from drinking fountains, cafeteria/food preparation areas, or reusable bottle filling stations;
- Collect samples on a Tuesday, Wednesday, Thursday, or Friday on a day when school is in session;
- Submit samples to an ELAP certified laboratory;
- Within two business days of a result that shows an exceedance of 15 parts per billion (ppb), notify the school of the sample result;
- If an initial sample shows an exceedance of 15 ppb:
    - Collect an additional sample within 10 business days, unless the sample site is removed from service by the school;
    - Collect a third sample within 10 business days if the resample is less than or equal to 15 ppb;
    - Collect at least one more sample at a site where the school has completed some corrective action;
- Ensure the water system receives the results of repeat samples no more than 10 business days after the date of collection;
- Do not release lead sampling data to the public for 60 days, unless in compliance with a Public Records Act request;
- Discuss the results with the school prior to releasing the results to the public.[152]

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.[153]

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.[154] "Authorized school representative" is defined as "the superintendent or

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

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

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

designee of a school, governing board or designee of a charter school, or administrator or designee of a private school."[155]

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.[156]

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

Effective January 1, 2018 (almost one year after the effective date of the test claim order), Health and Safety Code section 116277 (AB 746) required community water systems[157] 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.[158] The section became inoperative July 1, 2019, and was repealed effective January 1, 2020.[159] 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

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

[156] 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.

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

[158] Exhibit X (4), Health and Safety Code section 116277 (as added by Stats. 2017, ch. 746) (AB 746).

[159] Exhibit X (4), Health and Safety Code section 116277(g) (as added by Stats. 2017, ch. 746) (AB 746).

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

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

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

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

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

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

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

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

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

(3) The local educational agency completed lead testing of the potable water system after January 1, 2009, and posts information about the lead testing on the local educational agency's public Internet Web site, including, at a minimum, identifying any schoolsite where the level of lead in drinking water exceeds 15 parts per billion.

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

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

> (1) "Local educational agency" means a school district, county office of education, or charter school located in a public facility.
>
> (2) "Potable water system" means water fountains and faucets used for drinking or preparing food.

> (g) This section shall become inoperative on July 1, 2019, and, as of January 1, 2020, is repealed.[160]

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.[161] 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.[162]

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

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[160] Exhibit X (4), Health and Safety Code section 116277 (as added by Stats. 2017, ch. 746) (AB 746).

[161] Exhibit X (4), 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.

[162] Exhibit X (4), 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.

> lead sample was found. These amendments allowed the private schools to continue to request sampling and assistance after the passage of AB 746.[163]

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.[164]

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."[165]

III. Positions of the Parties

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.[166] 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.[167] 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.[168]

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[163] Exhibit X (7), State Water Board, *Lead Sampling in Schools*, https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/leadsamplinginschools.html (accessed on January 30, 2023), page 1.

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

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

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

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

[168] 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.[169] The claimant asserts that these facts constitute practical compulsion within the meaning of *Department of Finance v. Commission* (*Kern*).[170]

The claimant asserts that the test claim order imposes a new program or higher level of service.[171]

The claimant also asserts that it has incurred increased costs mandated by the state, and that the exceptions in Government Code section 17556 do not apply. The claimant alleges its total costs for fiscal year 2016-2017 to be $351,577.26, and for fiscal year 2017-2018, $47,815.67.[172] The order expressly provides that the claimant must conduct the lead sampling at no charge to the schools in its service area. The claimant concludes on this basis, and pursuant to article XIII C of the California Constitution, which prohibits a fee or charge that exceeds the proportional cost of service attributable to a parcel, that the claimant is unable to recoup the costs of the alleged mandate through fees for water service, because it cannot impose or increase fees on the schools in which it conducts lead testing, and it is legally proscribed from imposing or increasing fees on other water users.[173]

The claimant states in its rebuttal comments that the test claim order results in increased costs mandated by the state: "By mandating that the City perform lead testing for free, the Permit Amendment has ensnared the City in [a] constitutional web of fees and charges, where the only ways out are to spend local tax revenue or to seek reimbursement through this Commission."[174] The claimant argues that because the express language of the test claim order prohibits charging schools for the costs of sampling, "the cost of the new service is being absorbed by all City ratepayers."[175] The "constitutional web" the claimant is referring to is the substantive limitations on new fees or charges imposed by Proposition 218; article XIII D imposes a proportionality requirement, a prohibition on excessive fees, and a prohibition on new fees or charges for any service "unless that service is actually used by, or immediately available to, the owner of the property in question."[176] And although the "SWRCB believes that the Permit Amendment

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

[170] (2003) 30 Cal.4th 727.

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

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

[173] Exhibit A, Test Claim, filed January 11, 2018, page 54.

