



December 21, 2018

Ms. Erika Li
Department of Finance
915 L Street, 10th Floor
Sacramento, CA 95814

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

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

Re: Draft Proposed Decision, Schedule for Comments, and Notice of Hearing
Lead Sampling in Schools: Public Water System No. 3710020, 17-TC-03
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. Li and Mr. Palmucci:

The Draft Proposed Decision for the above-captioned matter is enclosed for your review and comment.

Written Comments

Written comments may be filed on the Draft Proposed Decision by **January 11, 2019**. Please note that all representations of fact submitted to the Commission must be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge, information, or belief. (Cal. Code Regs., tit. 2, § 1187.5.) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over an objection in civil actions. (Cal. Code Regs., tit. 2, § 1187.5.) The Commission's ultimate findings of fact must be supported by substantial evidence in the record.¹

You are advised that comments filed with the Commission on State Mandates (Commission) are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your documents. Refer to http://www.csm.ca.gov/dropbox_procedures.php on the Commission's website for electronic filing instructions. (Cal. Code Regs., tit. 2, § 1181.3.)

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

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

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Hearing

This matter is set for hearing on **Friday, March 22, 2019** at 10:00 a.m., State Capitol, Room 447, Sacramento, California. The Proposed Decision will be issued on or about March 8, 2019. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

Sincerely,



Heather Halsey
Executive Director

ITEM ____
TEST CLAIM
DRAFT PROPOSED DECISION

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

Lead Sampling in Schools: Public Water System No. 3710020

17-TC-03

City of San Diego, Claimant

EXECUTIVE SUMMARY

Overview

This test claim alleges reimbursable state-mandated activities arising from Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017. This amendment requires the City of San Diego's (claimant's) Public Water System (PWS)¹ to sample and test drinking water in K-12 schools for the presence of lead, upon request of an authorized representative of the school from January 18, 2017 until November 1, 2019. According to the claimant city, as of January 1, 2018, 502 schools within San Diego County requested lead sampling from their respective PWSs.²

The test claim order imposes new requirements on the claimant, but the requirements do not mandate a new program or higher level of service because the test claim order is one of over 1,100 orders issued simultaneously to both publicly and privately owned and operated PWSs. In addition, the provision of drinking water is not a peculiarly governmental function or service, even when one of the system's customers is a K-12 school. Therefore, the test claim order does not impose a reimbursable state-mandated program.

Procedural History

The State Water Resources Control Board (SWRCB) issued 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017. The claimant filed the Test Claim on January 11, 2018.³ The Notice of Complete Test Claim, Schedule for Comments,

¹ These systems are also known as "community water systems" which are PWSs 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.

² Exhibit A, Test Claim, page 14.

³ Exhibit A, Test Claim, page 1. Note though, that only a portion of schools within San Diego County are served by claimant, the *City of San Diego*.

Request for Administrative Record, and Notice of Tentative Hearing Date was issued on April 13, 2018.

SWRCB requested an extension of time to comment and to provide the administrative record on April 23, 2018, which was granted. The Department of Finance (Finance) requested an extension of time on May 11, 2018, which was granted. SWRCB requested a second extension of time to comment and to provide the administrative record and a postponement of hearing on June 11, 2018, which was granted for good cause. Finance requested a second extension of time on June 25, 2018, which was granted for good cause.

Finance filed comments on the Test Claim on August 13, 2018.⁴ SWRCB filed comments on the Test Claim on August 13, 2018,⁵ along with the requested administrative record for Permit Amendment No. 2017 PA-SCHOOLS.⁶ The claimant requested an extension of time to file rebuttal comments on August 29, 2018, which was granted. The claimant requested a second extension of time to file rebuttal comments on October 18, 2018, after the Third District Court of Appeal issued its decision in *Paradise Irrigation District v. Commission on State Mandates*,⁷ which has since been withdrawn by the court pursuant to a grant of rehearing under Rule 8.268 of the California Rules of Court; that extension was granted. The claimant filed rebuttal comments on November 9, 2018.⁸

Commission staff issued the Draft Proposed Decision on December 21, 2018.⁹

Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. “Test claim” means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of

⁴ Exhibit D, Finance’s Comments on the Test Claim.

⁵ Exhibit C, SWRCB’s Comments on the Test Claim.

⁶ Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS.

⁷ The court’s order of October 31, 2018 vacating its decision pending rehearing renders the decision non-citeable, as if it had never been published.

⁸ Exhibit E, Claimant’s Rebuttal Comments.

⁹ Exhibit F, Draft Proposed Decision.

the California Constitution and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”¹⁰

Claims

The following chart provides a brief summary of the claims and issues raised and staff’s recommendation.

Issue	Description	Staff Recommendation
Is the Test Claim timely filed pursuant to Government Code section 17551?	Government Code section 17551 states that test claims must be filed “not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.” ¹¹	<i>Timely filed</i> - The effective date of the Order is January 18, 2017. ¹² The claimant filed the Test Claim on January 11, 2018, less than 12 months after the effective date of the Order. ¹³ Therefore, the Test Claim is timely filed.
Does the Test Claim Order impose a state-mandated new program or higher level of service?	Mandate reimbursement is required only in the case that the Legislature or an executive order imposes a “new program or higher level of service.” ¹⁴ The California Supreme Court explained in <i>County of Los Angeles v. State of California</i> (1987) 43 Cal.3d 46 that “the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not for expenses incurred by local agencies as an incidental impact of laws	<i>Deny</i> - The activities required by the order are new, as compared against prior state and federal law. However, the activities alleged do not constitute a state-mandated new program or higher level of service subject to reimbursement under article XIII B, section 6 of the California Constitution. The requirements imposed by the test claim order are not mandated by the state, but are triggered by a local decision to provide water service and operate as a public water

¹⁰ *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

¹¹ Government Code section 17551(c).

¹² Exhibit A, Test Claim, page 104 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 1].

¹³ Exhibit A, Test Claim, page 1.

¹⁴ California Constitution, article XIII B, section 6.

Issue	Description	Staff Recommendation
	that apply generally to all state residents and entities.” ¹⁵ Thus, the test claim order must carry out the governmental function of providing a service to the public; or, to implement a state policy, impose unique requirements on local agencies, which do not apply generally to all residents and entities in the state. ¹⁶	system. In addition, the Order is one of 1,100 nearly identical permit amendments issued to “public water system(s),” as defined, over one-third of which are privately owned and operated, and are not governmental entities. Thus, the test claim order is not unique to government. In addition, the provision of drinking water, even when K-12 schools are among the customers of a PWS, is not a peculiarly governmental function or service. Thus, the test claim order does not provide a <i>governmental</i> service to the public.

Staff Analysis

A. This Test Claim Is Timely Filed.

Government Code section 17551 states that local agency and school district test claims must be filed “not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.”¹⁷

The effective date of the order is January 18, 2017.¹⁸ The claimant filed the Test Claim on January 11, 2018, less than 12 months after the effective date of the order.¹⁹ Therefore, the Test Claim is timely filed.

¹⁵ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56-57.

¹⁶ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

¹⁷ Government Code section 17551(c).

¹⁸ Exhibit A, Test Claim, page 104 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 1].

¹⁹ Exhibit A, Test Claim, page 1.

B. The Test Claim Order Does Not Impose a State-Mandated New Program or Higher Level of Service.

1. The test claim order imposes new requirements on operators of public water systems.

This Test Claim alleges new state-mandated activities and costs arising from an amendment to the claimant’s public water system permit adopted by SWRCB, Order No. 2017 PA-SCHOOLS, which requires the claimant, as the operator of a “public water system” (PWS) that serves a number of K-12 schools, to perform lead sampling, upon request. A PWS may be a private company or a governmental entity.²⁰ Generally, under the order, the PWS must submit to the SWRCB a list of names and addresses of all K-12 schools served water by the PWS through a utility meter and must, upon request, take samples at one to five fixtures (e.g., drinking fountains or food preparation areas) on the school’s property, process the samples 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), as specified.²¹

Both the claimant and SWRCB agree that the order imposes requirements which are new, as compared to prior law.²² Prior law did not specifically require local government to assist schools with lead sampling at drinking water fountains and other fixtures. Accordingly, the requirements of the order are new.

²⁰ 42 United States Code, section 300f(4): “The term “public water system” means a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals.” Also, “the term “supplier of water” means any person who owns or operates a public water system.” (42 United States Code, section 300f(5), Emphasis added.) Further, “the term “person” means an individual, corporation, company, association, partnership, State, municipality, or Federal agency (and includes officers, employees, and agents of any corporation, company, association, State, municipality, or Federal agency).” (42 United States Code, section 300f(12).) California law is consistent: “Public water system” means 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.” (Health and Safety Code 116275(h).)

