STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

December 6, 2023

Mr. Chris Hill
Department of Finance
915 L Street, 8th Floor
Sacramento, CA 95814

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

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

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

Dear Mr. Hill and Mr. Palmucci:

On December 1, 2023, the Commission on State Mandates adopted the Decision denying the Test Claim on the above-captioned matter.

Sincerely,

Heather Halsey
Executive Director

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BEFORE THE

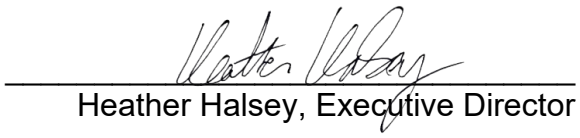
COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON REMAND Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017 Filed on January 11, 2018 City of San Diego, Claimant Notice of Entry of Judgement and Writ of Mandate Remanding the Matter for Reconsideration, served December 1, 2022	Case No.: 17-TC-03-R *Lead Sampling in Schools: Public Water System No. 3710020* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 On Remand from *City of San Diego v. Commission on State Mandates*, Court of Appeal, Third Appellate District, Case No. C092800; Judgment and Writ of Mandate issued by the Sacramento County Superior Court, Case No. 34-2019-80003169-CU-WM-GDS (*Adopted December 1, 2023*) (*Served December 6, 2023*)

TEST CLAIM

The Commission on State Mandates adopted the attached Decision on December 1, 2023.



Heather Halsey, Executive Director

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON REMAND Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017 Filed on January 11, 2018 City of San Diego, Claimant Notice of Entry of Judgement and Writ of Mandate Remanding the Matter for Reconsideration, served December 1, 2022	Case No.: 17-TC-03-R *Lead Sampling in Schools: Public Water System No. 3710020* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 On Remand from *City of San Diego v. Commission on State Mandates*, Court of Appeal, Third Appellate District, Case No. C092800; Judgment and Writ of Mandate issued by the Sacramento County Superior Court, Case No. 34-2019-80003169-CU-WM-GDS (*Adopted December 1, 2023*) (*Served December 6, 2023*)

DECISION

The Commission in State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on December 1, 2023. Kevin King, Lisa Celaya, and Adam Jones appeared on behalf of the claimant, Marilyn Munoz appeared on behalf of the Department of Finance, and David Rice appeared on behalf of the State Water Resources Control Board.

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

The Commission adopted the Proposed Decision to deny the Test Claim by a vote of 4-2 with one abstention, as follows:

Member	**Vote**
Lee Adams, County Supervisor	No
Jennifer Holman, Representative of the Director of the Office of Planning and Research	Yes
Gayle Miller, Representative of the Director of the Department of Finance, Chairperson	Yes

Member	Vote
Renee Nash, School District Board Member	No
Sarah Olsen, Public Member	Abstain
David Oppenheim, Representative of the State Controller, Vice Chairperson	Yes
Spencer Walker, Representative of the State Treasurer	Yes

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*.[1, 2]

The test claim order newly requires the claimant's public water system, beginning January 18, 2017, to submit to the State Board's Division of Drinking Water a list of all public and private K-12 schools it serves and to sample and test drinking water in any K-12 school it serves for the presence of lead, upon the request of a school representative made prior to November 1, 2019 with the following limitation: Beginning January 1, 2018, any lead testing conducted by the claimant on those public schools constructed or modernized before January 1, 2010, that did not request testing before January 1, 2018, is required by Health and Safety Code section 116227, and not by the test claim order.[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 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

[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] 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.

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

governmental function and the mandated testing of this water for lead is plainly a service to the public."[4] The Court directed the Commission to set aside its original Decision and to issue a new Decision consistent with its ruling, and remanded the claim back to the Commission to determine the remaining mandate issues.

The Commission finds that the test order does not impose a reimbursable state-mandated program pursuant to article XIII B, section 6. Although a test claim statute or executive order may contain new requirements, the determination of whether those requirements are mandated by the state depends on whether the claimant's participation in the underlying program is voluntary or compelled.[5]

The claimant is not legally compelled to comply with the test claim order since the claimant's participation in the underlying program to provide water service is not mandated by state law.[6] Under Article XI, section 9(a) of the California Constitution, a "municipal corporation" *may* be established to operate public works to furnish light, water, power, heat, transportation, or means of communication.[7] The courts have interpreted article XI, section 9 (previously section 19) as granting authority rather than imposing a duty.[8] Government Code section 38742 also provides that the legislative body of any city "may" contract for supplying the city with water for municipal purposes; or "may" "[a]cquire, construct, repair, and manage pumps, aqueducts, reservoirs, or other works necessary or proper for supplying water for the use of the city or its inhabitants or for irrigating purposes of the city."

The courts have acknowledged the possibility that a state mandate may be found in the absence of legal compulsion when a statute or executive order induces compliance through the imposition of certain and severe, or other draconian consequences that leave the local entity no reasonable alternative but to comply.[9] The claimant argues

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

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

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

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

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

[9] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816; see also *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 754; *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1367.

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

- The claimant cannot take back a decision made more than 120 years ago to provide water because "[c]ities must provide for the health, safety, and welfare of their residents, and simply put, people cannot survive without water."
- If the claimant ceased operating its water system, it would face immediate repayment of bonds and other financing secured over the years to maintain the water system in good working order totaling nearly one billion dollars.
- If the claimant fails to comply with the test claim order, the State Board could suspend or revoke its operating permit, which would prevent the claimant from operating its water system and leave 1.3 million residents without water service.[10]

The Commission finds that the record does *not* contain substantial evidence showing that the claimant will face certain and severe penalties or other draconian consequences, as is required for a finding of practical compulsion, if it decides not to participate in the underlying program and provide water service to City residents. While a long history of operating a public water system is a factor that supports a finding of practical compulsion under *City of Sacramento v. State of California*, the duration of participation in a voluntary program is just one factor and is insufficient on its own to establish that the claimant is practically compelled to comply with the test claim order.[11]

Moreover, the record does not support the claimant's assertion that if it ceased operating its water system, it would face immediate repayment of bonds and other financing secured over the years to maintain the water system in good working order totaling nearly one billion dollars. In *Kern High School Dist*., the Supreme Court described the financial consequences to the state and its residents in *City of Sacramento* as "so onerous and punitive" that they amounted to "certain and severe federal penalties…including double taxation and other draconian measures."[12] The penalties in that case, double taxation on all of the State's businesses, were immediate

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

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

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

and "draconian," that "the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses.[13]

The evidence does not support that finding here. As explained in this Decision, the claimant is not the debt-holder on the bond funds, and the funds received from the bonds and the Drinking Water State Revolving Fund loans for the improvements to its water system are paid from the Water Utility Fund and, thus, the claimant's general fund is generally not at risk.[14] In the event of default, the principal amount of the debt owing *may* come immediately due, but that is not certain to occur.[15] The State, as the holder of the senior debt from the Drinking Water State Revolving Fund, has priority over the bond debt holders, and is not required to make such a demand. And the bond debt holders have discretion whether to vote collectively to have the debt declared immediately due and payable.[16] Furthermore, the claimant has express contractual discretion to transfer the water system to another water supplier for fair market value, the proceeds of which are used to pay off the debt.[17]

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

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

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

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

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

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

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

COMMISSION FINDINGS

I. Chronology

01/18/2017	Permit Amendment No. 2017PA-SCHOOLS for City of San Diego PWS 3710020 was adopted by the State Board's Division of Drinking Water.[18]
01/11/2018	The claimant filed the Test Claim.[19]
08/13/2018	The State Board filed comments on the Test Claim.[20]
08/13/2018	Finance filed comments on the Test Claim.[21]
11/09/2018	The claimant filed its rebuttal comments.[22]
12/21/2018	Commission staff issued the Draft Proposed Decision.[23]
01/11/2019	The State Board filed comments on the Draft Proposed Decision.[24]
01/11/2019	The claimant filed comments on the Draft Proposed Decision.[25]
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.