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

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

[176] Exhibit D, Claimant's Rebuttal Comments, filed November 9, 2018, page 10, citing California Constitution, article XIII D, section 6.

confers a direct benefit on all water ratepayers, not just the schools, in the form of increased property values and ensuring the City's water does not contain lead,"[177] the claimant argues that the benefits are not sufficiently direct:

> First, raising water rates to cover the cost of the Permit Amendment would ultimately violate the Permit Amendment itself. The City is legally obligated by Proposition 218 to apportion the cost of service based on the relative benefits received by its customers. Proposition 218 further prohibits the City from charging customers for services that are not immediately available to them. The schools, as the exclusive and direct recipients of lead testing under the Permit Amendment, benefit the most in that the testing assesses school pipes and fixtures for sources of lead. Lead testing is not available to the rest of the City's water ratepayers under the Permit Amendment, so they do not receive the benefit of having their own properties evaluated. The benefits of higher property values and testing of City water that SWRCB says are direct benefits to all ratepayers, are really collateral or incidental benefits. Any water rate increase apportioning the cost of lead testing among City ratepayers would fall primarily on schools, the direct and primary beneficiary of the lead testing. The Permit Amendment, however, prohibits charging a school for lead testing. A school is being charged for lead testing whether the City sends the school an invoice when the testing is done, or passes on the cost of lead testing to a school through a water rate increase.
>
> Second, even assuming there is a plausible connection between lead testing at schools and higher property values in the surrounding neighborhoods, higher property values do not benefit all water ratepayers. Water ratepayers are both homeowners and renters. While a homeowner may benefit from a higher resale value of a home, a tenant will not. Higher property values cannot justify charging all water ratepayers for a service they are not receiving.[178]

Moreover, the claimant argues that any fees that might be imposed for lead testing are not imposed as an incident of property ownership, on an ongoing basis.[179] Accordingly, the claimant argues that Proposition 26 controls:

> Proposition 26 further tightened the restrictions on local government revenue imposed by Propositions 13 and 218 by defining a tax as "any levy, charge, or exaction of any kind imposed by a local government, except the following:"
>
> > (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.

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[177] Exhibit D, Claimant's Rebuttal Comments, filed November 9, 2018, page 10.

[178] Exhibit D, Claimant's Rebuttal Comments, filed November 9, 2018, page 11.

[179] Exhibit D, Claimant's Rebuttal Comments, filed November 9, 2018, page 12.

> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
>
> (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
>
> (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
>
> (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
>
> (6) A charge imposed as a condition of property development.
>
> (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

A fee or charge is a tax that must be approved by the voters unless the fee or charge meets one of these seven exceptions. [Citing to Cal. Const., art. XIII C, § 2.] The last of the seven exceptions is for property-related fees and charges under Proposition 218, but because lead testing performed under the Permit Amendment is not provided as an incident of property ownership (discussed above), the City cannot avail itself of that exception to raise water rates without voter approval. The third through sixth exceptions are inapplicable to a fee for lead testing because the City is not acting as a regulator in performing the service, the City is not charging the schools to enter City property, the City is not fining the schools for violating the law, and the City is not imposing a development fee, respectively. The first exception for "a specific benefit conferred or privilege granted directly to the payor" does not apply either, because the City is not issuing a school a permit or a license to engage in any activity.

This leaves only the second exception, which would ordinarily give the City sufficient fee authority in situations like this: "[a] charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." [Citing to Cal. Const., art. XIII C, § 1(e)(2).] The City is providing lead testing services on school property at the request of each school, for which the City could ordinarily charge each school an amount equivalent to the cost of providing the service. The problem is the Permit Amendment prohibits the City from charging the schools, even though the schools are receiving the government service. The school is not the "payor," so the second exception does not apply. Therefore, by default, the City's water ratepayers become the "payor" even though they are not requesting or receiving the service. Without any applicable exceptions, charging water ratepayers for

lead testing provided to schools for free is a tax subject to voter approval under Proposition 26.[180]

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

B. Department of Finance

Finance contends that the test claim order does not impose a new program or higher level of service.[181]

Finance argues that "claimants do have fee authority undiminished by Propositions 218 or 26."[182] Finance states that "Proposition 26 specifically excludes assessments and property-related fees imposed in accordance with Proposition 218 from the definition of taxes."[183] Finance maintains that the alleged mandate "involves the provision of water services and the fee authority is subject at most to the majority protest provision under article XIII D, section 6(a)."[184] Finance further asserts that "as the State Board makes clear in its comments on this test claim, lead testing in K-12 schools provides a direct benefit to the water system as a whole and each ratepayer, and the City may therefore set water rates sufficient to pay for the costs of compliance with the permit amendment."[185]

C. State Water Resources Control Board

The State Board asserts that the test claim order is not subject to state mandate reimbursement because it does not impose a new program or higher level of service, and because the claimant has fee authority sufficient to cover the costs of any required activities despite Proposition 218.[186]

The State Board argues that Proposition 218 does not prevent the claimant from imposing or increasing water rates to recoup the costs of the alleged mandate. The State Board argues that the lead testing required under the Order confers a direct benefit on all water system users as a whole because it functionally extends the Lead and Copper rule by providing additional water quality data of systemwide importance, which in turn "will help to maintain and possibly improve property values."[187]

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[180] Exhibit D, Claimant's Rebuttal Comments, filed November 9, 2018, pages 12-13.