²¹ Exhibit A, Test Claim, page 108 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, pp 3-5.].

²² See Exhibit A, Test Claim, 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 C, SWRCB’s Comments on the Test Claim, 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.].

2. The requirements imposed by the test claim order are not mandated by the state, but are triggered by a local decision to provide water service and operate as a public water system.

The requirements of the test claim order are not mandated by the state, but are triggered by a local discretionary decision to provide water service and operate as a PWS.

Article XI, section 9(a) of the California Constitution provides that a “municipal corporation” *may* be established to operate public works to furnish light, water, power, heat, transportation, or means of communication.²³ The courts have interpreted article XI, section 9 (previously section 19) as granting authority, rather than imposing a duty.²⁴

Under the Government Code, when interpreting statutes and constitutional provisions, “shall” is mandatory, and “may” is permissive.²⁵ Article XI, section 9 provides that a municipal corporation *may* establish water service. Government Code section 38742 also provides that the legislative body of any city “*may*” contract for supplying the city with water for municipal purposes; *or “may”* “[a]cquire, construct, repair, and manage pumps, aqueducts, reservoirs, or other works necessary or proper for supplying water for the use of the city or its inhabitants or for irrigating purposes of the city.”

The claimant contends that the required activities are mandated by the state since its city charter “imposes a legal obligation and responsibility on the City to provide water service.”²⁶ However, the claimant’s obligations under its own city charter are self-imposed, and are no different than the circumstances in *City of Merced*,²⁷ *Department of Finance (Kern High School Dist.)*,²⁸ and *Department of Finance (POBRA)*²⁹ in which test claimants sought reimbursement for costs alleged to be state-mandated, but which the courts found were incurred as a result of their own discretionary decisions and thus were not subject to the subsection requirement of article XIII B, section 6 of the California Constitution.

Here, state law does not legally compel the claimant to provide water services or to operate as a PWS, and there is no evidence in the record that the claimant is practically compelled and would suffer “certain and severe penalties or other draconian measures,” if the claimant decided to no longer provide water services to its residents or operate as a PWS. As noted above, the California Constitution clearly permits cities to establish and operate public works to provide

²³ California Constitution, article XI, section 9(a).

²⁴ *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274.

²⁵ Government Code section 14.

²⁶ Exhibit E, Claimant’s Rebuttal Comments, page 4.

²⁷ *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.

²⁸ *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727.

²⁹ *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355.

water; however the next subdivision permits the same activities to be undertaken by a private entity.³⁰

Moreover, the line of cases finding that the service of water by a city is considered a proprietary function rather than a governmental one supports this conclusion. (*In re Orosi Public Utility Dist.* [1925] 196 Cal. 43, 57-58; *City of Pasadena v. Railroad Com.* [1920] 183 Cal. 526, 529; *Marin Water etc. Co. v. Town of Sausalito* [1916] 168 Cal. 587, 595, overruled on other grounds in *Los Angeles Met. Transit Authority v. Public Utilities Com.* [1963] 59 Cal.2d 863, 869; *South City of Pasadena v. Pasadena Land etc. Co.* [1908] 152 Cal. 579, 593.) In supplying water to its inhabitants, a municipality acts in the same capacity as a private corporation engaged in a similar business, and not in its sovereign role. (*Nourse v. City of Los Angeles* [1914] 25 Cal.App. 384, 385.) Consequently, the authority granted to a city under article XI, section 19, is a “privileged power”; a city is not obliged to furnish water to its inhabitants and has no duty of supplying water, although it may do so. (*People ex rel. City of Downey v. Downey County Water Dist.* [1962] 202 Cal.App.2d 786, 792.) Moreover the law has always authorized the provision of water by private companies, but historically, the authority of municipal corporations (which includes cities) to provide this service was in question until the amendment of article XI of the California Constitution in 1911.³¹ Thus, the law allows a city to operate as a PWS, and also allows a city to contract for the supply of the city’s water. But there is no state law that legally compels the claimant, or any other similarly situated local government entity, to operate a public water system, or to serve as the drinking water provider of last resort, or to include such obligations in its city charter.³²

Accordingly, staff finds that requirements imposed by the test claim order are not mandated by the state, but are triggered by a local discretionary decision to provide water services and operate as a PWS.

3. The new requirements of the test claim order do not constitute a new program or higher level of service, within the meaning of article XIII B, section 6 of the California Constitution.

State mandate reimbursement is not required for any and all costs that might be incurred by local government as an incident of a change in law. Mandate reimbursement is required only when all elements of article XIII B, section 6 are met, including that the statute or executive order imposes a “new program or higher level of service.”³³ The California Supreme Court explained in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, that a new program or higher level of service means a program that carries out of the governmental function of providing services to the public, or laws which, to implement a state policy, imposes unique requirements

³⁰ California Constitution, article XI, section 9(a-b).

³¹ *National City v. Fritz* (1949) 33 Cal.2d 635, 637.

³² See *City of Merced v. State of California* (1984) 153 Cal.App.3d 777 [Finding that statute requiring compensation for business goodwill was not a state mandate because the requirement was triggered only by the discretionary local decision to exercise eminent domain.]

³³ California Constitution, article XIII B, section 6.

on local government and does not apply generally to all residents and entities in the state.³⁴ The Court further held that “the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions *peculiar to government*, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities.”³⁵ The Court also concluded that the statute did not impose unique requirements on local government: “Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers.”³⁶ Therefore, the Court found that reimbursement was not required.

In *City of Sacramento*, the Court held that “[b]y requiring local governments to provide unemployment compensation protection to their own employees, the state has not compelled provision of new or increased ‘service to the public’ at the local level...[nor] imposed a state policy ‘uniquely’ on local governments.”³⁷ Rather, the Court observed that most employers were already required to provide unemployment protection to their employees, and “[e]xtension of this requirement to local governments, together with the state government and nonprofit corporations, merely makes the local agencies ‘indistinguishable in this respect from private employers.’”³⁸

In *Carmel Valley*, the claimants sought reimbursement from the state for protective clothing and equipment required by regulation, and the State argued that private sector firefighters were also subject to the regulations, and thus the regulations were not unique to government.³⁹ The court rejected that argument, finding that “police and fire protection are two of the most essential and basic functions of local government.”⁴⁰ The court concluded that the regulations imposed a reimbursable “program,” within the meaning of article XIII B, section 6.

Later, in *County of Los Angeles II*, counties sought reimbursement for elevator fire and earthquake safety regulations that applied to all elevators, not just those that were publicly

³⁴ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (emphasis added).

³⁵ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56-57 (emphasis added).

³⁶ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56, 58.

³⁷ *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67.

³⁸ *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67. See also, *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190 [Finding that statute eliminating local government exemption from liability for worker’s compensation death benefits for public safety employees “simply puts local government employers on the same footing as all other nonexempt employers.”]

³⁹ *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521.

⁴⁰ *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537 [quoting *Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107].

owned.⁴¹ The court found that the regulations were plainly not unique to government.⁴² The court also found that the regulations did not carry out the governmental function of providing a service to the public, despite declarations by the county that without those elevators, “no peculiarly governmental functions and no purposes mandated on County by State law could be performed in those County buildings”⁴³

Here, the test claim order is one of over 1,100 public water system permits amended simultaneously, approximately 450 of which were issued to privately-owned and operated drinking water suppliers. Furthermore, providing water, and testing for lead in that water, is not a peculiarly governmental function, traditionally it is a proprietary one. Case law distinguishes between local government activities in a sovereign capacity and local government activities more in the nature of corporate or business activities, and the operation of a PWS is comparable to the latter category of activity.⁴⁴ And, the Service Duplication Law within the Public Utilities Code requires a local government to compensate a private water provider when it extends service into the private entity’s service area, which implies that providing water service is not universally, or even predominantly, the purview of local government.⁴⁵

In its rebuttal comments, the claimant argues at length that providing water service *is* a governmental function of providing services to the public, and that the test claim order imposes unique requirements on the claimant.⁴⁶

As analyzed herein, staff finds that the test claim order does not impose a new program or higher level of service.

⁴¹ *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538.

