



State Water Resources Control Board

March 14, 2025

VIA DROP BOX

**RECEIVED**  
March 14, 2025  
**Commission on**  
**State Mandates**

Julianna F. Gmur  
Executive Director  
Commission on State Mandates  
980 9th Street, Suite 300  
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**COMMENTS OF THE STATE WATER RESOURCES CONTROL BOARD**

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

Dear Ms. Gmur:

The State Water Resources Control Board (State Water Board) has reviewed the Proposed Decision dated February 26, 2025 (Proposed Decision). The State Water Board commends the careful and thoughtful work of the Commission on State Mandates (Commission) staff. The State Water Board submits the following comments on the Proposed Decision.

**I. The City of San Diego Has Fee Authority Under Article XIII D of the California Constitution (Prop 218) Because the Permit Amendment Does Not Prohibit the City From Sharing the Costs of Compliance With Schools Receiving Testing.**

The State Water Board agrees with the Proposed Decision that an increase in fees for ongoing water service to comply with the testing requirements in Permit Amendment No. 2017-PA-SCHOOLS (Permit Amendment) would satisfy the requirements of a property-related fee within the meaning of article XIII D, section 2 of the California Constitution.<sup>1</sup> The State Water Board also agrees that such an increase in fees would meet the requirements of article XIII D, sections 6(b)(1)-(2) and 6(b)(4)-(5).<sup>2</sup> But, the State Water Board disagrees with the Proposed Decision

<sup>1</sup> Proposed Decision, pp. 72-73.

<sup>2</sup> *Id.* at pp. 74-75. Although the Proposed Decision does not expressly address compliance with sections 6(b)(1)-(2) and 6(b)(5), that is a reasonable conclusion from the relevant analysis. By stating that, “[h]owever, there remains an issue with respect to article XIII D, section 6(b)(3),” the Proposed Decision identifies this provision as the sole remaining barrier to finding fee authority under article XIII D. Additionally, there are no facts in the record to suggest that such a fee would not meet the requirements in sections 6(b)(1)-(2) and 6(b)(5).

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E. JOAQUIN ESQUIVEL, CHAIR | ERIC OPPENHEIMER, EXECUTIVE DIRECTOR

regarding whether such an increase in fees would comply with the proportionality requirement contained in article XIII D, section (b)(3).

With respect to section (b)(3), the Proposed Decision concludes that because the Permit Amendment's express language prohibits the City from imposing any increased fees on schools receiving testing services, including the same fees imposed on all other customers, the City is without fee authority under article XIII, section 6.<sup>3</sup> While the State Water Board agrees that the Permit Amendment prohibits the City from assessing schools receiving testing services a separate fee in addition to their regular water rates, the State Water Board disagrees that the Permit Amendment prohibits the City from charging schools receiving testing services the same rates or increased fees as all other customers.

A. The Proposed Decision Identifies Two Different Types of Fees that the Proposed Decision Interprets the Permit Amendment to Prohibit the City From Charging: (1) a Separate Fee Just for Schools Receiving Testing Services, and (2) a Fee for the Same Costs, Applied to All Customers, Including the Schools.

At the outset, it is helpful to identify the two types of fees that the Proposed Decision concludes the Permit Amendment prohibits the City from charging a school receiving testing. The first is a separate fee that the City could charge a particular school to recover the direct costs of testing services for that particular school. Depending on the size of the school and the nature of the testing services, this fee could be more than several thousand dollars. The State Water Board agrees that the Permit Amendment prevents the City from charging this type of fee solely to the schools receiving testing services. The Permit Amendment would also prohibit the City from imposing a fee on all schools receiving testing services based on the average cost of that testing.