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

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

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

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

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

[186] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, pages 8-17.

[187] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, pages 15-16.

IV. Discussion

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

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

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[188] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[189]

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

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[190]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[191]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order.[192]
4. The mandated activity results in the local agency or school district incurring increased costs mandated by the state within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[193]

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

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

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

[191] *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).

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

[193] *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 Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[194] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[195] 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."[196]

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."[197]

The effective date of the order is January 18, 2017.[198] The claimant filed the Test Claim on January 11, 2018, less than 12 months after the effective date of the order.[199] Therefore, the Test Claim is timely filed.

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

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

This Test Claim alleges new state-mandated activities and costs arising from an amendment to the claimant's public water system permit adopted by the State Water Board, Order No. 2017PA-SCHOOLS for the City of San Diego PWS No. 3710020. The test claim order requires the claimant, as the operator of a "public water system" that serves a number of K-12 schools, to perform lead sampling upon request of a school at no cost to the school.[200] Under the order,

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

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

[196] *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).

[197] Government Code section 17551(c).

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

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

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

upon request, the claimant must take samples to perform lead sampling, at one to five fixtures (e.g., drinking fountains or food preparation areas) on the school's property, process those results at a certified laboratory, maintain records of the requests and the results, and provide the results, and if necessary, information to the school regarding possible remediation or other solutions if lead is detected in the fixtures above 15 parts per billion (ppb).

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

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

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

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

1. Submit to the State Water Board's Division of Drinking Water a comprehensive list of the names and addresses of all K-12 schools served water through a utility meter [by the claimant] by July 1, 2017;[201]
2. If a school representative requests lead sampling assistance in writing by November 1, 2019:[202]
   a. Respond in writing within 60 days and schedule a meeting with school officials to develop a sampling plan;[203]
   b. Finalize a sampling plan and complete initial sampling within 90 days [or an alternative time schedule approved by DDW];[204]
   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;[205]

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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.

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

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

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

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

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

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;[206]

e. Ensure samples are collected by an adequately trained water system representative;[207]

f. Submit the samples to an ELAP certified laboratory for analysis;[208]

g. Require the laboratory to submit the data electronically to DDW;[209]

h. Provide a copy of the results to the school representative;[210]

i. Within two business days of a result that shows an exceedance of 15 ppb, notify the school of the sample result;[211]

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;[212]
- Collect a third sample within 10 business days after notification that a resample result is less than or equal to 15 ppb;[213]
- 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;[214]

k. Ensure that the water system receives the results of repeat lead samples from the laboratory in no more than 10 business days;[215]

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;[216]

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

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

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

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

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

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

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

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

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

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

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

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;[217]

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.[218] ***The water system is not responsible for the costs of any corrective action or maintenance***;[219]

o. Keep records of all requests for lead related assistance and provide the records to DDW, upon request;[220]

p. Include in the annual Consumer Confidence Report a statement summarizing the number of schools requesting lead sampling.[221]

Both the claimant and the State Water Board agree that these requirements are new, as compared against prior law.[222]

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

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

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

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

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

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

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

[222] 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 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).

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.[223] "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."[224]

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.[225]

From January 1, 2018 through July 1, 2019, however, Health and Safety Code section 116277 required a community water system[226] serving any public school constructed or modernized prior to January 1, 2010, to test for lead in the school's potable water system[227] 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.

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

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

[225] 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.

[226] "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).)

[227] Exhibit X (4), 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).

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"[228] and does *not* apply if the "schoolsite was constructed or modernized after January 1, 2010."[229] Section 116277 defines "local educational agency" as "a school district, county office of education, or charter school located in a public facility."[230] 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 agrees that the requirements of section 116227 apply only to public schools.[231] 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.[232]

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

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[228] Exhibit X (4), Health and Safety Code section 116277(a)(1) (as added by Stats. 2017, ch. 746) (AB 746).

[229] Exhibit X (4), Health and Safety Code section 116277(e)(1) (as added by Stats. 2017, ch. 746) (AB 746).

[230] Exhibit X (4), Health and Safety Code section 116277(f)(1) (as added by Stats. 2017, ch. 746) (AB 746).

[231] Exhibit X (7), 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.").

[232] Exhibit X (4), 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.

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.[233] Section 116277 was not effective until January 1, 2018 and contains no similar requirement. Thus, this requirement is imposed solely by the test claim order.