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

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

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

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

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

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

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

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

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 for the May 26, 2023 Commission hearing.[26]

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

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

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

05/04/2023 The claimant and the State Board filed comments on the Draft Proposed Decision.[27]

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

09/06/2023 Commission staff issued the Proposed Decision.

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

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

II. Background

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

A. Lead as an Environmental Health Risk

Lead is toxic and has "no known value to the human body."[28] Young children "are at particular risk for lead exposure because they have frequent hand-to-mouth activity and

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

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

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

absorb lead more easily than do adults."[29] 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.[30] 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.[31] Higher lead levels can cause severe neurological problems and ultimately death.[32]

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."[33] 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.[34] 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.[35] U.S. EPA and other agencies have "taken steps over the past several decades to dramatically reduce new

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August 13, 2018, page 163 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6).

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

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

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

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

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

[34] Exhibit K (7), National Institute of Environmental Health Sciences, Lead Information Home Page, https://www.niehs.nih.gov/health/topics/agents/lead/index.cfm (accessed on September 26, 2018), page 1.

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

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."[36] Sources include: lead-based paint; lead in the air from industrial emissions; lead in the soil around roadways and streets from past emissions by automobiles using leaded gasoline, and from deposits of lead dust from paints; industrial lead byproducts; consumer products, including imported dishes, toys, jewelry and plastics; and lead in drinking water leaching from corrosion of plumbing products containing lead.[37]

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.[38] 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.'"[39] 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."[40] 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."[41] Accordingly, the primary regulatory approach, as discussed below, is to require water systems to

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

[37] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 37100200, effective January 18, 2017, filed August 13, 2018, pages 163-164 (USEPA: 3Ts for Reducing Lead in Drinking Water in Schools).

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

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

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

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

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,[42] 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.[43] The Act did not specifically require testing of drinking water, but only required the Department to assess risk factors, of which drinking water was one.

B. Prior Law on Drinking Water

1. Federal Law

In 1974 Congress passed the federal Safe Drinking Water Act, authorizing U.S. EPA to set health-based standards for drinking water supplies, which U.S. EPA, the states, and drinking water systems work together to meet.[44] 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.[45] U.S. EPA states that there are over 170,000 public water systems providing drinking water to Americans, to which the Act applies.[46]

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).[47] 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]."[48] The number of samples required depends on the size of

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[42] Education Code section 32240 et seq.

[43] Education Code section 32242.

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

[45] 42 U.S.C. § 300f(4).

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

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

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

the drinking water system, and any history of prior exceedances.[49] 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.[50] The LCR also includes monitoring and reporting requirements for public water systems.[51]

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."[52] 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.[53]

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

[50] 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).

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

[52] Health and Safety Code section 116270.

[53] Health and Safety Code section 116270.

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.[54] 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 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."[55]

The courts have called the California Safe Drinking Water Act "a remedial act intended to protect the public from contamination of its drinking water."[56] 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.[57] 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,"[58] and the monitoring and corrosion control requirements are aimed at the water systems themselves, whether publicly or privately owned.

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[54] 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.

[55] 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).

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

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

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

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.[59] 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.[60] Approximately 500 schools within California are themselves permitted as a "public water system," because they have their own water supply, such as a well.[61] Those entities also are required to test their taps for lead and copper under the LCR; however, most schools are served by community water systems that are not required to test for lead specifically at the school's taps.[62]

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.[63]

In September 2015, the Legislature passed SB 334 as a potential solution to the gap in regulation, which would have, had it been enacted, required school districts with water sources or drinking water supplies that do not meet U.S. EPA standards to close access to those drinking water sources; provide alternative drinking water sources if the school did not have the minimum number of drinking fountains required by law; and provide access to free, fresh, and clean drinking water during meal times in the food service

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[59] 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).

[60] 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).

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

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

[63] 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").

areas of the schools under its jurisdiction.[64] SB 334 was vetoed by then-Governor Brown, whose veto message expressed concern that the bill could create a very expensive reimbursable state mandate.[65] 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.[66]

Accordingly, the State Board adopted the Permit Amendment (the test claim order) at issue here, as well as over 1,100 other nearly identical (but for the individual public water system information) permit amendments for other drinking water systems serving K-12 schools. Specifically, beginning January 18, 2017, the test claim order requires the claimant to submit to the Division of Drinking Water (DDW) a list of all K-12 schools served water through a utility meter; and then, if requested by any school within its service area by November 1, 2019, the drinking water system shall:

- Respond in writing within 60 days and schedule a meeting;
- Finalize a sampling plan and complete initial sampling within 90 days, or develop an alternative time schedule if necessary;
- Collect one to five samples from drinking fountains, cafeteria/food preparation areas, or reusable bottle filling stations;
- Collect samples on a Tuesday, Wednesday, Thursday, or Friday on a day when school is in session;
- Submit samples to an ELAP certified laboratory;
- Within two business days of a result that shows an exceedance of 15 parts per billion (ppb), notify the school of the sample result;
- If an initial sample shows an exceedance of 15 ppb:
    - Collect an additional sample within 10 business days, unless the sample site is removed from service by the school;
    - Collect a third sample within 10 business days if the resample is less than or equal to 15 ppb;
    - Collect at least one more sample at a site where the school has completed some corrective action;

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

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

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

- 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.[67]

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.[68]

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.[69] "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."[70]

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.[71]

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

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

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

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

[71] 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.

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[72] 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.[73] The section became inoperative July 1, 2019, and was repealed effective January 1, 2020.[74] Section 116277 states in its entirety as follows:

> (a)(1) A community water system that serves a schoolsite of a local educational agency with a building constructed before January 1, 2010, on that schoolsite shall test for lead in the potable water system of the schoolsite on or before July 1, 2019.
>
> (2) The community water system shall report its findings to the schoolsite within 10 business days after the community water system receives the results from the testing laboratory or within two business days if it is found that the schoolsite's lead level exceeds 15 parts per billion.
>
> (3) If the lead level exceeds 15 parts per billion, the community water system shall also test a water sample from the point in which the schoolsite connects to the community water system's supply network to determine the lead level of the water entering the schoolsite from the community water system's water supply network.
>
> (b)(1) A local educational agency shall allow the community water system access to each of the local educational agency's schoolsites that are subject to subdivision (a) to conduct testing.
>
> (2) If the lead level exceeds 15 parts per billion, the local educational agency shall notify the parents and guardians of the pupils who attend the schoolsite or preschool where the elevated lead levels are found.
>
> (c)(1) If lead levels exceed 15 parts per billion, the local educational agency shall take immediate steps to make inoperable and shut down from use all fountains and faucets where the excess lead levels may exist.