The second type of fee would be an increased fee that would be charged to all ratepayers, including the schools receiving testing, to pay for the cumulative costs of school testing. In this case, using conservative assumptions, the increased cost would be approximately 50 cents per customer.<sup>4</sup> To illustrate this fee, the Proposed Decision draws a distinction between a fee assessed to comply with the Lead and Copper Rule and a fee assessed to comply with the Permit Amendment. The Proposed Decision states:

*The difference, however, is that under the Lead and Copper Rule, all customers share in the costs of lead testing. Here, the claimant is prohibited by the test claim order from passing those increased costs onto the schools receiving the lead testing. Thus, passing the increased costs on to the remaining customers, making the costs of service to their parcels higher than the cost of service to the schools receiving the additional lead testing is no different than a water service district recouping costs from irrigation users to keep costs to the remaining customers proportionally low...<sup>5</sup>*

The implication of this language is that the Permit Amendment prohibits the City from charging a school receiving testing services the same share, in this case approximately 50 cents, as all other customers. And, on this basis, the Proposed Decision concludes that the proportionality test in section (b)(3) is not met.<sup>6</sup> The State Water Board disagrees with this interpretation of the Permit Amendment and therefore disagrees with the conclusion reached based on that interpretation.

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<sup>3</sup> Proposed Decision, pp. 77-78.

<sup>4</sup> The City serves approximately 1.3 million customers. Using a conservative estimate of a total cost of compliance of \$650,000, each customer's share would be 50 cents.

<sup>5</sup> Proposed Decision, pp. 77-78 (emphasis added).

<sup>6</sup> *Ibid.*

B. The Most Reasonable Interpretation of the Permit Amendment is That the City May Charge a School Receiving Testing Services the Same Fee as Other Customers to Pay.

The relevant Permit Amendment language is as follows:

5. *The water system is responsible for the following costs:*
  - (a) *Laboratory fees for all lead samples and reporting of the result to DDW and school, and all laboratory coordination and instruction*
  - (b) *All water system staff time dedicated to the tasks required by the provisions in this permit amendment.*<sup>7</sup>

This language does not expressly define what specific fees the City, as the water system, may charge a school. Rather, it states that the water system must pay for the specified costs of testing. The Permit Amendment provides no further guidance on exactly how and with what fees and process the water system should pay for the costs.

The State Water Board guidance identified in the Proposed Decision provides no additional information regarding exactly how and using what fee structure and approach the water system should pay for the costs of lead testing.<sup>8</sup> Consistent with the Permit Amendment language, the State Water Board's "Frequently Asked Questions" document states that the "community water system that serves the school is responsible for costs associated with collecting, analyzing, and reporting drinking water samples for lead testing..."<sup>9</sup> This does not address the question of what fees or other revenues the community water system may use to cover the costs for which the community water system is responsible, except that the community water system may not circumvent that responsibility by requiring those costs to be reimbursed by the school.

By interpreting the Permit Amendment to prohibit the City from charging schools receiving testing any fees, including the same 50 cent fee applicable to all other customers, the Proposed Decision appears to conclude that requiring the community water system to be responsible for the costs means that it cannot spread the costs among its fee payers unless it exempts the schools receiving the testing from that charge. This interpretation assumes that, to comply with the Permit Amendment, the City would be forced to alter its billing system to effectively exempt a school receiving testing from paying a one-time charge of approximately 50 cents (or charge the schools a cumulative 50 cents less than other customers from a fee or fees covering all costs of service, including the lead testing). This interpretation is without any factual or legal basis.

The Permit Amendment is focused on whether the City may charge the schools *instead of* covering the costs for which the City is responsible out of generally applicable revenues. The Proposed Decision's interpretation might be plausible if the cost of compliance was so significant that it required the City to charge a one-time fee or increase its baseline rates to accommodate the costs of testing. But, here, using an assumed total cost of compliance with the Permit Amendment of \$650,000 and recognizing that the City's Water Enterprise Fund budget from 2023 was \$618,683,116,<sup>10</sup> the City's cost of compliance was approximately .001 of the annual budget. There is no reason to assume that the Permit Amendment had any specific fees in mind, other than a fee charged solely to the schools.

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<sup>7</sup> Test Claim, Exhibit A, p. 107.

<sup>8</sup> Proposed Decision, p. 67.