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

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

When determining whether a test claim statute or order compels compliance and, thus, creates a state-mandated program for purposes of reimbursement under article XIII B, section 6, the courts have identified two distinct theories: legal compulsion and practical compulsion.[234] 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.[235] The California Supreme Court has described legal compulsion as follows:

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

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[233] 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.

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

[235] *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.[236]

Article XI, section 9(a) of the California Constitution provides that a "municipal corporation" *may* be established to operate public works to furnish light, water, power, heat, transportation, or means of communication.[237] The courts have interpreted article XI, section 9 (previously section 19) as granting authority, rather than imposing a duty.[238]

Under the Government Code, when interpreting statutes and constitutional provisions, "shall" is mandatory, and "may" is permissive.[239] Article XI, section 9 provides that a municipal corporation *may* establish water service. Government Code section 38742 also provides that the legislative body of any city "*may*" contract for supplying the city with water for municipal purposes; *or* "*may*" "[a]cquire, construct, repair, and manage pumps, aqueducts, reservoirs, or other works necessary or proper for supplying water for the use of the city or its inhabitants or for irrigating purposes of the city."

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

Nonetheless, even where a local government entity is not legally compelled to perform required activities, it may be practically compelled to do so. As the California Supreme Court recently stated in *Coast Community College Dist. v. Commission on State Mandates*, practical compulsion "arises when a statutory scheme does not command a local entity to engage in conduct, but rather induces compliance through the imposition of severe consequences that leave the local entity no reasonable alternative but to comply."[240]

In *City of Sacramento v. State Of California* , the California Supreme Court addressed a federal law requiring states to provide unemployment insurance to public employees, characterized as

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

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

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

[239] Government Code section 14.

[240] *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).

employing "a 'carrot and stick' to induce state compliance."[241] 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.[242] 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.[243] The state opposed the request for reimbursement on the ground that the legislation imposed a federal mandate and, thus, reimbursement was not required.[244] 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.[245] The court 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."[246] 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."[247]

Thus, where the plain language of the law at issue 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 activities at issue will result in certain and severe penalties or other draconian consequences, such that the local government agency has no choice but to comply.[248]

The claimant concedes that it is not legally obligated to provide water service under state law, instead asserting that it "has no practical alternative but to comply with the Permit

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

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

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

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

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

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

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

[248] *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; Government Code section 17559.

Amendment."[249] The claimant argues that because of its long history of providing water service and because of the substantial bond liability that would immediately come due if it ceased operating as a public water system, it has no choice but to continue operating as a public water system and comply with the test claim order.

Substantial evidence in the record submitted by the claimant shows that the claimant is practically compelled to continue providing water service as a public water system: namely, 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,[250] 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.[251]

The claimant also argues that failure to comply with the test claim order could result in suspension or revocation of the permit, without which the claimant cannot operate its water system.[252] In support, the claimant cites to Health and Safety Code section 116625, which provides that the State Water 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 applicable law.[253] Section 116625 also gives the State Water Board the authority to temporarily suspend any permit prior to hearing if necessary to prevent "an imminent or substantial danger to health."[254] Furthermore, 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."[255]

There is substantial evidence in the record showing that the claimant would suffer "certain and severe penalties" or other draconian measures if the claimant decided to no longer provide water

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

[250] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed January 11, 2019, page 9 (The claimant also points out that its six largest customers are federal, state, and local agencies, including the claimant itself, and that these agencies could not function if the claimant elected to discontinue water service).

[251] Exhibit G, Claimant's Comments on the Draft Proposed Decision, filed January 11, 2019, pages 8-11; 56-59 (Declaration of Raymond C. Palmucci, Deputy City Attorney designated to review and approve information pertaining to the City's Water Fund); 112 (Financial Statement regarding Subordinated Water Revenue Bonds, Series 2018A); 648-716 (2009 Amended and Restated Master Installment Purchase Agreement).

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

[253] Health and Safety Code section 116625(a).

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

[255] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, pages 16-17.

service to its residents or operate as a public water system in order to avoid compliance with the test claim order. The evidence shows that if the claimant stops providing water after continuously doing so for over 120 years, more than 1.3 million residents will lose access to safe and clean drinking water, including the public agencies that make up its six largest consumers. As the claimant notes, "simply put, people cannot survive without water" and therefore, the claimant "must continue to provide water service to protect the health safety and welfare of its residents."[256] Furthermore, the claimant will be in default on debt secured to maintain its water system, and will face immediate repayment of more than $890 million.

Thus, the Commission finds that claimant has submitted substantial evidence showing that it is practically compelled to continue to operate as a public water system, and as such, is required to comply with the requirements imposed by the test claim order.