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

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

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

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.[75]

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.[76] 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.[77]

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

> As of July 1, 2019, the Division of Drinking Water (DDW), in collaboration with the California Department of Education, has completed the initiative to test for lead in drinking water at all public K-12 schools. California Assembly Bill 746 (AB 746) published on October 12, 2017, effective January 1, 2018, *required community water systems to test lead levels, by July 1, 2019, in drinking water at all California public, K-12 school sites that were constructed before January 1, 2010*.
>
> Prior to the passage of AB 746, in early 2017, the DDW and Local Primacy Agencies issued amendments to the domestic water supply permits of approximately 1,200 community water systems so that schools that are served by a public water system could request assistance from their public water system to conduct water sampling for lead and receive technical assistance if an elevated lead sample was found. These amendments allowed the private schools to continue to request sampling and assistance after the passage of AB 746.[78]

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

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

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

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

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

> 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.[79]

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."[80]

III. Positions of the Parties[81]

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.[82] 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.[83] 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.[84]

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

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

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

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

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

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

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

immediately come due if the City elected to discontinue such service.[85] The claimant asserts that these facts constitute practical compulsion within the meaning of *Department of Finance v. Commission* (*Kern High School Dist.*) (2003) 30 Cal.4th 727.[86]

The claimant asserts that the test claim order imposes a new program or higher level of service, that it has incurred increased costs mandated by the state, and that the exceptions in Government Code section 17556 do not apply.[87]

The claimant filed comments on the Draft Proposed Decision agreeing with the draft proposed finding that the claimant is practically compelled to comply with the test claim order because if it failed to comply, "then the State Water Board could suspend or revoke its operating permit, which would have dire consequences…its 1.3 million residents would be left without water service."[88] Furthermore, if the claimant discontinued water service, the claimant would face "severe financial consequences," namely "a default on the City's approximately $890 million debt from bonds and other financing."[89]

At the December 1, 2023 hearing, the Commission heard from Deputy City Attorney Kevin King and two witnesses for the claimant, Adam Jones and Lisa Celaya. Mr. King stated that the claimant's witnesses would provide testimony on the penalties and legal and practical consequences of noncompliance with the test claim order and why selling the public water system is not an option, factors which Mr. King argued weigh in favor of finding practical compulsion here. Mr. King also argued that there is no requirement that the consequences of noncompliance be certain and that the Proposed Decision incorrectly added an immediacy requirement to the practical compulsion standard. Mr. Jones, Deputy Director of Finance for the claimant's Public Utilities Department, provided testimony on the potential consequences of the City defaulting on its outstanding water system debt, including the City needing to liquidate and sell assets funded by both the Water Utility Fund and the City's General Fund due to insufficient funds to repay the debt; the likelihood that the water system would have to be sold piecemeal and the challenges the City would face in operating portions of such a system; and the risk to the City's financial ratings and ability to issue bonds in the future.

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

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

[87] Exhibit D, Claimant's Rebuttal Comments, filed November 9, 2018, pages 2-9, 58. The claimant alleges its total costs for fiscal year 2016-2017 to be $351,577.26, and for fiscal year 2017-2018, $47,815.67.

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

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

Ms. Celaya, Executive Assistant Director for the claimant's Public Utilities Department, testified that the claimant cannot sell the public water system because it would be impossible for the City to find a buyer in light of the water system's size, complexity, and its interconnectedness with a water project that involves the City's wastewater treatment system (Pure Water San Diego project).

B. Department of Finance

Finance asserts that reimbursement is not required under article XIII B, section 6.[90] The test claim order does not result in increased costs mandated by the state because the order does not impose a new program or higher level of service and the claimants have fee authority sufficient to cover the alleged mandated costs of the claimed activities.[91] Finance did not comment on the whether the test claim order imposes a state-mandated program on the claimant under a theory of legal or practical compulsion.

C. State Water Resources Control Board

The State Board contends that the test claim order is not an unfunded state mandate.[92] The State Board argues that the test claim order does not impose a state-mandated program on the claimant and challenges the finding in the Draft Proposed Decision that the claimant is practically compelled to comply with the test claim order.[93] The State Board argues that *City of Sacramento v. State of California*, *Coast Community College Dist. v. Commission on State Mandates*, and *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) do not support a finding of practical compulsion here and that "[b]y finding that the City is practically compelled to comply with the test claim order, the Commission creates new law in an area where the Supreme Court has expressed caution."[94] The State Board contends that because the claimant is not required to operate a public water system, "the severe consequences and penalties the City claims will occur…may be avoided by transferring its public water system to another entity," and the claimant "has provided no evidence that an appropriate financing package could not be created" to address the claimant's outstanding bond debt.[95] Unlike the local agencies in *City of Sacramento*, who could not avoid the federal unemployment insurance requirements, the voluntary nature of

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

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

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

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

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

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

operating a public water system means that the claimant has "a true choice" and is therefore not practically compelled to comply with the test claim order.[96]

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."[97] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[98]

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

- A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[99]
- 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.[100]

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

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

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

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

[100] *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).

- 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.[101]
- 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.[102]

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.[103] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[104] 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."[105]

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."[106] The effective date of the order is January 18, 2017.[107] The claimant filed the Test Claim on January 11, 2018, less than 12 months after the effective date of the order.[108] 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.

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

[102] *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.

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

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

[105] *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).

[106] Government Code section 17551(c).

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

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

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

B. The Test Claim Order Does Not Impose a Reimbursable State-Mandated Program Within the Meaning of Article XIII B, Section 6 of the California Constitution.

This Test Claim alleges new state-mandated activities and costs arising from an amendment to the claimant's public water system permit adopted by the State Board, Order No. 2017PA-SCHOOLS for the City of San Diego PWS No. 3710020. The test claim order requires the claimant, as the operator of a "public water system" that serves a number of K-12 schools, to perform lead sampling upon request of a school at no cost to the school.[109] Under the order, upon request, the claimant must take samples to perform lead sampling, at one to five fixtures (e.g., drinking fountains or food preparation areas) on the school's property, process those results at a certified laboratory, maintain records of the requests and the results, and provide the results, and if necessary, information to the school regarding possible remediation or other solutions if lead is detected in the fixtures above 15 parts per billion (ppb).

On April 29, 2022, the Third District Court of Appeal issued an unpublished opinion in *City of San Diego v. Commission on State Mandates*, finding that the test claim order imposes a new program or higher level of service in that "the provision of drinking water to schools is a peculiarly governmental function and the mandated testing of this water for lead is plainly a service to the public" and remanded the claim back to the Commission to determine the remaining issues.[110] The court interpreted "peculiar" to

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[109] 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.

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

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

mean “particularly” but not “exclusively” associated with government, and explained that a function can be “peculiar to” government even if it is not exclusive to government. The court used as an example *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, where the Second District Court of Appeal “found that ‘the installation and maintenance of trash receptacles at transit stops’ is a ‘governmental function that provides services to the public,’ even though it acknowledged that ‘collecting trash at transit stops’ is ‘typically,’ but not exclusively, ‘within the purview of government agencies.’”[111] The court did not decide the separate issue of whether the *Lead Sampling in Schools* program is mandated by the State.[112] Accordingly, the Commission finds that the test claim order imposes a new program or higher level of service.

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

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

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

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

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

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

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

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;[113]
2. If a school representative requests lead sampling assistance in writing by November 1, 2019:[114]
    a. Respond in writing within 60 days and schedule a meeting with school officials to develop a sampling plan;[115]
    b. Finalize a sampling plan and complete initial sampling within 90 days [or an alternative time schedule approved by DDW];[116]
    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;[117]
    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;[118]
    e. Ensure samples are collected by an adequately trained water system representative;[119]
    f. Submit the samples to an ELAP certified laboratory for analysis;[120]
    g. Require the laboratory to submit the data electronically to DDW;[121]
    h. Provide a copy of the results to the school representative;[122]
    i. Within two business days of a result that shows an exceedance of 15 ppb, notify the school of the sample result;[123]
    j. If an initial sample shows an exceedance of 15 ppb:

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

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

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

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

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

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

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

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

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

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

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

- Collect an additional sample within 10 days if the sample site remains in service;[124]
- Collect a third sample within 10 business days after notification that a resample result is less than or equal to 15 ppb;[125]
- 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;[126]

k. Ensure that the water system receives the results of repeat lead samples from the laboratory in no more than 10 business days;[127]

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;[128]

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;[129]

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.[130] ***The water system is not responsible for the costs of any corrective action or maintenance***;[131]

o. Keep records of all requests for lead related assistance and provide the records to DDW, upon request;[132]

p. Include in the annual Consumer Confidence Report a statement summarizing the number of schools requesting lead sampling.[133]

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

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

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

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

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

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

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

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

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

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

Both the claimant and the State Board agree that these requirements are new, as compared against prior law.[134]

The Commission finds that the requirements imposed by the test claim order are new. Prior law, under the federal and state Safe Drinking Water Act and the federal and state Lead and Copper Rule, all address, in some manner, the existence of lead in drinking water. But none of those provisions specifically requires local government to assist schools with lead sampling at drinking water fountains and other fixtures. As noted, schools that operate their own water systems or that receive water from groundwater wells were already subject to some mixture of lead sampling requirements and control measures under existing law. The requirements of the test claim order for the claimant, City of San Diego, as a public water system that supplies water to K-12 schools, to sample one to five drinking water fixtures on school property upon request of the school, are new. Furthermore, while the test claim order is one of over 1,100 permit amendments simultaneously issued to privately- and publicly-owned public water systems, the test claim order is issued only to the claimant, the City of San Diego. Therefore, the new requirements imposed by the test claim order are imposed solely on the City of San Diego.

b. <u>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.</u>

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.[135] "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."[136]

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-

[134] 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).