⁴² *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

⁴³ *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

⁴⁴ *In re Orosi Public Utility Dist.* (1925) 196 Cal. 43, 57-58; *City of Pasadena v. Railroad Com.* [1920] 183 Cal. 526, 529; *Marin Water etc. Co. v. Town of Sausalito* [1916] 168 Cal. 587, 595, overruled on other grounds in *Los Angeles Met. Transit Authority v. Public Utilities Com.* [1963] 59 Cal.2d 863, 869; *South City of Pasadena v. Pasadena Land etc. Co.* [1908] 152 Cal. 579, 593.): See also *Nourse v. City of Los Angeles* (1914) 25 Cal.App. 384, 385 “In supplying water to its inhabitants, a municipality acts in the same capacity as a private corporation engaged in a similar business, and not in its sovereign role.”; And *People ex rel. City of Downey v. Downey County Water Dist.* (1962) 202 Cal.App.2d 786, 792. “Consequently, the authority granted to a city under article XI, section 19, is a “privileged power”; a city is not obliged to furnish water to its inhabitants and has no duty of supplying water, although it may do so.”

⁴⁵ See Public Utilities Code sections 1501-1504.

⁴⁶ Exhibit E, Claimant’s Rebuttal Comments, pages 7-8.

a. The requirements of the test claim order are not uniquely imposed on government.

The claimant contends that the test claim order imposes unique requirements on the claimant that do not apply generally to all residents and entities in the State and, therefore constitutes a new program or higher level of service.⁴⁷

Staff disagrees with the claimant and finds that the requirements of the test claim order are not uniquely imposed on government.

It is correct that the test claim order, as pled, is uniquely addressed to a local government entity (the City of San Diego, in its capacity as the operator of a PWS). However, as instructed by the courts interpreting article XIII B, section 6 of the California Constitution, this test claim order cannot be considered in isolation; it must be construed in context with other similar permits issued by SWRCB to PWSs.⁴⁸ Thus the courts required the Commission to consider the test claim order in the context of the other identical orders adopted simultaneously.⁴⁹

Furthermore, as indicated above, the provision of water through a public water system, to a school or any other customer, is not a mandatory function of government, and may be performed by a private corporation. Article XI, section 9 of the California Constitution provides that a municipal corporation, or a private person or corporation, may be established to operate public works to furnish water.⁵⁰ This provision was adopted by voter initiative to make clear that cities or other local entities had authority to organize to provide such services, which had previously been provided primarily by private entities.⁵¹ Moreover, the term “public water system” does not mean a water system owned or operated by a governmental entity; both the federal Lead and Copper Rule (LCR) and California’s Safe Drinking Water Act (SDWA) define a PWS 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.⁵² The law makes no distinction between publicly and privately owned PWSs. And, SWRCB provides evidence that currently

⁴⁷ Exhibit E, Claimant’s Rebuttal Comments, page 8.

⁴⁸ See *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190 [Elimination of a previous statutory exemption from part of worker’s compensation law was not a new program, uniquely imposed on government, even though the statute itself, considered in isolation, affected only local government.].

⁴⁹ *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 69 [The Court observed that it would “have an anomalous result” if the State could “avoid subvention under *County of Los Angeles* standards by imposing new obligations on the public and private sectors at the same time,” while “if it chose to proceed by stages, extending such obligations first to private entities, and only later to local governments, it would have to pay.”].

⁵⁰ California Constitution, article XI, section 9(a-b).

⁵¹ *In re Bonds of Orosi Public Utility Dist.* (1925) 196 Cal. 43, 55 [“The adoption of the amendment definitely settled and removed all doubt from the question of the right of cities and towns to own and operate the kind of public utilities designated by the Constitution.”].

⁵² Health and Safety Code 116275(h); 40 Code of Federal Regulations, Part 141.80 et seq.

there are 6,970 water systems of various types operating in California, 5,314 of which (approximately 76 percent) are privately owned and operated, and 1,656 of which are public entities.⁵³

Thus, the test claim order is but one of 1,128 permit amendments adopted near-simultaneously, more than a third of which were issued to privately owned PWSs, with the same requirements to perform lead sampling upon request of a school district.⁵⁴ Privately owned PWS's subject to lead testing requirements due to a permit amendment include mutual water companies organized under the Corporations Code;⁵⁵ and investor-owned utilities regulated under the Public Utilities Code.⁵⁶ Accordingly, this test claim is distinguishable from *Carmel Valley*, in which the court

⁵³ Exhibit C, SWRCB's Comments on the Test Claim, pages 2; 455-457. However, the claimant argues, and SWRCB concedes, that the largest water systems are publicly owned, and therefore the majority of Californians are served by a publicly owned water system. (Exhibit C, SWRCB's Comments on the Test Claim, p. 2; Exhibit E, Claimant's Rebuttal Comments, p. 5.)

⁵⁴ Exhibit C, SWRCB's Comments on the Test Claim, pages 14, 819-14751. The SWRCB states that approximately 450 of the PWSs receiving the permit amendments are privately owned. (See, e.g., Exhibit C, SWRCB's Comments on the Test Claim, page 6481 [Permit Amendment Issued to East Pasadena Water Co.]; Exhibit X, List of Regulated Water and Sewer Utilities, California Public Utilities Commission, August 17, 2018, p. 5 [East Pasadena Water Co.]

⁵⁵ Corporations Code section 14300 et seq.. See, e.g., Exhibit C, SWRCB Comments on the Test Claim, Permit Amendments issued to entities described as "mutual water company" or "mutual water association": pages 897 [Ali Mutual Water Co.]; 1053 [Aromas Hills Mutual Water Association]; 1092 [Arrowhead Villas Mutual Service Co.]; 1139 [Atascadero Mutual Water Co.]; 1153 [Averydale Mutual Water Co.]; 1340 [Bedel Mutual Water Co.]; 1392 [Bellflower-Somerset MWC]; 1414 [Best Road Mutual Water Co.]; 1427 [Beverly Grand Mutual Water]; 1623 [Box Springs Mutual Water Co.]

⁵⁶ See, Exhibit X, List of Regulated Water and Sewer Utilities, California Public Utilities Commission, August 17, 2018. See, e.g., Exhibit C, SWRCB Comments on the Test Claim, Permit Amendments issued to investor-owned utilities regulated by PUC: pages 1265 [Bakman Water Co.]; 1292 [Bass Lake Water Co.]; 1455 [Big Basin Water Co.]; 1862-1939 [California Water Service Company: King City, Las Lomas, Oak Hills, Salinas Hills, Salinas, Stockton]; 1940 [California American Water, Coronado]; 2105 [California Water Service, Bear Gulch]; 2133-2177 [California Water Service: East Los Angeles, Hermosa/Redondo; Palos Verdes]; 2193-2220 [California Water Service: Westlake, Los Altos Suburban]; 2240 [California Water Service, South San Francisco]; 2380-2414 [Cal-Water Service Co.: Chico, Hamilton City, Marysville, Oroville, Willows]; 2508 [Canada Woods Water Co.]; 2661 [Cazadero Water Co.]; 5956 [CWS Bakersfield]; 6034 [CWS Selma]; 6060-6098 [CWS: Visalia, Dixon, Livermore]; 6194-6214 [Del Oro Water Co.: Magalia, Paradise Pines, Stirling Bluffs]; 6481 [East Pasadena Water Co.]; 6541 [Easton Estates Water Co.]; 6725 [Erskine Creek Water Co.]; 7077 [Fruitridge Vista Water Co.]; 7192 [Golden State Water Co., Clearlake]; 7315 [Golden State Water Co., Wrightwood]; 7395 [Great Oaks Water Co.]; 7408 [Green Acres Mobile Home Estates]; 7880 [Havasu Water Co.]; 8078 [Hillview Water Co., Oakhurst/Sierra Lakes]; 8524 [Kenwood Village Water Co.]; 8866 [Lake Alpine Water Co.]; 9021 [Las Flores Water Co.]; 9270 Little Bear Water

noted that it did not have evidence in the record of the existence or prevalence of private fire-fighting teams or private fire personnel, but accepted it as a matter of judicial notice that the overwhelming majority of fire fighters discharge a governmental service.⁵⁷

This Test Claim most closely resembles *County of Los Angeles II*.⁵⁸ In that case, earthquake safety regulations applied to all elevators, and affected the local government only insofar as the local entity operated buildings that contained working elevators.⁵⁹ Here, the test claim order affects the claimant only because the claimant provides drinking water through a PWS to K-12 schools within its service area, and those schools have requested testing.

Accordingly, the requirements of the test claim order are not uniquely imposed on local government.