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

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

For the test claim order to be subject to subvention pursuant to article XIII B, section 6 of the California Constitution, the order must impose a new program or higher level of service. A new program or higher level of service is defined as a program that carries out the governmental function of providing services to the public, or, in implementing a state policy, imposes unique requirements on local government that do not apply generally to all residents and entities in the state.[257]

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."[258] The Court stated its conclusion that the permit establishes a new program and remanded the claim back to the Commission to determine the remaining issues as follows:

> On the City's appeal, we reverse. For reasons we will cover below, we conclude that the State Board's new condition requires local governments to support "a new program" within the meaning of article XIII B, section 6. But because the City's showing that the State Board's permit condition establishes a "new program" is a necessary, though not sufficient, showing for reimbursement, we stop short of

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

[257] California Constitution, article XIII B, section 6; *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[258] Exhibit X (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.

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.[259]

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

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

To be reimbursable, the mandated activities must also result in increased costs mandated by the state. Article XIII B, section 6 of the California Constitution and Government Code section 17561(a) require reimbursement for all costs mandated by the state, unless there is an express exemption in article XIII B, section 6. Government Code section 17514 defines "costs mandated by the state" as any increased costs that a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) further requires that no claim shall be made nor shall any payment be made unless the claim exceeds $1,000. In addition, a finding of costs mandated by the state means that none of the exceptions identified in Government Code section 17556 apply.[260]

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

The claimant alleges that it has incurred costs to comply with the test claim order, as follows:[261]

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

[259] Exhibit X (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.

[260] Government Code section 17556.

[261] Exhibit A, Test Claim, filed January 11, 2018, pages 18-51, 58.

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

As shown above, the claimant alleges incurred costs of $351,577.26 for fiscal year 2016-2017.[262] In support, the claimant cites to the declaration of Rex Ragucos, Supervising Management Analyst for the City of San Diego Public Utilities Department and to a cost analysis spreadsheet prepared by Mr. Ragucos.[263] Mr. Ragucos directly oversees the review of and budgetary requirements for implementation of the mandated activities in the test claim order.[264] His declaration contains a narrative of the cost analysis he performed of expenses incurred under the test claim order as of March 2018, as well as projected expenses through the end of fiscal year 2017-2018.[265] The cost analysis is attached to the Test Claim as Exhibit 36.[266]

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

The claimant states that it anticipates total costs will potentially be higher than the estimated $69,761.67 during the last quarter of fiscal year 2017-2018 "because the legislature is planning to require all schools to receive this lead testing, whether voluntarily requested or not."[267] The claimant appears to be referencing AB 746, discussed above, which added Health and Safety Code section 116277 to require community water systems serving public school constructed before January 1, 2010 to test for lead in the schools' potable water system during the time period January 1, 2018 through July 1, 2019.[268] AB 746 is the not the subject of this test claim, nor has a test claim been filed on AB 746. Therefore, whether AB 746 imposes a reimbursable state-mandated program on the claimant or any other local government agency is not presently before the Commission, and the Commission makes no findings regarding whether Health and Safety Code section 116277 (as added by Stats. 2017, ch. 746) imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6. As discussed above, beginning January 1, 2018, any lead testing conducted by the claimant on those public schools constructed or modernized before January 1, 2010, that did not request testing before

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

[263] Exhibit A, Test Claim, filed January 11, 2018, page 79 (Declaration of Rex Ragucos).

[264] Exhibit A, Test Claim, filed January 11, 2018, page 79 (Declaration of Rex Ragucos).

[265] Exhibit A, Test Claim, filed January 11, 2018, page 79 (Declaration of Rex Ragucos).

[266] Exhibit A, Test Claim, filed January 11, 2018, pages 2767-2768.

[267] Exhibit A, Test Claim, filed January 11, 2018, pages 58, 86 (Declaration of Rex Ragucos).

[268] Health and Safety Code section 116277 (as added by Stats. 2017, ch. 746).

January 1, 2018, is required by Health and Safety Code section 116227 (as added by Stats. 2017, ch. 746), and not by the test claim order.

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

As stated above, the test claim order imposes the following new requirement on the claimant: "Do not release the lead sampling data to the public for 60 days following receipt of the initial lead sampling results unless in compliance with a Public Records Act request for specific results."[269] This activity is limited to releasing the lead sampling data in compliance with preexisting obligations under the Public Records Act.

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

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

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

Government Code section 17556(d) provides that the Commission shall not find costs mandated by the state if it finds that the "local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." Thus, even if a statute or executive order requires a local government agency to provide a new program, subvention is not required under article XIII B, section 6 if the local government has fee authority sufficient as a matter of law to pay for the mandated program.[270]

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[269] Exhibit A, Test Claim, filed January 11, 2018, page 107 (test claim order). The claimant alleges it incurred reimbursable costs under Section 3(l) of the test claim order to prepare presentations for the Environmental Committee of the City Council on the progress of lead testing and to respond to media requests on a daily basis. Exhibit A, Test Claim, filed January 11, 2018, pages 44-45. Section 3(l) of the test claim order simply requires the claimant to release the data in compliance with the Public Records Act (Government Code section 7920 et seq.) and does not require the claimant to prepare presentations or any new documents, or to respond to requests for lead sampling data.