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

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

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.[137]

From January 1, 2018 through July 1, 2019, however, Health and Safety Code section 116277 required a community water system[138] serving any public school constructed or modernized prior to January 1, 2010, to test for lead in the school's potable water system[139] by July 1, 2019, except for schools exempted from the requirement. There is no requirement in section 116277 that a school first make a request for testing.

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

In addition, by its plain language, Health and Safety Code section 116277 applies only to "schoolsite[s] of a local educational agency with a building constructed or modernized before January 1, 2010"[140] and does *not* apply if the "schoolsite was constructed or modernized after January 1, 2010."[141] Section 116277 defines "local educational agency" as "a school district, county office of education, or charter school located in a

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[137] 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.

[138] "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).)

[139] Exhibit K (5), Health and Safety Code section 116277(f)(2) (as added by Stats. 2017, ch. 746) (AB 746), which defines "potable water system" as "water fountains and faucets used for drinking or preparing food," which is substantially similar to the test claim order's requirement that samples be collected at "regularly used drinking fountains, cafeteria or food preparation areas, or reusable bottle filling stations." Exhibit A, Test Claim, filed January 11, 2018, page 106 (test claim order).

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

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

public facility."[142] 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.[143] 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.[144]

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

Finally, the test claim order requires the claimant to submit to the State Board's Division of Drinking Water a comprehensive list of the names and addresses of all K-12 schools to which it serves water by July 1, 2017, which is *prior* to the effective date of Health and Safety Code section 116277.[145] 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.

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

[143] Exhibit K (8), State Water Resources Control Board, *Lead Sampling in Schools*, https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/leadsamplinginschools.html (accessed on January 30, 2023), page 1 ("As of July 1, 2019, the Division of Drinking Water (DDW), in collaboration with the California Department of Education, has completed the initiative to test for lead in drinking water at all public K-12 schools. California Assembly Bill 746 (AB 746) published on October 12, 2017, effective January 1, 2018, required community water systems to test lead levels, by July 1, 2019, in drinking water at all California public, K-12 school sites that were constructed before January 1, 2010.").

[144] Exhibit K (5), Health and Safety Code section 116277(e) (as added by Stats. 2017, ch. 746) (AB 746). Section 116277(e) also exempts those schools whose local educational agency is currently permitted as a public water system and is currently required to test for lead in the potable water system. The claimant would not have to provide lead testing services to these schools under the test claim order either, since the water is supplied by the local educational agency and not the claimant.

[145] 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.

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

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

The courts have explained that even though the test claim statute or executive order may contain new requirements, the determination of whether those requirements are mandated by the state depends on whether the claimant's participation in the underlying program is voluntary or compelled.[146] When local government elects to participate in the underlying program, then reimbursement under article XIII B, section 6 is not required.[147]

The courts have identified two distinct theories for determining whether a program is compelled, or mandated by the state: legal compulsion and practical compulsion.[148] 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.[149] In the recent case of *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 815, the California Supreme Court reiterated the legal standards applicable to these two theories of mandate:

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

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

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

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

[149] *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.[150]
>
> * * *
>
> "[P]ractical compulsion," [is] a theory of mandate that arises when a statutory scheme does not command a local entity to engage in conduct, but rather induces compliance through the imposition of severe consequences that leave the local entity no reasonable alternative but to comply.[151]

The Draft Proposed Decision found that while the claimant was not legally compelled to comply with the test claim order, the claimant was "practically compelled" and therefore mandated by the state to comply with the new requirements imposed by the test claim order. This finding was based on the fact that the claimant has provided water continuously for over 120 years to its now more than 1.3 million residents, with its six largest consumers being federal, state, and local agencies. The Draft Proposed Decision further found that "the claimant incorporated its municipal water 'agency' on July 21, 1901, when the voters approved the issuance of bonds to purchase the distribution system from a private water company, [fn. omitted] and that subsequent 'bonds and other financing secured over the years to maintain the water system in good working order,' totaling approximately $890 million as of November 2018, would immediately come due if the claimant sought to discontinue service [fn. omitted]."[152]

After further review and consideration, the Commission finds that the record does not contain substantial evidence showing that the claimant will face certain and severe penalties or other draconian consequences, as is required for a finding of practical compulsion, if it decides not to participate in the underlying program and provide water service to City residents. While a long history of operating a public water system is a factor that supports a showing of practical compulsion under *City of Sacramento v. State of California*, the duration of participation in a voluntary program is just one factor and is insufficient on its own to establish that the claimant is practically compelled to comply with the test claim order.[153]

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

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

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

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

Moreover, the record does not support the claimant's assertion that if it ceased operating its water system, it would face immediate repayment of bonds and other financing secured over the years to maintain the water system in good working order totaling nearly one billion dollars. In *Kern High School Dist*., the Supreme Court described the financial consequences to the state and its residents in *City of Sacramento* as "so onerous and punitive" that they amounted to "certain and severe federal penalties…including double taxation and other draconian measures."[154] The evidence does not support that finding here. As explained below, the California Constitution provides authority, but does not require local government to become a public water supplier. The claimant is not the debt-holder on the bond funds, and the funds received from the bonds and the Drinking Water State Revolving Fund loans for the improvements to its water system are paid from the Water Utility Fund and, thus, the claimant's general fund is generally not at risk. In the event of default, the principal amount of the debt owing *may* come immediately due, but that's not certain to occur. The State, as the holder of the senior debt from the Drinking Water State Revolving Fund, has priority over the bond debt holders, and is not required to make such a demand. And the bond debt holders have discretion whether to vote collectively to have the debt declared immediately due and payable. Furthermore, the claimant has express contractual discretion to transfer the water system to another water supplier for fair market value, the proceeds of which are used to pay off the debt.

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

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

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

The parties agree that the claimant is not legally compelled to comply with the test claim order since the claimant's participation in the underlying program to provide water service is not mandated by state law.[155] Under Article XI, section 9(a) of the California

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

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

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

Constitution, a "municipal corporation" *may* be established to operate public works to furnish light, water, power, heat, transportation, or means of communication.[156] The courts have interpreted article XI, section 9 (previously section 19) as granting authority rather than imposing a duty.[157] Government Code section 38742 also provides that the legislative body of any city "may" contract for supplying the city with water for municipal purposes; or "may" "[a]cquire, construct, repair, and manage pumps, aqueducts, reservoirs, or other works necessary or proper for supplying water for the use of the city or its inhabitants or for irrigating purposes of the city." When interpreting statutes and constitutional provisions, "shall" is mandatory, and "may" is permissive.[158]

The test claim order is one of over 1,100 nearly identical permit amendments issued to both privately- and publicly-owned public water systems serving K-12 schools. Because state law authorizes, but does not require, the claimant to provide water services or to operate a public water system, the requirements imposed by the test claim order result from the claimant's "voluntary or discretionary decision to undertake an activity" and therefore are not legally compelled.[159]

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

The courts have acknowledged the possibility that a state mandate may be found in the absence of legal compulsion "when a statutory scheme does not command a local entity to engage in conduct, but rather induces compliance through the imposition of severe consequences that leave the local entity no reasonable alternative but to comply."[160] Indeed, case precedent establishes that where the plain language of the test claim order falls short of legal compulsion, practical compulsion may be found if there is a clear showing in the law or substantial evidence in the record that a failure to perform the program activities will result in certain and severe penalties or other draconian

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

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

[158] Government Code section 14.