- b. The test claim order does not impose a governmental function of providing a service to the public within the meaning of article XIII B, section 6.

Staff finds that the test claim order does not impose a governmental function of providing a service to the public within the meaning of article XIII B, section 6 of the California Constitution.

As discussed above, the California Supreme Court in *County of Los Angeles* defined a program subject to article XIII B, section 6, as “*programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.*”⁶⁰ The Court went on to explain that the intent underlying section 6 was to require reimbursement to local agencies for the *costs involved in carrying out functions peculiar to government*, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities.⁶¹ On that basis, the Court reasoned that

Co.]; 9426 Lukins Brothers Water Co.]; 9768 [Mesa Crest Water Co.]; 10082 [Mountain Mesa Water Co.]; 10217 Nacimiento Water Co.]; 10871 Penngrove Water Co.]; 10925 [Pierpoint Springs Water Co.]; 11066 [Point Arena Water Works]; 11478 [Rio Plaza Water Co.]; 11542 [Rolling Green Utilities]; 11803-11845 [San Gabriel Valley Water Co., El Monte, Montebello, Fontana]; 11915 [San Jose Water Co.]; 12959 [Southern California Edison Co., Santa Catalina]; 12975 [Spreckels Water Co.]; 13163-13213 [Suburban Water Systems, Covina, Glendora, La Mirada]; 14361 [Warring Water Service, Inc.]; 14411 [Weimar Water Co.]; 14426 [West San Martin Water Works, Inc.]; 14649 [Yerba Buena Water Co.].

⁵⁷ *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App. 3d 521, 537.

⁵⁸ *County of Los Angeles v. Dept. of Industrial Relations* (1989) 214 Cal.App.3d 1538.

⁵⁹ *County of Los Angeles v. Dept. of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

⁶⁰ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (emphasis added).

⁶¹ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57.

workers compensation was not a governmental *program* at all, because it is not administered by local government and private and public employers have the same obligations under the law.⁶²

In the years since, the courts have applied this test to *confirm* the existence of a *governmental* program within the meaning of article XIII B, section 6 to include the following: protective clothing and equipment for firefighters;⁶³ education of “handicapped” children;⁶⁴ reducing racial or ethnic segregation in public schools;⁶⁵ providing due process in expulsion proceedings in public schools;⁶⁶ and providing due process in disciplinary proceedings for peace officers employed by cities and counties.⁶⁷ In addressing fire protective clothing and equipment, the court observed that fire fighting is a “peculiarly governmental function,” and that police and fire protection are “two of the most essential and basic functions of local government.”⁶⁸ The same was echoed in *POBRA*, relative to the due process for city and county peace officer disciplinary proceedings.⁶⁹ *Lucia Mar, Long Beach*, and *San Diego Unified* all addressed alleged reimbursable mandates in the realm of education,⁷⁰ for which the governmental duty of a school district is clearly expressed in the California Constitution,⁷¹ and for which the court in *Long Beach* expressly recognized that education is a “peculiarly governmental function,” notwithstanding the existence of private schools.⁷²

At the same time the courts have *rejected* mandate reimbursement in the following cases because they did *not* involve a *governmental function* of providing a service to the public: fire and

⁶² *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58.

⁶³ *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521.

⁶⁴ *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830.

⁶⁵ *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155.

⁶⁶ *San Diego Unified School Dist. v. Commission* (2004) 33 Cal.4th 859.

⁶⁷ *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355.

⁶⁸ *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537 [citing *County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481; *Verreros v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107].

⁶⁹ *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1367 [An “ordinary, principal and mandatory duty” for cities and counties and some special districts to provide “policing services within their territorial jurisdiction.”].

⁷⁰ *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830; *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155; *San Diego Unified School Dist. v. Commission* (2004) 33 Cal.4th 859.

⁷¹ California Constitution, article IX, sections 2 [providing for a State Superintendent of Public Instruction]; 3 [providing for a Superintendent of Schools in each county]; 5 [“The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year.”].

⁷² See *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172.

earthquake safety features for elevators in buildings open to the public;⁷³ elimination of a government and nonprofit employer exemption from contributing to unemployment insurance;⁷⁴ awarding attorneys' fees against a local government under Code of Civil Procedure section 1021.5;⁷⁵ and the elimination of an exemption for local governments employing public safety workers from requirements to pay workers' compensation death benefits.⁷⁶ The cases disapproving reimbursement therefore involved either costs and activities related to public employees;⁷⁷ or generally-applicable laws that impacted local government but which were not a *governmental function* or unique to government (i.e., the award of attorneys' fees for litigants successful against local government, and the applicability of elevator safety regulations in public buildings).⁷⁸

Unlike *Carmel Valley*, *Lucia Mar*, *Long Beach*, *San Diego Unified*, and *POBRA*, the test claim order in this case does not involve an essential and *peculiarly governmental function*.⁷⁹ The test claim order here relates to the provision of drinking water through a PWS, which is fundamentally distinct from the other examples discussed above: providing water service for a fee—a traditionally a proprietary function—to ratepayers, is far different from a city or county providing police or fire protection, or tax administration or mental hospital care, or from school districts providing a free and appropriate public education, to all residents of the jurisdiction regardless of their ability to pay.

Furthermore, as noted above, there is no legal requirement for local agencies to be involved in providing water, nor historical predominance of local agencies in this area. Article XI, section 9 of the California Constitution provides that a municipal corporation *may* be established to operate public works to furnish light, water, power, heat, transportation, or means of communication, or, *private persons or corporations* may also establish and operate works for those same purposes “upon conditions and under regulations that the city may prescribe...”⁸⁰ The courts have interpreted article XI, section 9 to provide *authority* to provide public utilities,

⁷³ *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538.

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

⁷⁵ *County of Fresno v. Lehman* (1991) 229 Cal.App.3d 340.

⁷⁶ *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

⁷⁷ *City of Sacramento v. State of California* (1990) 50 Cal.3d 51; *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190. See also, *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

⁷⁸ *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538; *County of Fresno v. Lehman* (1991) 229 Cal.App.3d 340.

⁷⁹ See, e.g., *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1367; *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172.

⁸⁰ California Constitution, article XI, section 9(a-b).

but not a *duty*.⁸¹ As noted, SWRCB provides evidence that there are 6,970 water systems currently operating in California, 5,314 of which are privately owned and operated, and 1,656 of which are public entities.⁸² And, as many as two million Californians “are served either by the estimated 250,000 to 600,000 private domestic wells, or by water systems serving fewer than 15 service connections.”⁸³ Thus, the provision of drinking water through a PWS is not only not necessary in all cases and in all parts of the State, it is also an activity and function that, where necessary or expedient, can be fulfilled by a private person or corporation.⁸⁴ It bears repeating that the term “public water system” does not mean a water system owned or operated by a governmental entity; a “public water system” is defined only by the number of connections.⁸⁵ Neither the California SDWA, nor federal regulations, defines these entities any differently whether owned and operated by a public entity or by a private person or corporation.

The Claimant challenges SWRCB’s evidence that approximately 75 percent of water systems throughout the state are privately owned or operated. The claimant states that the same data provided by SWRCB “demonstrate that public agencies serve 81% of people in the State who have drinking water service.”⁸⁶ The claimant argues that the number of people statewide receiving drinking water from a publicly owned utility “is strong evidence that water service is a governmental function, more persuasive than the fact that small, privately owned water systems outnumber large, publicly owned systems.”⁸⁷

However, the relative number of *persons* served by privately or publicly owned water systems is not persuasive evidence that water service is a governmental function; the majority of persons served by publicly owned water systems is merely a function of the size and capacity of the publicly owned systems, and presumably also a more dense and urbanized ratepayer/customer base.⁸⁸ In addition, as many as two million California residents still rely on private domestic wells or water systems with fewer than 15 service connections for their drinking water, rather

⁸¹ *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 275.

⁸² Exhibit C, SWRCB’s Comments on the Test Claim, page 2. See also, Exhibit C, SWRCB’s Comments on the Test Claim, pages 455; 457 [Listing the number of public and private water systems, respectively, governed by each county and water district].

⁸³ Exhibit X, *A Guide for Private Domestic Well Owners*, California State Water Resources Control Board Groundwater Ambient Monitoring and Assessment (GAMA) Program, March 2015, page 6.

⁸⁴ See California Constitution, article XI, section 9(b); Corporations Code section 14300 et seq.

⁸⁵ A public water system is defined as having 15 or more service connections, serving 25 or more persons at least 60 days out of the year.