[270] *County of Fresno v. State of California* (1990) 53 Cal.3d. 482, 487; *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 811; *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195.

As explained below, the service provided to test for lead upon request of a school is not a property-related service and so a property-related fee may not be imposed pursuant to Proposition 218. Moreover, Proposition 26 prohibits the claimant from charging fees for the mandated activities on ratepayers who do not receive the service.

Article XIII D of the California Constitution, which was added in 1996 by Proposition 218, defines "fees" associated with property ownership as follows:

> (e) "Fee" or "charge" means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.[271]

Article XIII D further defines a "property-related service" as "a public service having a *direct relationship* to property ownership."[272]

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

> *Except for fees or charges for sewer, water, and refuse collection services*, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.[273]

"Thus, article XIII D expressly exempts water service charges from the voter-approval requirement that it imposes on all other fees and charges."[274] Nonetheless, water service fees are still subject to the procedural requirements imposed by article XIII D, section 6(a), including the voter protest provisions.[275] And a water service fee must satisfy the five substantive requirements of article XIII D, section 6(b), which provides as follows:

> A fee or charge shall not be extended, imposed, or increased by any agency unless it meets *all* of the following requirements:
>
> (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

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[271] California Constitution, article XIII D, section 2(e).

[272] California Constitution, article XIII D, section 2(h), emphasis added.

[273] California Constitution, article XIII D, section 6(c).

[274] *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 219.

[275] *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal. 4th 205, 215 ("Because article XIII D does not include similar express exemptions from the other requirements that it imposes on property-related fee[s] and charges, the implication is strong that fees for water, sewer, and refuse collection services are subject to those other requirements").

> (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.
>
> (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership *shall not exceed the proportional cost of the service attributable to the parcel*.
>
> (4) No fee or charge may be imposed for a service *unless that service is actually used by, or immediately available to, the owner of the property in question*. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.
>
> (5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.[276]

The claimant argues that it cannot increase water rates to cover the costs of the mandated program. Because the test claim order "divests the City of its authority to levy fees by ordering the City to provide a new service at no charge" and "[w]ithout the ability to charge the schools for a new service provided exclusively to them" the cost of the *Lead Sampling* program would have to be absorbed by the remaining ratepayers, which would violate the substantive requirements that article XIII D imposes on all property-related fees.[277]

> [R]aising water rates to cover the cost of the Permit Amendment would ultimately violate the Permit Amendment itself. The City is legally obligated by Proposition 218 to apportion the cost of service based on the relative benefits received by its customers. Proposition 218 further prohibits the City from charging customers for services that are not immediately available to them. The schools, as the exclusive and direct recipients of lead testing under the Permit Amendment, benefit the most in that the testing assesses school pipes and fixtures for sources of lead. Lead testing is not available to the rest of the City's water ratepayers under the Permit Amendment, so they do not receive the benefit of having their own properties evaluated. The benefits of higher property values and testing of City water that SWRCB says are direct benefits to all ratepayers, are really collateral or incidental benefits. Any water rate increase apportioning the cost of lead testing among City ratepayers would fall primarily on schools, the direct and primary beneficiary of the lead testing. The Permit Amendment, however, prohibits charging a school for lead testing. A school is being charged for lead testing whether the City sends the school an invoice when the testing is done, or passes on the cost of lead testing to a school through a water rate increase.[278]

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[276] California Constitution, article XIII D, section 6(b), emphasis added.

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

[278] Exhibit D, Claimant's Rebuttal Comments, filed November 9, 2018, pages 10-11.

The State Board contends – and Finance agrees – that Proposition 218 does not prevent the claimant from increasing water rates because lead testing confers a "direct benefit" to the water system as a whole and, by extension, each ratepayer. [279] Specifically, the State Board alleges that the mandated program "functionally extends" the Lead and Copper Rule and helps to maintain and possibly improve property values.[280]

> By requiring additional lead testing in schools, the Permit Amendment functionally extends the Lead and Copper rule by providing additional testing points which can inform the City about how the water chemistry in its distribution network may be impacting not only particular schools, but residences who obtain water from a common source or through a common delivery system. And to the extent the City takes corrective action, for example by additional treatment to reduce corrosivity, all users, not just the schools, will benefit [] from the reduced threat of lead exposure. Therefore, just as the testing of private residences under the Lead and Copper rule benefits the water system as a whole, and by extension, each of the ratepayers, not just the owners of the residences being tested, the lead testing in K-12 schools provides similar direct benefit to each ratepayer by providing additional testing inputs the City can use to optimize its water chemistry and quality to reduce the amount of lead in [] all residences and businesses.
>
> Additionally, the lead testing in schools provides a direct benefit for each ratepayer by maintaining, and possibly, improving property values.[281]

The California Supreme Court has held that domestic water delivery through a pipeline is a "property-related service" within the meaning of article XIII D,[282] and therefore the fee imposed for that service is a property-related fee subject to the restrictions of article XIII D.[283] But this determination does not apply to any domestic water delivery system-related service without limitation. As the Court explained in *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, "[a] water service fee is a fee or charge under article XIII D if, but only if, it is imposed 'upon a person as an incident of property ownership.'"[284]

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[279] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, page 16; Exhibit C, Finance's Comments on the Test Claim, filed August 13, 2018, page 2.