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

[160] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816; see also *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 754 (where no "legal" compulsion exists, "practical" compulsion may be found if the local agency faces "certain and severe…penalties" such as "double…taxation" or other "draconian" consequences if they fail to comply with the statute); *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1365-1367 (practical compulsion requires a "concrete showing" that a failure to engage in the activities at issue will result in "severe adverse consequences").

consequences, such that the local government agency has no true alternative but to comply.[161] However, where a local government agency participates "voluntarily," i.e., without legal or practical compulsion, in a program with a rule requiring increased costs, the program cannot be said to be mandated by the state.[162]

In *Coast Community College Dist.* (2022)*,* the Supreme Court reaffirmed the viability of practical compulsion as a theory of state mandate when it specifically directed the Court of Appeal to consider on remand whether community college districts were practically compelled to comply with the funding entitlement regulations at issue.[163] The Commission had denied reimbursement, finding that the regulations were not mandated by the state, and the trial court agreed. However, the Court of Appeal concluded that the districts were legally compelled to comply with the regulations on the basis that the they applied to the districts' underlying core functions, which state law compelled the districts to perform.[164] The Supreme Court reversed, holding that the standards set forth in the regulations were insufficient to legally compel the districts to adopt them.[165] The court explained that because the districts were not legally required to adopt the standards described in the regulations, and instead faced the risk of "potentially severe financial consequences" if they elected not to do so, legal compulsion was inapplicable. The court characterized the appellate court's ruling as premised upon a determination that the districts had no "true choice" but to comply with the regulations at issue, which the court explained "sound in *practical*, rather than *legal*, compulsion."[166] In drawing this distinction and remanding the case to the Court of Appeal to consider in the first instance whether the districts established practical compulsion, the court relied upon *City of Sacramento* for the proposition that practical compulsion exists where ""[t]he

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

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

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

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

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

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

alternatives were so far beyond the realm of practical reality that they left the state 'without discretion' to depart from federal standards".)[167]

In *City of Sacramento v. State of California* (1990), the Supreme Court addressed practical compulsion in the context of a 1976 federal law requiring states, for the first time, to provide unemployment insurance to public employees, characterized as employing "a 'carrot and stick' to induce state compliance."[168] 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.[169] 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.[170] The state opposed the request for reimbursement on the ground that the legislation imposed a federal mandate and, thus, reimbursement was not required.[171] 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.[172] The court agreed and found that the immediate penalty of double taxation for not complying with the federal law was "draconian," that "the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses," and that "[t]he alternatives were "so far beyond the realm of practical reality[,] that they left the state 'without discretion' to depart from federal standards."[173]

> As the drafters and adopters of article XIII B must have understood, certain regulatory standards imposed by the federal government under "cooperative federalism" schemes are coercive on the states and localities in every practical sense. The instant facts amply illustrate the point. Joint federal-state operation of a system of unemployment compensation has been a fundamental aspect of our political fabric since the Great Depression. California had afforded federally "certified" unemployment insurance protection to its workers for over 40 years by the time Public Law 94-566, chapter 2/78, and article XIII B were adopted. Every other state also operated such a system. If California failed to conform its plan to new federal requirements as they arose, its businesses faced a new and serious penalty - full, double unemployment taxation by both state and

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

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

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

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

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

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

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

> federal governments. Besides constituting an intolerable expense against the state's economy on its face, this double taxation would place California employers at a serious competitive disadvantage against their counterparts in states which remained in federal compliance.
>
> Plaintiffs and their amici curiae suggest California could have chosen to terminate its own unemployment insurance system, thus leaving the state's employers faced only with the federal tax. However, we cannot imagine the drafters and adopters of article XIII B intended to force the state to such draconian ends.
>
> Here, the state simply did what was necessary to avoid certain and severe federal penalties upon its resident businesses. The alternatives were so far beyond the realm of practical reality that they left the state "without discretion" to depart from federal standards. We therefore conclude that the state acted in response to a federal "mandate" for purposes of article XIII B.[174]

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."[175]

In *Kern High School Dist.*, the California Supreme Court addressed an amendment to state open meeting laws to require school site councils and advisory bodies formed under state and federal grant programs to post a notice and an agenda of their meetings.[176] The court rejected the school districts' "assertion that they have been legally compelled to incur notice and agenda costs, and hence entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, without regard to whether claimant's participation in the underlying program is voluntary or compelled."[177] The court determined that school districts elected to participate in the school site council programs to receive funding associated with the programs and, thus, were not legally compelled to incur the notice

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

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

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

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

and agenda costs.[178] The court stated that it would "not foreclose the possibility that a reimbursable state mandate under article XIII B, section 6, properly might be found in some circumstances in which a local entity is not legally compelled to participate in a program that requires it to expend additional funds."[179] However, the circumstances in *Kern High School Dist.* did not rise to the level of practical compulsion, since a school district that elects to discontinue participation in the grant programs does not face certain and severe penalties, such as double taxation or other draconian consequences, but simply must adjust to the withdrawal of grant money.[180]

In *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, the court determined that the Peace Officers Procedural Bill of Rights Act (POBRA), which imposed requirements on all law enforcement agencies, did not constitute a state-mandated program on school districts. The court found that because school districts are authorized, but not required, by state law to hire peace officers, there was no legal compulsion to comply with POBRA.[181] In considering whether the districts were practically compelled to comply, the court found that it was "not manifest on the face of the statutes cited nor is there any showing in the record that hiring its own peace officers, rather than relying upon the county or city in which it is embedded, is the only way as a practical matter to comply."[182] The court emphasized that practical compulsion requires a *concrete* showing that a failure to engage in the activities at issue will result in certain and severe penalties or other draconian consequences, leaving the districts no choice but to comply.[183]

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

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

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

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

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

[183] *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1367 ("The Commission submits that this case should be distinguished from *City of Merced* and *Kern High School Dist.* because the districts "employ peace officers when necessary to carry out the essential obligations and functions established by law." However, the "necessity" that is required is facing " 'certain and severe ... penalties' such as 'double ... taxation' or other 'draconian' consequences."…That cannot be established in this case without a *concrete showing* that reliance upon the general law enforcement resources of cities and counties will result in such severe adverse consequences"). Emphasis added.

Here, the claimant argues that it "has no practical alternative but to comply" with the test claim order,[184] based on the following factual allegations:

- The claimant cannot "take back a decision" made more than 120 years ago and stop providing water to its residents because "[c]ities must provide for the health, safety, and welfare of their residents, and simply put, people cannot survive without water."[185]
- If the claimant ceased operating its water system, it would face immediate repayment of bonds and other financing secured over the years to maintain the water system in good working order totaling nearly one billion dollars.[186]
- If the claimant fails to comply with the test claim order, the State Board could suspend or revoke its operating permit, which would prevent the claimant from operating its water system and leave 1.3 million residents without water service.[187]

These arguments are addressed below.