⁸⁶ Exhibit E, Claimant’s Rebuttal Comments, page 5.

⁸⁷ Exhibit E, Claimant’s Rebuttal Comments, page 5.

⁸⁸ Exhibit C, SWRCB’s Comments on the Test Claim, page 2.

than a PWS.⁸⁹ The specific requirements of this test claim order apply beyond local government entities, as discussed above; the requirements apply to any and every PWS that decides to supply water and serves at least one K-12 school. Substantial evidence has been presented that as many as one-third of affected entities are privately held or operated.⁹⁰

Finally, the claimant argues that the “program” at issue in this Test Claim is not providing water through a PWS at all; rather “[t]he lead testing program in the Permit Amendment carries out a...governmental function of ensuring safe schools.”⁹¹ Staff disagrees.

A PWS has no duty to ensure safe schools, as alleged by the claimant; the schools maintain and exercise that duty with their request for lead testing. The claimant, and other public entities operating water systems that serve K-12 schools, are subject to the test claim order by virtue of their decision to provide water. Like maintaining elevators, providing water is not a *governmental* function, as explained in the above analysis.

Therefore, the test claim order does not impose a *governmental* function of providing a service to the public within the meaning of article XIII B, section 6 of the California Constitution.

SWRCB asserts that local governments act in either a “governmental” or “public” capacity, or a “corporate” or “private” capacity, and that the same distinction used to determine whether sovereign immunity attached to a particular action is consistent with, and provides an analogy to, the concept of a governmental function or “program” in the mandates context.⁹²

The claimant argues, to the contrary, that essentially any service that a local government has authority to provide, or any activity that local government may engage in under its police power, is a local government function, and that the distinction between governmental and “proprietary” or “corporate” activity is no longer a useful determinant: “Water service provided by public agencies no longer carries the indicia of a proprietary function or private enterprise due to Proposition 218..., which eliminates profit from water service charges.”⁹³ The claimant cites authority that it maintains undermines the usefulness of the distinction: in *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* the court held that “[t]he labels ‘governmental function’ and ‘proprietary function’ are of dubious value in terms of legal

⁸⁹ Exhibit C, SWRCB’s Comments on the Test Claim, page 2; Exhibit X, *A Guide for Private Domestic Well Owners*, California State Water Resources Control Board Groundwater Ambient Monitoring and Assessment (GAMA) Program, March 2015, page 6.

⁹⁰ See Exhibit E, Claimant’s Rebuttal Comments, pages 34-35 [SWRCB Media Release, January 17, 2017 (“The Board is requiring all community water systems to test school drinking water upon request by the school’s officials.”)]; Exhibit C, SWRCB’s Comments on the Test Claim, page 2. See also, Exhibit C, SWRCB’s Comments on the Test Claim, pages 455; 457 [Listing the number of public and private water systems, respectively, governed by each county and water district]

⁹¹ Exhibit E, Claimant’s Rebuttal Comments, page 6.

⁹² Exhibit C, SWRCB’s Comments on the Test Claim, page 12.

⁹³ Exhibit E, Claimant’s Rebuttal Comments, page 5.

analysis in any context.”⁹⁴ The court went on to say that the distinction, developed for and applied in government tort claims, was “manifestly unsatisfactory” and “operated both ‘illogically’ and ‘inequitably.’”⁹⁵ In *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County*, also cited by the claimant, the court stated broadly that anything local government is authorized to do “constitutes a function of government, and when a municipality acts pursuant to granted authority it acts as government and not as a private entrepreneur.”⁹⁶

First, staff disagrees that Proposition 218 has any bearing on whether water service is a “governmental” function. Imposition of additional limitations on fee authority when a governmental entity undertakes an activity has no bearing on the nature of the activity. Furthermore, the comparison is poor: a private utility entity is hardly an unfettered profit generator, because it is required by law to charge only rates that are just and reasonable, subject to the regulation and control of the Public Utilities Commission.⁹⁷ In short, the limitations of Proposition 218, applicable to a publicly owned PWS, do not alter the fundamental nature of the service or function being provided.

More importantly, while the cases cited by the claimant discount the value of the distinction between *governmental* and *proprietary* or *corporate* functions,⁹⁸ they are decided on grounds other than the nature of the service provided. In both cases the court is weighing the rights of a utility (in *Northeast Sacramento* an apparent publicly owned utility) to place its service lines along or under a public roadway, against the power of a public agency to force relocation of those service lines at the utility’s expense.⁹⁹ This makes the applicability of the cited language

⁹⁴ *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968.

⁹⁵ *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968.

⁹⁶ *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325.

⁹⁷ See Public Utilities Code 451; 454; 728 [“Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules, practices, or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix, by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force.”].

⁹⁸ *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968; *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325.

⁹⁹ *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 961-961; *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 318.

to the mandates context suspect, at best. And, in each case, the claimant has selectively quoted language that undermines the *governmental* versus *proprietary* distinction, despite contrary language in the same opinion.¹⁰⁰ In addition, *neither* court finds the distinction to be dispositive of the issues.¹⁰¹

And, in 1967, the year after *Northeast Sacramento*, the Fourth District Court of Appeal decided *Glenbrook Development Co.*¹⁰² As discussed above, the court in *Glenbrook Development Co.* found that that cities have no legal duty to provide water to their citizens, and reiterated and endorsed the view that “service of water by a city is a proprietary function.”¹⁰³

Thus, these cases overwhelmingly support the conclusion that the test claim order does not impose a *governmental* function of providing a service to the public within the meaning of article XIII B, section 6, and the cases cited by the claimant on this point are not relevant to the new program or higher level of service issue here and are dicta,¹⁰⁴ at best.

Staff finds further that the Service Duplication Law, Public Utilities Code section 1501 et seq., provides a remedy to protect the investment of privately owned utilities providing water service, and to mitigate the deterrent effect of potential eminent domain. And, while sections 1503 and 1504 of the Public Utilities Code may have become necessary due to a pattern of municipalities extending duplicative service in certain areas and thus undermining the value of privately owned

¹⁰⁰ *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 969 [“Under traditional tests, such enterprises were uniformly treated as being proprietary in nature.”]; *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325 [“...as we have seen a district furnishing a domestic water supply is said to be performing a proprietary act.”].

¹⁰¹ *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968 [“A utility’s right to compensation should depend, not on whether municipal activity is ‘governmental’ or ‘proprietary,’ but on whether compensation has been required by the Legislature, or whether there has been a constitutionally compensable taking or damaging of a valuable property right.”]; 970 [“PT&T’s contention that it is entitled to compensation on the theory that the city and the agency were acting in a proprietary capacity is without merit.”]; *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325 [To maintain the ‘governmental versus proprietary function’ as a test in the determination of relocation cost allocation is no less specious.”].

¹⁰² *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267.

¹⁰³ *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 275 [“In supplying water to its inhabitants, a municipality acts in the same capacity as a private corporation engaged in a similar business, and not in its sovereign role.”].

¹⁰⁴ “Dicta” is a legal term which is short for “obiter dictum” which in Latin means “something said in passing” and is a comment made while delivering a judicial opinion, but is unnecessary to the decision in the case and therefore not precedential.

facilities or equipment, there is no indication that there was any intent of the Legislature to make the service of water a governmental rather than proprietary function, as the claimant seems to imply. Indeed the acknowledgement of a deterrent effect on private water suppliers and the statutory requirement of compensation suggests that the Legislature believed that private utility companies serving water in areas of the State would continue to be necessary into the future, and for that reason their investments should be protected, lest private entities choose not to offer such services in the first instance. The courts have observed that this is especially important with respect to water utilities.¹⁰⁵ Without the Service Duplication Law, infringement on the service area of a private water utility, and the potential loss of business, might not be compensable at all, unless the facilities and equipment were fully acquired by eminent domain.¹⁰⁶ The Service Duplication Law, in short, is a Legislative innovation designed to protect the viability of private water utilities, in recognition of their long term necessity to provide water in certain areas of the State.

Accordingly, case law distinguishing between proprietary and governmental functions, and the “Service Duplication Law” support the finding that the test claim order does not impose a *governmental* function of providing a service to the public within the meaning of article XIII B, section 6.