[280] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, page 16.

[281] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 13, 2018, page 16.

[282] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 426–427.

[283] *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 217.

[284] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal. 4th 409, 426–427.

Richmond addressed whether a water district's fee for fire suppression as part of a new service connection fee was subject to the restrictions of article XIII D. In upholding the validity of the fee, the Supreme Court held that a fee for making a new connection to the water system is not imposed "as an incident of property ownership" and therefore not subject to the restrictions that article XIII D imposes on property assessments and property related fees because the fee results "from the owner's *voluntary decision* to apply for the connection."[285]

> Thus, we agree that water service fees, being fees for property-related services, may be fees or charges within the meaning of article XIII D. But we do not agree that all water service charges are necessarily subject to the restrictions that article XIII D imposes on fees and charges. Rather, we conclude that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed "upon a person as an incident of property ownership." (Art. XIII D, § 2, subd. (e).) A fee for ongoing water service through an existing connection is imposed "as an incident of property ownership" because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed "as an incident of property ownership" because it results from the owner's voluntary decision to apply for the connection.
>
> Any doubt on this point is removed by considering the requirements that article XIII D imposes on property-related fees and charges. As with assessments, article XIII D requires local government agencies to identify the parcels affected by a property-related fee or charge. Specifically, it requires the agency to identify "[t]he parcels upon which a fee or charge is proposed for imposition." (Art. XIII D, § 6, subd. (a)(1).) As we have explained, *it is impossible for the District to comply with such a requirement for connection charges, because the District cannot determine in advance which property owners will apply for water service connection*. As with assessments, this impossibility of compliance strongly suggests that connection fees for new users are not subject to article XIII D's restrictions on property-related fees.[286]

Thus, under *Richmond*, a water service fee imposed because of a voluntary decision of a property owner is not imposed 'as an incident of property ownership' and therefore is not a property-related fee within the meaning of article XIII D. Here, because the claimant's performance of the mandated activities is triggered by the voluntary decision of a school to request testing, the claimant cannot impose a property-related fee to cover the costs of the *Lead Sampling* program pursuant to Proposition 218 (article XIII D), since the service is not a property-related service.

In 2010, the voters adopted Proposition 26, which sought to broaden the definition of "tax." Thus, under article XIII C, section 1(e) of the California Constitution, "any levy, charge, or

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[285] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal. 4th 409, 427.

[286] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 427–428, emphasis added.

exaction of any kind imposed by a local government," is a "tax," and therefore requires voter approval under article XIII C,[287] unless one of the following seven exceptions applies:[288]

> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor *that is not provided to those not charged*, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
>
> (2) A charge imposed for a specific government service or product provided directly to the payor *that is not provided to those not charged*, and which does not exceed the reasonable costs to the local government of providing the service or product.
>
> (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
>
> (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
>
> (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
>
> (6) A charge imposed as a condition of property development.
>
> (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D [Proposition 218].[289]

The claimant asserts that the test claim order prohibits it from exercising its fee authority on schools, and none of the seven exceptions under Proposition 26 apply.[290]

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[287] California Constitution, article XIII C, section 2, which was added by Proposition 218 in 1996 states in pertinent part:

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

[288] California Constitution, article XIII C, section 1(e).

[289] California Constitution, article XIII C, section 1(e), emphasis added.

[290] Exhibit D, Claimant's Rebuttal Comments, filed November 9, 2018, pages 12-13.

> The last of the seven exceptions is for property-related fees and charges under Proposition 218, but because lead testing performed under the Permit Amendment is not provided as an incident of property ownership (discussed above), the City cannot avail itself of that exception to raise water rates without voter approval. The third through sixth exceptions are inapplicable to a fee for lead testing because the City is not acting as a regulator in performing the service, the City is not charging the schools to enter City property, the City is not fining the schools for violating the law, and the City is not imposing a development fee, respectively. The first exception for "a specific benefit conferred or privilege granted directly to the payor" does not apply either, because the City is not issuing a school a permit or a license to engage in any activity.[291]

The claimant further states that the second exception (a "charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product") might ordinarily apply but for the fact that here, the permit order prohibits the claimant from charging the schools receiving the lead testing services. "The school is not the 'payor,' so the second exception does not apply. Therefore, by default, the City's water ratepayers become the 'payor' even though they are not requesting or receiving the service."[292]

Finance, however, argues that the claimant has fee authority under Proposition 26 to impose a property-related fee.[293] Similarly, while not specifically addressing Proposition 26, the State Water Board takes the position that the claimant has the authority to pay for the program costs by raising water rates, which it characterizes as a property-related service.[294]

The Commission finds that exceptions (1) through (6) do not apply here. Exceptions (1) and (2) (charges for benefits conferred and privileges granted, services and products provided) do not apply. The test claim order expressly provides that the claimant must conduct lead sampling at *no charge* to the schools in its service area. Because the claimant is required to provide lead sampling to "those not charged," exceptions (1) and (2) do not apply.