<sup>9</sup> *Ibid.*

<sup>10</sup> State of California, State Controller's Office website: [San Diego | California State Controller's Office Expenditures](#)



The more reasonable interpretation, consistent with the intent and purpose of the Permit Amendment language, is that the City was authorized to use revenues from all customers, including schools, to pay for the costs of compliance. As explained in the Declaration of Darrin Polhemus, Deputy Director of the Division of Drinking Water for the State Water Board,<sup>11</sup> the language in section 5 of the Permit Amendment was intended to prevent a school receiving testing services from shouldering the entire burden of the testing costs.<sup>12</sup> The State Water Board was concerned that if a school receiving testing services was required to pay the full costs of testing, the school would be discouraged from requesting the lead testing.<sup>13</sup> Additionally, forcing the schools to pay for the entire testing costs is inconsistent with the fact that the larger community, not just the schools, benefits from ensuring that the community's children avoid ingesting lead through the school's drinking water system.<sup>14</sup>

C. Because The Permit Amendment Allows the City to Charge the Same Fee to All Customers, Including Schools Receiving Testing, Such a Fee Does Not Violate Prop 218.

As explained above, the Permit Amendment was neither intended to nor should be interpreted to prevent the City charging the same fee to all customers, including schools receiving testing, to pay for the costs of complying with the Permit Amendment. Or, as is likely the case here, the Permit Amendment did not prevent the City from using the revenues received from all customers, including the schools, to pay for the testing costs. Therefore, the proportionality requirement in article XIII, D, section 6(b)(3) is met, and such a fee does not violate Prop 218.

**II. A Fee Imposed By The City On All Customers of the Water System Would Not Be Considered A Tax Subject to Voter Approval Because Such a Fee Would Fall Under Several Exemptions In Article XIII C of the California Constitution (Prop 26).**

As explained above, the Permit Amendment does not prohibit the City from spreading the costs of compliance among all customers, including those schools that requested and received testing services. Accordingly, a fee imposed by the City on all customers would satisfy exemptions (1) and (2) of Prop 26.

The Proposed Decision contends that, because the Permit Amendment prohibits the City from charging the schools receiving testing services any associated costs, the City is forced to spread the costs of compliance among all other customers.<sup>15</sup> The Proposed Decision further contends that this creates a situation where the schools receive a benefit, privilege, service, or product without being charged for those services.<sup>16</sup> Accordingly, the Proposed Decision concludes that exceptions (1) and (2) to Prop 26 do not apply.<sup>17</sup> But, as explained above, the Permit Amendment does not prohibit the City from assessing the schools receiving testing services the same incremental cost as all other customers. Therefore, any benefit, privilege, service, or product that the schools receive from the lead testing is not without charge, and such a fee would satisfy exemptions (1) and (2) to Prop 26.

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<sup>11</sup> Declaration of Darrin Polhemus, attached as Exhibit A.

<sup>12</sup> *Id.* at p. 2.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Proposed Decision, p. 80.

<sup>16</sup> *Id.* at p. 79, noting the emphasis of "that is not provided to those not charged" in the quoted language from article XIII C, section (e).

<sup>17</sup> *Id.* at p. 80.

Moreover, the Proposed Decision takes an unnecessarily narrow view of who receives the benefits of increased lead testing. The Permit Amendment was intended to protect those most vulnerable to lead poisoning—the children of the City's customers. City residents who are school faculty or staff also benefit. Additionally, the larger community benefits from healthier children and safer water at schools, many of which function as community centers.

Finally, as discussed above, the City has fee authority under article XIII D. Therefore, exception (7) to Prop 26 also applies.

**III. The City Has Fee Authority Sufficient As a Matter of Law To Pay for the Mandated Program Within the Meaning of Government Code Section 17556(d).**

As explained above, the Permit Amendment does not prevent the City from treating the schools the same as all customers when paying for the costs of compliance with the Permit Amendment. The City is authorized to issue the same fee to all customers, including schools receiving testing services. Additionally, the City is authorized to use revenues collected from its customers, including schools receiving the testing services, to pay for the testing costs. Issuing such fees or using the revenues collected from all customers to pay for the costs of compliance do not violate Prop 218 and are not considered a tax under Prop 26. Therefore, the City has fee authority within the meaning of Government Code section 17556(d).