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

In alleging that it is practically compelled and, thus, mandated by the state to comply with the new requirements imposed by the test claim order, the claimant relies on the fact that "[t]he City "decided" to become a municipal water agency on July 21, 1901, when San Diego voters approved the issuance of bonds to purchase the water distribution system from a private water company."[188] In support, the claimant cites to a 1908 publication entitled *History of San Diego, 1542-1908*, which states, as alleged, "the system of [water] distribution within the city limits became the property of the

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

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

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

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

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

municipality, a bond issue of $600,000 having been voted for its acquisition."[189] The claimant argues that because it began providing water to the City's residents prior to the 1911 Constitutional amendment specifically authorizing municipalities to provide water service,[190] "the City started providing water service *likely* before there was even a requirement to obtain a permit from the State to operate a municipal water system."[191] The City asserts that it "cannot take back a decision made almost 120 years ago and stop providing water to its [1.3 million] residents [including federal, state, and local agencies]."[192]

Indeed, the Third District Court of Appeal noted in its unpublished decision in this matter that "[m]unicipal authorities in San Diego, similarly, began supplying residents with water as early as 1834 when the Mexican government established the Pueblo of San Diego. (*City of San Diego v. Cuyamaca Water Co.* (1930) 209 Cal. 105, 111, 115 [" 'during the entire term of its existence,' " the " 'Pueblo of San Diego and the inhabitants thereof . . . enjoyed, asserted and exercised a preference or prior right to the use of the waters of [the] San Diego River for the benefit of said pueblo and the inhabitants thereof' "].).[193]

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

> the nature and purpose of the…program; whether its design suggests an intent to coerce; *when state and/or local participation began*; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal.[194]

In this respect, the State Board contends that even if the City has been providing water for a long time, there is no evidence of practical compulsion (certain and severe penalties or other draconian consequences) will occur if the claimant stopped providing

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

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

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

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

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

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

water service since the City can transfer its public water system to another entity. The State Board urges the Commission to *not* find a state mandate as follows:

> Moreover, and this underscores the challenge in applying the practical compulsion theory to state mandates under article XIII B, section 6, the severe consequences and penalties the City claims will occur following noncompliance with the test claim order requirements may be avoided by transferring its public water system to another entity. As has been established, the City has no obligation to operate a public water system, regardless of how large or complex the public water system has become. Indeed, just as no federal or state law requires the City to operate a public water system, no federal or state law prohibits the City from transferring its public water system to another public or private entity. By transferring ownership of the water system, the customers would continue to receive drinking water and the City would avoid any penalties imposed by the State Water Board. In terms of the bond debt that may come due, the City has provided no evidence that an appropriate financing package could not be created to address any outstanding debt as part of a large commercial transaction.[195]

Thus, while the record shows that the claimant has a long history of providing water service to the residents of the City of San Diego, dating back to before the California Constitution was amended in 1911 to specify that both private and public entities are authorized to provide water service, that factor, alone, is not determinative.[196]

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

The claimant asserts it has no practical alternative to continuing to operate its public water system because if it discontinues water service, it will face severe financial consequences in the form of immediate repayment of nearly one billion dollars in debt incurred to maintain the water system.[197] The claimant offers the following facts and evidence in support:

1. As of November 15, 2018, the cumulative amount of water system financing debt was approximately $890 million, consisting of $78 million in senior obligations

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

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

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

and $812 million in subordinate obligations.[198] Evidence cited: Official Statement, City of San Diego Subordinated Water Revenue Bonds, Series 2018A (Official Statement), page 5.[199]

2. Repayment of the water system financing debt is scheduled to run through 2050.[200] Evidence cited: Official Statement, City of San Diego Subordinated Water Revenue Bonds, Series 2018A, Debt Service Schedule, page 24.[201]
3. As a condition of receiving the water system financing, the claimant is required to operate and maintain its water system and dedicate net system revenues towards paying back the borrowed money plus interest.[202] Evidence cited: Official Statement, City of San Diego Subordinated Water Revenue Bonds, Series 2018A, pages 13-14; 2009 Amended and Restated Master Installment Purchase Agreement, sections 5.01, 6.07.[203]
4. Discontinuing water service would be considered an "Event of Default," upon which owners of 25 percent or more of the outstanding principal amount can "declare the entire unpaid principal amount thereof and the accrued interest thereon to be due and payable immediately," amounting to nearly one billion dollars.[204] Evidence cited: 2009 Amended and Restated Master Installment Purchase Agreement, sections 8.01(b), 8.01(d).[205]

The Series 2018A bonds referenced above are Subordinated Water Revenue Bonds issued in 2018 by the Public Facilities Financing Authority, a joint powers agency formed by the claimant and others to finance public capital improvements, including

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

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

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

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

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

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

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

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

improvements to the claimant's water system.[206] The official statement shows that as of November 15, 2018, the outstanding principal bond debt was $812,654,000, consisting of bonds issued by the Authority in 2012 and 2016, which are subordinate to senior obligations.[207] The City also has "senior obligations" of $78,332,490 in loans from the Drinking Water State Revolving Fund (the "Senior SRF Loans").[208] Thus, the total water system financing debt was approximately $890 million as of November 2018.

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

With respect to the bond debt, the official notice for the 2018 bonds explains that the Public Facilities Financing Authority was established pursuant to the Third Amended and Restated Joint Exercise of Powers Agreement dated as of January 1, 2013.[209] That agreement provides that the bonds issued by the Authority, together with the interest and premium, if any, "shall not be deemed to constitute a debt of the City."[210] The Bonds shall be only special obligations of the Authority, and the Authority "shall under no circumstances be obligated to pay the Bonds or the respective project costs except from revenues and other funds pledged therefor."[211] In addition, neither the City nor the Authority "shall be obligated to pay the principal of, premium, if any, or interest on the Bonds, or other costs incidental thereto, except from the revenues and funds pledged therefor . . ."[212] This language is consistent with the following statement in the 2018 bond package:

> The 2018 Bonds are limited obligations of the Authority payable solely from and secured solely by the Subordinated Revenues pledged therefor and amounts on deposit in the Subordinated Bonds Payment Fund established under the Indenture. The obligation of the City to make 2018

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

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

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

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

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

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

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

> Subordinated Installment Payments under the 2018 Supplement does not constitute an obligation of the City for which the City is obligated to levy or pledge any form of taxation or for which the City has levied or pledged any form of taxation. Neither the full faith and credit of the Authority, the City, the County of San Diego (the "County"), the State of California (the "State"), or any political subdivision of the State nor the taxing power of the City, the County, the State, or any political subdivision of the State is pledged to the payment of the principal of or interest on the 2018 Bonds. The Authority has no taxing power. *Neither the 2018 Bonds nor the obligation of the City to make 2018 Subordinated Installment Payments constitutes an indebtedness of* the Authority, *the City*, the County, the State, or any political subdivision of the State within the meaning of any constitutional or statutory debt limitation or restriction.[213]

This type of transaction is authorized by the Joint Exercise of Powers Act (Government Code section 6500 et seq.), and has been upheld by the courts, including for the City of San Diego and the Public Facilities Financing Authority, as follows:[214]

> The Supreme Court in *Rider* and this court in *San Diegans* previously approved the type of financial transaction at issue here. (Citations omitted.) The Supreme Court explained that a joint powers agency, like the Financing Authority, has the power under state law to issue bonds in its own name. (Citations omitted.) It therefore need not comply with the limitations that would apply to City-issued bonds, such as voter approval: "[W]hen the Financing Authority issues bonds, it does so independently of any common powers delegated in the joint powers agreement, and therefore it is not subject to the limitations that would apply to the City, including the two-thirds vote requirements in the [California] Constitution and the City's charter." (Citation omitted.) "[T]he Financing Authority is a separate legal entity from the City [citation], and the Financing Authority's debts are not the City's debts [citation]." (Citations omitted.)
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> In *San Diegans*, this court followed *Rider* even where, as here, the Financing Authority is under the control of the City. We explained, "*Rider* made clear that for purposes of the debt limitation provisions, when a financing authority created to issue bonds 'has a genuine separate existence from the City,' 'it does not matter whether or not the City "essentially controls" the [f]inancing [a]uthority.' " (Citations omitted.) "Under the Joint Exercise of Powers Act, the Financing Authority has a genuine separate existence from the City. [Citation.] The Successor