Nor does exception (3) (reasonable regulatory costs) apply. Conducting lead sampling of drinking water at schools is not a "reasonable regulatory cost[] to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof."[295] The claimant is not acting in a regulatory capacity in performing the mandated activities. Even characterizing the mandated activities as investigations or inspections, the activities are not carried out for a

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[291] Exhibit D, Claimant's Rebuttal Comments, filed November 9, 2018, page 13.

[292] Exhibit D, Claimant's Rebuttal Comments, filed November 9, 2018, page 13.

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

[294] Exhibit B, State Water Resources Control Board's Comments on the Test Claim, filed August 14, 2018, pages 15-16.

[295] California Constitution, article XIII C, section 1(e)(3).

regulatory purpose. The claimant is not ensuring the school is complying with applicable laws regarding lead limits in school drinking water and expressly does not have any enforcement authority or responsibility under the test claim order if a lead level exceedance is detected. The testing is only done at the request of the school and if there is a violation, the test claim order requires the school, not the claimant, to remediate.[296] Thus, the claimant is performing a service (respond to a request, collect and test samples, provide the school with the results, and discuss the results with the school), not regulating school water quality.

Exceptions (4) (a charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property), (5) (a fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law), and (6) (a charge imposed as a condition of property development) do not apply based on their plain language.

Exception (7), "assessments and property-related fees imposed in accordance with the provisions of Article XIII D," is also inapplicable because, as discussed above, the service is not provided and thus a fee may not be imposed "as an incident of property ownership."

Thus, because the test claim statute prohibits the claimant from imposing a fee for the service upon the schools, and because the claimant cannot impose a fee under Proposition 218 in accordance with the provisions of article XIII D (because the service is not "property related"), or under Proposition 26 in accordance with the provisions of article XIII C (because it does not meet any of the exceptions to the definition of a tax), the claimant does not have fee authority sufficient to cover the costs of the mandated program pursuant to Government Code section 17556(d). In addition, no law or facts in the record support a finding that any of the other exceptions specified in Government Code section 17556 apply to this claim. Accordingly, the Commission finds that the test claim order results in increased costs mandated by the state within the meaning of Government Code sections 17514 and 17556.

V. Conclusion

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

1. Submit to the State Water Board's Division of Drinking Water a comprehensive list of the names and addresses of all K-12 schools served water through a utility meter [by the claimant] by July 1, 2017;[297]
2. If an authorized school representative of a private K-12 school or a public K-12 school in the claimant's service area requests lead sampling assistance in writing by November 1, 2019:[298]

[296] Exhibit A, Test Claim, filed January 11, 2018, page 108.

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

[298] 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;[299]

b. Finalize a sampling plan and complete initial sampling within 90 days [or an alternative time schedule approved by DDW];[300]

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;[301]

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;[302]

e. Ensure samples are collected by an adequately trained water system representative;[303]

f. Submit the samples to an ELAP certified laboratory for analysis;[304]

g. Require the laboratory to submit the data electronically to DDW;[305]

h. Provide a copy of the results to the school representative;[306]

i. Within two business days of a result that shows an exceedance of 15 ppb, notify the school of the sample result;[307]

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;[308]

   - Collect a third sample within 10 business days after notification that a resample result is less than or equal to 15 ppb;[309]

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

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

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

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

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

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

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

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

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

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

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

- 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;[310]

k. Ensure that the water system receives the results of repeat lead samples from the laboratory in no more than 10 business days;[311]

l. Discuss the lead sample results with the school prior to releasing the sample results to the public, and within 10 days of receiving the results from the laboratory;[312]

m. Communicate with the school after lead sampling and assist the school with the interpretation of laboratory results and provide information regarding potential corrective actions if the results confirm lead levels above 15 ppb.[313] ***The water system is not responsible for the costs of any corrective action or maintenance***;[314]

n. Keep records of all requests for lead related assistance and provide the records to DDW, upon request;[315]

o. Include in the annual Consumer Confidence Report a statement summarizing the number of schools requesting lead sampling.[316]

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

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

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

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

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

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

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

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

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

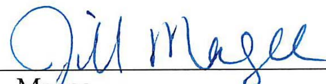
On March 23, 2023, I served the:

- **Draft Proposed Decision, Schedule for Comments, and Notice of Hearing issued March 23, 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 March 23, 2023 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 3/23/23

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.)

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