**IV. Conclusion**

The State Water Board appreciates the Commission's consideration of these comments.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing facts are true and correct to the best of my personal knowledge or information or belief.

Very Truly Yours,



David Rice  
Senior Staff Counsel  
State Water Resources Control Board

cc: Service List via CSM dropbox

# Exhibit A

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BEFORE THE COMMISSION ON STATE MANDATES  
STATE OF CALIFORNIA

IN RE: TEST CLAIM ON REMAND	)	Case No.: 17-TC-03-R2
Permit Amendment No. 2017PA-SCHOOLS,	)	<i>Lead Sampling in Schools: Public Water</i>
City of San Diego Public Water System No.	)	<i>System No. 3710020</i>
3710020, effective January 18, 2018	)	
Filed on January 11, 2018	)	DECLARATION OF DARRIN
City of San Diego, Claimant	)	POLHEMUS

I, Darrin Polhemus, declare as follows:

1. I am the Deputy Director for the State Water Resources Control Board’s Division of Drinking Water (Division). I have served as the Deputy Director of the Division since December 2016.
2. I am a licensed civil engineer with the State of California and have worked for the State Water Board for more than 32 years. Prior to serving as the Deputy Director for the Division, I served as Deputy Director for the Division of Financial Assistance for two years, Deputy Director for the Division of Administrative Services for 4 years, Deputy Director for the Division of Water Quality for 4 years, and have had oversight roles in permitting, enforcement, and major policy setting at the State Water Board.
3. I am familiar with the City of San Diego’s Test Claim filing regarding Permit Amendment No. 2017PA-SCHOOLS (Permit Amendment), which the Division issued on January 17, 2017.
4. I was the Deputy Director for the Division at the time the Permit Amendment was issued. I worked directly on the development of the language contained in the Permit Amendment and, more specifically, I am familiar with the purpose and intent behind the language contained in section 5 of the directives portion of the Permit Amendment regarding the responsibility for costs associated with complying with the Permit Amendment requirements.

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5. The purpose and intent of the language contained in section 5 was to prevent the City from issuing a separate fee, in addition to the regular rates the schools pay for water service, for the testing and analysis required by the Permit Amendment. The section 5 language was neither intended to, nor drafted in a manner to, exempt a school receiving lead testing from paying all normal rates, including any incremental charge associated with costs of complying with the Permit Amendment requirements.
6. The section 5 language addressed concerns that if the City chose to issue a separate fee to each school receiving lead testing to cover the costs of the lead testing services, schools would choose not to request the lead testing. Failure to test would pose a particular health risk to those children as children are more susceptible to the health risks from lead.
7. Additionally, requiring all ratepayers to share the costs of compliance reflects the State Water Board's belief that lead testing in schools provides a tremendous community benefit in terms of healthier children, healthier community members who use the schools for non-school events, and additional information regarding lead in the water system. Similarly, the State Water Board requires other specific testing by water systems for the protection of subgroups or distinct populations such as after a system has received significant damage from a wildfire and testing for benzene is required before full use of water can be restored to those areas.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed this 14th day of March in Sacramento, California.



Darrin Polhemus  
DDW Deputy Director  
State Water Resources Control Board



## DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

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

On March 14, 2025, I served the:

- **Current Mailing List dated March 11, 2025**
- **Water Board's Comments on the Proposed Decision filed March 14, 2025**

*Lead Sampling in Schools: Public Water System No. 3710020, 17-TC-03-R2*

On Remand from City of San Diego v. Commission on State Mandates,  
Sacramento County Superior Court, Case No. 24WM000056; Permit Amendment  
No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020,  
effective January 18, 2017

City of San Diego, Claimant

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 14, 2025 at Sacramento, California.



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Commission on State Mandates  
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## COMMISSION ON STATE MANDATES

### Mailing List

**Last Updated:** 3/11/25

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

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

**Claimant:** City of San Diego

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

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

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