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

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

> Agency and the Housing Authority also have genuine separate existences from the City. [Citations.] In recognition of the separate status, the [Financing Authority's governing document] specifies that bonds are not a debt of the City, the Successor Agency, or the Housing Authority, and are only special obligations of the Financing Authority to be paid from revenues and other funds pledged therefor. This arrangement comports with *Rider.*" (Citation omitted.)
>
> Along with its approval, the Supreme Court noted, "We are not naive about the character of this transaction. If the City had issued bonds ..., the two-thirds vote requirement would have applied. Here, the City and the Port District have created a financing mechanism that matches as closely as possible (in practical effect, if not in form) a City-financed project, but avoids the two-thirds vote requirement. Nevertheless, the law permits what the City and the Port District have done. Plaintiffs are correct that this conclusion allows local governments to burden taxpayers with potentially high costs that voters have not approved, but local governments impose similar burdens on taxpayers every time they enter into long-term leases involving property of substantial value. We have long held that the two-thirds vote requirement does not apply to these leases so long as the obligation to pay rent is contingent on continued use of the leased property." (Citations omitted.)[215]

Although the debt to the bond holder is that of the Authority's to be paid from "revenues and other funds pledged therefor," the 2018 bond package explains that the "revenues and other funds pledged therefor" are from the rates and charges for the City's water service (the Water Utility Fund), which are paid to the Authority pursuant to a Master Installment Purchase Agreement (Master Agreement).[216] The Master Agreement is between the City of San Diego and the San Diego Facilities and Equipment Leasing Corporation and relates to installment payments from the net system revenues from the claimant's Water Utility Fund.[217] The San Diego Facilities and Equipment Leasing Corporation "is a nonprofit charitable corporation duly organized and existing under and by virtue of the laws of the State. The Corporation was organized to acquire, lease, and/or sell to the City real and personal property to be used in the municipal operations of the City. The Corporation was formed at the request of the City to assist in financings

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

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

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

such as the installment purchase financing described [in the Official Statement] and is governed by its own Board of Directors."[218]

Under the Master Agreement, "the City agrees and covenants that all System Revenues shall be received by the City in trust and shall be deposited when and as received in the Water Utility Fund, which fund the City agrees and covenants to maintain so long as any Installment Payment Obligations remain unpaid, and all moneys in the Water Utility Fund shall be so held in trust and applied and used solely as provided herein."[219] Payments from the City for the bond debt are made to the nonprofit corporation, which then assigns its right to receive the installment payments to the Authority.[220] According to the 2018 bond package, the "City has covenanted to ensure that net revenues [from the Water Utility Fund] are equal to at least 1.1 times maximum annual debt service on all Obligations in each Fiscal Year."[221] In addition, the City agreed "to make Installment Payments solely from Net System Revenues [i.e. the Water Utility Fund] until such time as the Purchase Price for any Components has been paid in full (or provision for the payment thereof has been made pursuant to the Master Installment Purchase Agreement)."[222] Thus, since the revenues come solely from Water Utility Fund, the claimant's general fund revenues are not at risk.

The remaining $78,332,490 in outstanding indebtedness pertains to loans from the Drinking Water State Revolving Fund (DWSRF).[223] The claimant has not provided evidence explaining the nature of these funds. The DWSRF program was established by a 1996 amendment to the federal Safe Drinking Water Act.[224] As of July 1, 2014, the State Board implements the DWSRF program, which provides low-interest loans and other financial assistance to public water systems for infrastructure improvements using

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

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

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

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

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

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

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

federal and state funds.[225] A publicly available DWSRF Funding Agreement between the State and the City of San Diego (Funding Agreement) shows that the claimant received a direct loan from the State for $18 million in DWSRF funds.[226] The Funding Agreement specifies that the DWSRF loan constitutes a "parity obligation" under the Master Installment Purchase Agreement, and thus, is considered a senior obligation to the bond debt.[227] Additionally, under the terms of the Funding Agreement, the claimant agreed "to repay the entire Principal Amount of the Loan, together with all interest thereon, as set forth in this Agreement, from Water Enterprise Fund rates, charges and assessments, and financing proceeds, and Supplier hereby pledges said Water Enterprise Fund rates, charges and assessments, and financing proceeds as collateral

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

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

[227] Exhibit K (11), Safe Drinking Water State Revolving Fund Funding Agreement No. SRF10CX120: https://www.sandiego.gov/sites/default/files/dm_otay.pdf (accessed on May 23, 2023), pages 36 ("Supplier agrees that it shall not incur any additional indebtedness having any priority in payment over Supplier's obligations to State under this Agreement"), 38 ("The Loan, secured by the Collateral, shall constitute a "Parity Obligation" as defined in that certain Master Installment Purchase Agreement dated as of August 1, 1998, by and between Supplier and the San Diego Facilities and Equipment Leasing Corporation, as amended from time to time"). The Master Agreement defines "parity obligations" as "(a) Parity Installment Obligations, (b) Obligations, the principal of and interest on which are payable on a parity with Parity Installment Obligations, and (c) Reserve Fund Obligations." Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 663 (Master Agreement), 673 (Master Agreement ["the City may not create any Obligations, the payments of which are senior or prior in right to the payment by the City of Parity Obligations"]); Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 112, 190 (Official Statement [""As of November 15, 2018, Senior Obligations consisted of $78,332,490 principal amount of loans from the Drinking Water State Revolving Fund (the "Senior SRF Loans"). There are no Outstanding Senior Bonds"]).

(the "Collateral") to secure repayment of the Loan."[228] Therefore, similar to the bond debt discussed above, the revenues used to repay the DWSRF loans come solely from the Water Utility [or Enterprise] Fund, and the claimant's general fund revenues are not at risk.

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

> SECTION 8.01. Events of Default and Acceleration of Maturities. If one or more of the following Events of Default shall happen, that is to say…
>
> (a) if default shall be made in the due and punctual payment of or on account of any *Parity Obligation* as the same shall become due and payable;
>
> (b) *if default shall be made by the City in the performance of any of the agreements or covenants required herein to be performed by it*…and such default shall have continued for a period of 60 days after the City shall have been given notice in writing of such default by the Corporation or any Trustee;
>
> [¶]…[¶]
>
> then, and in each and every such case during the continuance of such Event of Default, the Corporation shall upon the written request of the Owners of 25% or more of the *aggregate principal amount of all Series of Parity Installment Obligations Outstanding*, voting collectively as a single class, by notice in writing to the City, *declare the entire unpaid principal amount thereof and the accrued interest thereon to be due and payable immediately, and upon any such declaration the same shall become immediately due and payable*.[229]

Thus, under the terms of the Master Agreement, if the claimant defaults in performing any of its covenants, including payment and the covenant to operate and maintain its water system, the owners of 25 percent or more of "the aggregate principal amount of all Series of Parity Installment Obligations Outstanding" have the authority to have the debt declared immediately due and payable. As the Official Statement to the 2018 bond package explains, in an event of default, "the Holders…of 25% or more of the aggregate principal amount of all Series of Parity Installment Obligations Outstanding, or after all Parity Installment Obligations have been paid in full, the Holders…of 25% or more of the

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

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

aggregate principal amount of all Series of Subordinated Obligations Outstanding (the "Required Holders"), voting collectively as a single class, by notice in writing to the City" have the ability to declare the outstanding debt due and payable immediately.[230] Put differently, "Holders of Parity Obligations will be entitled to receive payment thereof in full before the Holders of Subordinated Obligations are entitled to receive payment thereof."[231]

The Master Agreement's default and acceleration clause does not establish with any certainty that those funds will be due and payable immediately since the 25 percent or more owners have discretion whether to vote collectively to have the debt declared immediately due and payable, and no evidence has been submitted showing why that outcome is "certain" to occur.[232] Furthermore, the Official Statement's description of the potential outcomes following an event of default demonstrate not only the discretion of the debt holders in seeking immediate repayment, but the uncertainty of obtaining adequate remedies.