Conclusion

Based on the forgoing analysis, staff finds that:

- The Test Claim is timely filed;
- The test claim order, Permit Amendment No. 2017 PA-SCHOOLS, issued to the City of San Diego Public Water System, imposes new requirements on the claimant which are identical to the requirements imposed on over 1,000 publicly and privately owned operators of public water systems through their Permit Amendments.
- The requirements imposed by the test claim order are not mandated by the state, but are triggered by a local decision to provide water service and operate as a public water system.
- The new requirements of the test claim order do not constitute a new program or higher level of service, within the meaning of article XIII B, section 6, because the requirements are not uniquely imposed on government, and do not impose a governmental function of providing services to the public.

Based on this conclusion, no findings are made on whether the test claim order results in increased costs mandated by the state within the meaning of Government Code sections 17514 and 17556.

¹⁰⁵ *Cucamonga County Water Dist. v. Southwest Water Co.* (1971) 22 Cal.App.3d 245, 259 [“The special importance attached to efficient and economical use and distribution of water in the arid western states, and the provision of the California Constitution that the use of all water is subject to regulation by the State (Cal.Const. Art. XIV) justifies the classification under consideration here.”]

¹⁰⁶ *Cucamonga County Water Dist. v. Southwest Water Co.* (1971) 22 Cal.App.3d 245, 259

Staff Recommendation

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

BEFORE THE
 COMMISSION ON STATE MANDATES
 STATE OF CALIFORNIA

<p>IN RE TEST CLAIM</p> <p>Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017</p> <p>Filed on January 11, 2018</p> <p>City of San Diego, Claimant</p>	<p>Case No.: 17-TC-03</p> <p><i>Lead Sampling in Schools: Public Water System No. 3710020</i></p> <p>DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7.</p> <p><i>(Adopted March 22, 2019)</i></p>
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DECISION

The Commission in State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on March 22, 2019. [Witness list will be included in the adopted Decision.]

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

The Commission [adopted/modified] the Proposed Decision to [approve/partially approve/deny] the Test Claim by a vote of [vote will be included in the adopted Decision], as follows:

Member	Vote
Lee Adams, County Supervisor	
Ken Alex, Director of the Office of Planning and Research	
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	
Sarah Olsen, Public Member	
Carmen Ramirez, City Council Member	
Yvette Stowers, Representative of the State Controller	
Jacqueline Wong-Hernandez, Representative of the Director of the Department of Finance, Chairperson	

Summary of the Findings

This Test Claim alleges new state-mandated activities and costs arising from an amendment to the City of San Diego’s (claimant’s) public water system (PWS) permit adopted by the State Water Resources Control Board (SWRCB), Order No. 2017PA-SCHOOLS. The test claim order requires the claimant, as the operator of a “public water system”¹⁰⁷ that serves a number of K-12 schools, to perform lead sampling, upon request. A PWS may be a private company or a governmental.¹⁰⁸ Specifically, a PWS is 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.¹⁰⁹ Under the order, upon request, the PWS must take samples at one to five fixtures (e.g., drinking fountains or food preparation areas) on the school’s property, process those results with a certified laboratory, maintain records of the requests and the results, and provide the results, and if necessary, information to the school regarding possible remediation or other solutions if lead is detected in the fixtures above 15 parts per billion (ppb).

The Commission finds that the Test Claim is timely filed.

The Commission further finds that the activities required by the order are new, as compared against prior state and federal law. However, the requirements of the test claim order are not mandated by the state, and do not impose a new program or higher level of service, within the meaning of article XIII B, section 6. First, the provision of water service as a PWS is not mandated by the state and is undertaken by a discretionary decision of the City.¹¹⁰ In addition, the requirements are not uniquely imposed on local government, because the Test Claim Order is one of over 1,100 PWS permits amended simultaneously with identical requirements

¹⁰⁷ These systems are also known as “community water systems” which are PWSs 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.

¹⁰⁸ 42 United States Code, section 300f(4): “The term “public water system” means a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals.” (Emphasis added.) Also, “the term “supplier of water” means any person who owns or operates a public water system.” (42 United States Code, section 300f(5).) Further, “the term “person” means an individual, corporation, company, association, partnership, State, municipality, or Federal agency (and includes officers, employees, and agents of any corporation, company, association, State, municipality, or Federal agency).” (42 United States Code, section 300f(12).) California law is consistent: “Public water system” means 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.” (Health and Safety Code 116275(h).)

¹⁰⁹ Health and Safety Code section 116275(h).

¹¹⁰ Department of Finance v. Commission on State Mandates (2003) 30 Cal.4th 727

approximately 450 of which were issued to privately-owned and operated drinking water suppliers. Moreover, water service is not a *governmental* function of providing services to the public because providing water service is not required by state or federal law and is not a core function of government, water service is different in character from providing police or fire protection, or education and this finding is further supported by the case law demonstrating that it is a proprietary function. Thus the order does not constitute a governmental “program,” nor does it impose requirements uniquely upon local government. For these reasons, the Commission finds that the test claim order does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution, and denies this Test Claim.

COMMISSION FINDINGS

I. Chronology

01/18/2017	Permit Amendment No. 2017PA-SCHOOLS for City of San Diego PWS 3710020 was adopted by SWRCB, Division of Drinking Water. ¹¹¹
01/11/2018	The claimant filed the Test Claim. ¹¹²
04/13/2018	The Test Claim was deemed complete and issued for comment, along with a request that SWRCB provide a copy of its administrative record for the adoption of the permit amendment.
04/23/2018	SWRCB requested an extension of time to file comments and to provide its administrative record.
05/11/2018	The Department of Finance (Finance) requested an extension of time to comment.
06/11/2018	SWRCB requested a second extension of time to file comments and to provide its administrative record, and a postponement of the hearing.
06/25/2018	Finance requested a second extension of time to comment.
08/13/2018	SWRCB filed comments on the Test Claim and provided its administrative record. ¹¹³
08/13/2018	Finance filed comments on the Test Claim. ¹¹⁴
08/29/2018	The claimant requested an extension of time to file rebuttal comments.
10/18/2018	The claimant requested a second extension of time to file rebuttal comments.

¹¹¹ Exhibit A, Test Claim, page 14.

¹¹² Exhibit A, Test Claim.

¹¹³ Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS; Exhibit C, SWRCB’s Comments on the Test Claim.

¹¹⁴ Exhibit D, Finance’s Comments on the Test Claim.

11/09/2018 The claimant filed its rebuttal comments.¹¹⁵
12/21/2018 Commission staff issued the Draft Proposed Decision.¹¹⁶

II. Background

The test claim order is one of over 1,100 permit amendments simultaneously issued to privately and publicly owned “public water systems,” (PWSs) requiring each to test for lead in the drinking water connections of every K-12 school that it serves and that requests testing at no charge to the school from January 11, 2017 until November 1, 2019.

A. Lead as an Environmental Health Risk

Lead is toxic and has “no known value to the human body.”¹¹⁷ Young children “are at particular risk for lead exposure because they have frequent hand-to-mouth activity and absorb lead more easily than do adults.”¹¹⁸ 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.¹¹⁹ 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.¹²⁰ Higher lead levels can cause severe neurological problems and ultimately death.¹²¹

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.”¹²² 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.¹²³ 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

¹¹⁵ Exhibit E, Claimant’s Rebuttal Comments.

¹¹⁶ Exhibit F, Draft Proposed Decision.

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

¹¹⁸ Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6].

¹¹⁹ Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6].

¹²⁰ Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6].

¹²¹ Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6].

¹²² Exhibit X, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, page 2.

¹²³ Exhibit X, National Institutes of Health, Lead Information Home Page, page 1.

eventually banned leaded gasoline.¹²⁴ U.S. EPA and other agencies have “taken steps over the past several decades to dramatically reduce new sources of lead in the environment; according to the U.S. EPA, “[t]oday, the greatest contributions of lead to the environment stem from past human activities.”¹²⁵ 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.¹²⁶

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.¹²⁷ 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.’”¹²⁸ 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.”¹²⁹ 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.”¹³⁰ Accordingly, the primary regulatory approach, as discussed below, is to require water systems to prioritize monitoring, and to implement and maintain corrosion control treatment to minimize toxic metals leaching into water supplies.

To potentially close some of the gaps in lead exposure prevention, the California Legislature in 1992 enacted the Lead-Safe Schools Protection Act,¹³¹ which acknowledged the potential

¹²⁴ Exhibit X, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, page 4.

¹²⁵ Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 163 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 6].

¹²⁶ Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, pages 163-164 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, pp. 6-7].

¹²⁷ Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 164 [USEPA: 3Ts for Reducing Lead in Drinking Water in Schools, p. 7].

¹²⁸ Exhibit X, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, pages 3-4.

¹²⁹ Exhibit X, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, page 4.

¹³⁰ Exhibit X, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, page 4.

¹³¹ Education Code section 32240 et seq.

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.”¹³² 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 (SDWA), 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.¹³³ 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.¹³⁴ U.S. EPA states that there are over 170,000 public water systems providing drinking water to Americans, to which the Act applies.¹³⁵

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).¹³⁶ 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].”¹³⁷ The number of samples required depends on the size of the drinking water system, and any history of prior exceedances.¹³⁸ 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

¹³² Education Code section 32242.

¹³³ Exhibit X, *Understanding the Safe Drinking Water Act*, EPA publication, June 2004, page 1 (available at <https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf>).

¹³⁴ 42 U.S.C. § 300f(4).

¹³⁵ Exhibit X, *Understanding the Safe Drinking Water Act*, EPA publication, June 2004, page 2 (available at <https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf>).

¹³⁶ Title 40, Code of Federal Regulations, section 141.80 et seq.

¹³⁷ Title 40, Code of Federal Regulations, section 141.80(c).

¹³⁸ See Exhibit X, *Lead and Copper Rule: A Quick Reference Guide*, U.S. EPA publication 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].

education.¹³⁹ The LCR also includes monitoring and reporting requirements for public water systems.¹⁴⁰

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.”¹⁴¹ These provisions do not provide a right to the delivery of water, but merely provide that drinking water delivered by a PWS 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.¹⁴²

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.¹⁴³ SWRCB

¹³⁹ Exhibit C, SWRCB’s Comments on the Test Claim, page 6; Title 40, Code of Federal Regulations, section 141.80(d-g).

¹⁴⁰ Title 40, Code of Federal Regulations, sections 141.86 – 141.91.

¹⁴¹ Health and Safety Code section 116270.

¹⁴² Health and Safety Code section 116270.

¹⁴³ 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, or manage a line, plant, or system for ...the production, generation, transmission, or furnishing of

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.”¹⁴⁴

The courts have called the California SDWA “a remedial act intended to protect the public from contamination of its drinking water.”¹⁴⁵ 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.¹⁴⁶ 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,”¹⁴⁷ and the monitoring and corrosion control requirements are aimed at the water systems themselves, whether publicly or privately owned.

The State has also adopted a Lead and Copper Rule, substantially similar to the federal rule, which requires all operators of drinking water systems to monitor and sample at a number of sample sites determined by the size of the system, primarily residential sample sites.¹⁴⁸ 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.¹⁴⁹ Approximately 500 schools within California are themselves permitted as a “public water system,” because they have their own water supply,

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.]

¹⁴⁴ 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).

¹⁴⁵ *Coshov v. City of Escondido* (2005) 132 Cal.App.4th 687, 704.

¹⁴⁶ *Guzman v. County of Monterey* (2009) 178 Cal.App.4th 983, 989.

¹⁴⁷ Health and Safety Code section 116270(e) (emphasis added).

¹⁴⁸ See California Code of Regulations, title 22, section 64670 et seq.; Exhibit C, SWRCB’s Comments on the Test Claim, pages 5-6; California Code of Regulations, title 22, section 64676 [Sample Site Selection].

¹⁴⁹ 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].

such as a well.¹⁵⁰ 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.¹⁵¹

C. The Test Claim Permit Amendment

Both the federal and state law and regulations have long required drinking water systems to monitor a sample of 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.¹⁵²

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 to provide access to free, fresh, and clean drinking water during meal times in the food service areas of the schools under its jurisdiction.¹⁵³ SB 334 was vetoed by the Governor, whose veto message expressed concern that the bill would create a very expensive reimbursable state mandate.¹⁵⁴ The veto message instead directed the SWRCB to examine the scope of the potential problem by incorporating water quality testing in schools as part of the state's LCR.¹⁵⁵

Accordingly, SWRCB adopted the Permit Amendment (the test claim order) at issue here, as well as over 1,100 nearly identical (but for the individual PWS information) permit amendments for other drinking water systems serving K-12 schools. Specifically, 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, the drinking water system shall:

- Respond in writing within 60 days and schedule a meeting;

¹⁵⁰ Exhibit X, *Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*, California Water Boards, March 30, 2018, page 2.

¹⁵¹ Exhibit X, *Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*, California Water Boards, March 30, 2018, page 2.

¹⁵² Exhibit C, SWRCB's Comments on the Test Claim, 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."]

¹⁵³ Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 148 [SB 334, Legislative Counsel's Digest].

¹⁵⁴ Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 145 [Governor's Veto Message].

¹⁵⁵ Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 145 [Governor's Veto Message].

- Finalize a sampling plan and complete initial sampling within 90 days, or develop an alternative time schedule if necessary;
- Collect one to five samples from drinking fountains, cafeteria/food preparation areas, or reusable bottle filling stations;
- Collect samples on a Tuesday, Wednesday, Thursday, or Friday on a day when school is in session;
- Submit samples to an ELAP certified laboratory;
- Within two business days of a result that shows an exceedance of 15 parts per billion (ppb), notify the school of the sample result;
- If an initial sample shows an exceedance of 15 ppb:
 - Collect an additional sample within 10 business days, unless the sample site is removed from service by the school;
 - Collect a third sample within 10 business days if the resample is less than or equal to 15 ppb;
 - Collect at least one more sample at a site where the school has completed some corrective action;
- Ensure the water system receives the results of repeat samples no more than 10 business days after the date of collection;
- Do not release lead sampling data to the public for 60 days, unless in compliance with a Public Records Act request;
- Discuss the results with the school prior to releasing the results to the public.¹⁵⁶

Finally, the order 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.¹⁵⁷

III. Positions of the Parties

A. City of San Diego

The claimant alleges that the test claim order required the claimant to perform lead testing, at no charge, on the property of all schools that receive water from the claimant's public water system, upon request.¹⁵⁸

¹⁵⁶ Exhibit A, Test Claim, pages 105-107 [Permit Amendment No. 2017-PASCHOOLS, pp. 2-4].

¹⁵⁷ Exhibit A, Test Claim, pages 108 [Permit Amendment No. 2017-PASCHOOLS, p. 5].

¹⁵⁸ Exhibit A, Test Claim, page 14.

Specifically, the claimant alleges initial costs to develop a plan and begin responding to testing requests from schools;¹⁵⁹ as well as costs to compile a list of schools within the claimant's service area;¹⁶⁰ and costs and activities surrounding the actual response to testing requests.¹⁶¹ Claimant further alleges for each sampling request received, it was required to:

- (a) Prepare and send a response to the request;
- (b) Submit a copy of the request to the state;
- (c) Communicate with the school to schedule training meetings;
- (d) Communicate school request status with the water system's management;
- (e) Create and maintain a tracking spreadsheet; and
- (f) Create sampling plans for each school (the claimant alleges 25 plans per week were required to be completed in order to meet the deadline in the order).¹⁶²

The claimant also states that for each sampling request, and to complete each sampling plan, the claimant was required to collect one to five samples at each school from "regularly used drinking fountains, cafeteria/food preparation areas, or reusable bottle water filling stations selected according to the lead sampling plan..."¹⁶³ The claimant asserts that this sampling could only be done before the start of the school day, because the order required sampling after water had been sitting in plumbing and fixtures for at least six hours; and, the claimant asserts that sampling was only permitted to be conducted Tuesday through Friday, or on Saturdays in specific cases with approval from SWRCB.¹⁶⁴ The claimant states that 1,115 samples were taken and analyzed by the claimant in fiscal year 2017, excluding quality control samples.¹⁶⁵ The claimant further states that it developed a reporting template for tracking samples and the schools and fixtures from which they originated; and, based on the requirements of the order, the claimant consulted with schools after testing, aiding in the interpretation of results.¹⁶⁶ For school fixtures with lead sampling results over 15 ppb, schools had the option to resample, remediate, or remove the fixture. In cases where the school chose remediation, follow-up samples were taken and new reports provided to the school.¹⁶⁷

¹⁵⁹ Exhibit A, Test Claim, page 21.

¹⁶⁰ Exhibit A, Test Claim, pages 22-23.

¹⁶¹ Exhibit A, Test Claim, pages 26-27.

¹⁶² Exhibit A, Test Claim, pages 28-30.

¹⁶³ Exhibit A, Test Claim, page 30.

¹⁶⁴ Exhibit A, Test Claim, pages 31-32.

¹⁶⁵ Exhibit A, Test Claim, page 32.

¹⁶⁶ Exhibit A, Test Claim, page 32.