> The Indenture[233] provides that, upon and during the continuance of an Event of Default thereunder, the Trustee *may*, subject to certain conditions, declare the principal of all Senior Bonds then Outstanding and the interest accrued thereon to be due and payable immediately. *So long as any Senior Bonds remain outstanding under the Indenture, no Owners of Subordinated Bonds shall have the right to declare an Event of Default, to declare any Subordinated Bonds immediately due and payable or to direct the Trustee or waive any Event of Default.* The foregoing notwithstanding, *the remedy of acceleration is subject to the limitations on legal remedies against public entities in the State, including a limitation on enforcement obligations against funds needed to serve the public welfare and interest.* Also, any remedies available to the Owners of the 2018 Bonds upon the occurrence of an Event of Default under the Indenture are in many respects dependent upon judicial actions, which are often subject

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

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

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

[233] "Indenture" refers to the agreement by and between the Public Facilities Financing Authority of the City of San Diego (Authority) and U.S. Bank National Association (Trustee) under which the 2018 bonds are secured and constitutes a valid and binding obligation of the City of the San Diego. Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, filed January 11, 2019, pages 101, 108, 210 (Official Statement).

> to discretion and delay and could prove both expensive and time consuming to obtain.
>
> Further, enforceability of the rights and remedies of the Owners of the 2018 Bonds, and the obligations incurred by the City, may become subject to the federal bankruptcy code and applicable bankruptcy, insolvency, receivership, reorganization, moratorium, or similar laws relating to or affecting the enforcement of creditor's rights generally, now or hereafter in effect, equity principles that may limit the specific enforcement under State law of certain remedies, the exercise by the United States of America of the powers delegated to it by the Constitution, the reasonable and necessary exercise, in certain exceptional situations, of the police powers inherent in the sovereignty of the State and its governmental bodies in the interest of serving a significant and legitimate public purpose, and the limitations on remedies against counties in the State. Bankruptcy proceedings, or the exercise of powers by the federal or State government, if initiated, could subject the Owners of the 2018 Bonds to judicial discretion and interpretation of their rights in bankruptcy or otherwise and consequently may entail risks of delay, limitation, or modification of their rights…
>
> If the City fails to comply with its covenants under the 2018 Supplement to pay the 2018 Subordinated Installment Payments, *there can be no assurance of the availability of remedies adequate to protect the interests of the holders of Senior Bonds and, accordingly, the Subordinated Bonds*.[234]

As the Official Statement makes clear, "there can be *no assurance* of the availability of remedies adequate to protect the interests" of the debt holders.[235]

Because the $78,332,490 in loans from the Drinking Water State Revolving Fund constitute senior obligations, then in the event of default, the State would have repayment priority over the bond debt holders.[236] The Funding Agreement does not

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

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

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

specify any events that automatically trigger an event of default, instead giving the State discretion to make that determination. Failure to operate and maintain the project "*may*, at the option of State, be considered a material breach of this Agreement and may be treated as a default under Article A-27, hereof."[237] Article A-27 provides that when an event of default occurs, the State shall give notice of and a 30-day period to cure the default.[238] If the claimant fails to timely cure the default to the State's satisfaction, then the State *may* do any or all of the following:

> (1) Declare that the aggregate amount of all Disbursements made by State, including any portion of the Grant, shall be deemed the Loan, and shall be repaid to State in accordance with the terms of this Agreement;
>
> (2) Declare Supplier's [City of San Diego's] obligations immediately due and payable, with or without demand or notice to Supplier, which Supplier expressly waives;
>
> (3) Terminate any obligation of State to make further Disbursements;
>
> (4) Exercise all rights and remedies available to a secured creditor after default, including, but not limited to, the rights and remedies of secured creditors under the California Uniform Commercial Code;
>
> (5) Perform any of Supplier's obligations under this Agreement for Supplier's account;
>
> (6) Notwithstanding the provisions of Section 5, hereof, commencing from the date of each Disbursement, apply the Rate of Interest specified in Section 9, hereof, to all Disbursements made by State, including any portion of the Grant; and/or
>
> (7) Take any other action it deems necessary to protect its interests.[239]

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

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

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

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

establish with certainty that the DWSRF funds will be immediately due and payable if the claimant stops operating and maintaining its drinking water system.

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

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

> (b) The City may dispose of any of the works, plant properties, facilities or other parts of the Water System, or any real or personal property comprising a part of the Water System, only upon the approval of the City Council and consistent with one or more of the following:
> [¶]
>
> (2) the City in its discretion may carry out such a disposition if the City receives from the acquiring party an amount equal to the fair market value of the portion of the Water System disposed of. As used in this clause (2), "fair market value" means the most probable price that the portion being disposed of should bring in a competitive and open market under all conditions requisite to a fair sale, the willing buyer and willing seller each acting prudently and knowledgeably, and assuming that the price is not affected by coercion or undue stimulus. The proceeds of the disposition shall be used *(A) first,* promptly to redeem, or irrevocably set aside for the redemption of, Parity Obligations, and *second,* promptly to redeem, or irrevocably set aside for the redemption of, Subordinated Obligations....[240]

In *Kern High School Dist*., the Supreme Court described the financial consequences to the state and its residents in *City of Sacramento* as "so onerous and punitive" that they amounted to "certain and severe federal penalties…including double taxation and other draconian measures."[241]

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

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

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

collectively to have the debt declared immediately due and payable. Furthermore, the claimant has express contractual discretion to transfer the water system to another water supplier for fair market value, the proceeds of which are used to pay off the debt.

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

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

In alleging that failure to comply with the test claim order *could* result in the State Board suspending or revoking the claimant's water system operating permit, the claimant cites to Health and Safety Code section 116625, which provides that the State Board *may*, pursuant to due process, suspend or revoke any permit issued under the Safe Drinking Water Act if it determines that the permittee is in noncompliance with the permit or other applicable law.[242] Section 116625 also gives the State Board the authority to temporarily suspend any permit prior to hearing if necessary to prevent "an imminent or substantial danger to health."[243] 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."[244]

By the claimant's own admission, however, the claimant faces the *possibility*, but not certainty, of suspension or revocation of its operating permit for noncompliance with the test claim permit.[245] While Health and Safety Code section 116625 gives the State Board authority to suspend or revoke the claimant's operating permit for noncompliance with the test claim order, the statute is permissive not mandatory, meaning that the State Board is authorized but not required to enforce a permit violation.

Furthermore, even if suspension or revocation were certain, the claimant has not shown "severe or draconian consequences," as discussed in the section above. The claimant instead states axiomatically that its entire water system would cease to exist, and that

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

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

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

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

the residents, businesses, and public entities that rely upon it to supply safe drinking water would simply go without, thereby creating a health and safety crisis.[246]

Again, for practical compulsion to apply, there must be a clear showing in the law or substantial evidence in the record that the test claim order induces compliance through the imposition of certain and severe or other draconian consequences that leave the local entity no reasonable alternative but to comply.[247] In *Kern High School Dist.*, the court rejected the claimants' argument that "the absence of a reasonable alternative to participation is a de facto [reimbursable state] mandate" and reasoned that the claimants were free to decide whether to continue to participate in optional programs, even though doing so caused them to incur additional program-related costs.[248]

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

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

[247] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816 ("'practical compulsion'…arises when a statutory scheme does not command a local entity to engage in conduct, but rather induces compliance through the imposition of severe consequences that leave the local entity no reasonable alternative but to comply"); *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 754 (where no "legal" compulsion exists, "practical" compulsion may be found if the local agency faces "certain and severe…penalties" such as "double…taxation" or other "draconian" consequences if they fail to comply with the statute); *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1367 (practical compulsion requires a "concrete showing" that a failure to engage in the activities at issue will result in "severe adverse consequences").

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

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

V. Conclusion

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

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 December 6, 2023, I served the:

- **Current Mailing List dated December 6, 2023**
- **Decision adopted December 1, 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 December 6, 2023 at Sacramento, California.

Jill Magee

Jill L. Magee
Commission on State Mandates
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 12/6/23

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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