¹⁶⁷ Exhibit A, Test Claim, pages 32-33.

The claimant states that it used its own laboratory, which contains a mass spectrometer, to analyze the samples. The samples were analyzed independently, and not combined with other regulatory or special project samples, but a trained chemist.¹⁶⁸ The results of the sampling were required to be uploaded to DDW's database, which, the claimant asserts, required the claimant to develop a method to convert and upload the information all at once, rather than generate and upload 1,115 separate reports.¹⁶⁹

The claimant further states that it was required to provide the results to the school representative, and in the case of an exceedance of 15 ppb, notify the school within two business days.¹⁷⁰ Also in the case of an exceedance, claimant states that it was required to collect and additional sample within 10 days, and a third sample within 10 days if the resample is less than or equal to 15 ppb.¹⁷¹ An additional sample is also required after remediation.¹⁷²

Though the order prohibits releasing the sampling results to the public for 60 days unless the water system releases the data in compliance with the Public Records Act, the claimant asserts that the Environmental Committee of the City Council also requested updates on the progress of lead testing on May 25, 2017 and June 20, 2017, for which the claimant prepared a presentation.¹⁷³ And, the order required the claimant to discuss lead sampling results with the school prior to release to the public, and to discuss results within 10 business days of receiving laboratory results.¹⁷⁴

Finally, the claimant states that the order required the claimant to keep records of all requests from schools for lead sampling, and provide those records to DDW, upon request.¹⁷⁵

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.¹⁷⁶

The claimant's rebuttal comments also assert that the test claim order imposes a new program or higher level of service. The claimant argues that the lead sampling requirements are a statewide policy or program;¹⁷⁷ which "furthers two governmental functions of providing services to the

¹⁶⁸ Exhibit A, Test Claim, pages 36-37.

¹⁶⁹ Exhibit A, Test Claim, page 38.

¹⁷⁰ Exhibit A, Test Claim, pages 39-41.

¹⁷¹ Exhibit A, Test Claim, page 42.

¹⁷² Exhibit A, Test Claim, page 43.

¹⁷³ Exhibit A, Test Claim, pages 44-45.

¹⁷⁴ Exhibit A, Test Claim, page 46.

¹⁷⁵ Exhibit A, Test Claim, page 49.

¹⁷⁶ Exhibit A, Test Claim, pages 16-17; 52-53.

¹⁷⁷ Exhibit E, Claimant's Rebuttal Comments, page 2.

public,” namely providing water service, and ensuring a safe environment for school children;¹⁷⁸ and that the Permit Amendment “applies uniquely to the City as a local water agency.”¹⁷⁹ The claimant also notes that the case law, beginning with *County of Los Angeles*, articulates and applies two alternative tests.¹⁸⁰ The California Supreme Court decision in *County of Los Angeles* states that:

The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public.¹⁸¹

The claimant argues: “This is precisely what the Permit Amendment is doing: creating a new lead testing program for schools and transferring the cost and administration of the program to the City.”¹⁸² The claimant states that it has “approximately 281,000 retail water connections,” and the city council approves rates and charges for water service.¹⁸³ The claimant also argues that the City’s charter “imposes a legal obligation and responsibility on the City to provide water service.”¹⁸⁴ Accordingly, the claimant argues that providing water service is a function of the City’s government. In addition, the claimant argues that the provision of water service is a governmental function “because it is predominantly provided by public agencies,” and in particular, “[l]ead testing of drinking water at schools is a service to the public.”¹⁸⁵ The claimant reasons, therefore that the test claim order is a new program eligible for reimbursement under *County of Los Angeles*.¹⁸⁶

Alternatively, the claimant argues that the test claim order constitutes a local program subject to mandate reimbursement because the lead sampling requirements carry out a governmental

¹⁷⁸ Exhibit E, Claimant’s Rebuttal Comments, page 3.

¹⁷⁹ Exhibit E, Claimant’s Rebuttal Comments, page 3.

¹⁸⁰ Exhibit E, Claimant’s Rebuttal Comments, page 3 [Citing *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537 (“In [*County of Los Angeles v.*] *State of California*, the Court concluded that the term ‘program’ has two alternative meanings...”).]. See also, *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 876 [Citing and discussing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51 (“We again applied the alternative tests set forth in *County of Los Angeles*...”).].

¹⁸¹ Exhibit E, Claimant’s Rebuttal Comments, page 6 [quoting *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56].

¹⁸² Exhibit E, Claimant’s Rebuttal Comments, page 6.

¹⁸³ Exhibit E, Claimant’s Rebuttal Comments, page 4.

¹⁸⁴ Exhibit E, Claimant’s Rebuttal Comments, page 4.

¹⁸⁵ Exhibit E, Claimant’s Rebuttal Comments, page 6.

¹⁸⁶ Exhibit E, Claimant’s Rebuttal Comments, page 6.

function related to the safety of schools: “Schools are obligated to provide free drinking water to students, or to adopt a resolution explaining why fiscal constraints or health and safety concerns prevent it.”¹⁸⁷ The claimant argues that the “history of the Permit Amendment demonstrates its purpose is to provide safe schools, a governmental function, while shifting financial responsibility to local water agencies.”¹⁸⁸ The claimant references failed SB 334, vetoed in October 2015: “Instead of signing the bill, the Governor directed SWRCB to implement lead testing at schools through local water agencies as part of the Lead and Copper Rule.”¹⁸⁹ The claimant argues that the reason SB 334 was vetoed was to avoid a reimbursable state mandate, but “[l]ead testing at schools does not lose its characterization as a ‘governmental function of providing services to the public’ under the Supreme Court’s test, merely because the obligation is transferred from schools to water agencies.”¹⁹⁰

The claimant also argues that the test claim order imposes a unique requirement on the claimant that does not apply generally to all residents and entities in the State:

The Permit Amendment applies specifically to the City. It does not apply generally to all residents and entities in the State. Even collectively considering all 1,100 permit amendments issued by SWRCB, they only apply to local water agencies with schools in their service areas, not to everyone in the State. The Permit Amendment does not require lead testing be performed for all state residents and entities either, only for schools. Collectively, the permit amendments apply uniquely to water agencies in the same way the Court found the requirement for fire protective gear applied uniquely to public and private fire protection agencies. The permit amendments do not need to exclusively apply to publicly-owned water agencies to satisfy the uniqueness element of the second test.

Under the second test, examples of laws that apply generally to all residents and entities in the state include requirements to provide employees with unemployment insurance coverage, worker’s compensation benefits, or to upgrade public buildings to comply with statewide elevator safety regulations. Subvention was denied in these cases because the requirements applied to everyone, not just to local government. Unlike these examples, though, the Permit Amendment only applies to the City. Those in the State who do not provide water service do not have to comply with the Permit Amendment.¹⁹¹

¹⁸⁷ Exhibit E, Claimant’s Rebuttal Comments, page 6 [citing Educ. Code § 38086].

¹⁸⁸ Exhibit E, Claimant’s Rebuttal Comments, page 7.

¹⁸⁹ Exhibit E, Claimant’s Rebuttal Comments, page 7.

¹⁹⁰ Exhibit E, Claimant’s Rebuttal Comments, page 7.

¹⁹¹ Exhibit E, Claimant’s Rebuttal Comments, page 8.

The claimant therefore concludes that the test claim order implements a state policy, and imposes unique requirements on the claimant that do not apply generally to all persons and entities in the state.¹⁹²

The claimant also disputes the arguments of the SWRCB and the Department of Finance. First, the claimant argues that the SWRCB's reliance on the concept of a service "peculiar" to government is not supported in the case law:

SWRCB argues that the City is ineligible for reimbursement because water service is not a function "peculiar" to government, and therefore not a governmental function. But the first test established by the California Supreme Court does not require that the function be "peculiar" to government, only that the program "carry out the governmental function of providing services to the public." The word "peculiar" is not in the test. The Supreme Court used the term "peculiar" only to distinguish programs that are forced on local government from laws that apply generally to all state residents and entities. The opinion of *Carmel Valley Fire Protection District v. State of California* cited by SWRCB, certainly found that "fire protection is a peculiarly governmental function" in satisfying the first test, despite the fact that private sector fire fighters provide the same service. The opinion does not say, however, that the first test can only be satisfied if the governmental function is peculiar to government, as SWRCB suggests.

The first test only requires that the governmental function be that "of providing services to the public." SWRCB does not cite a published opinion where the government was providing a public service, but subvention was denied because the government function was not peculiar to government. Instead, instances where the first test was not satisfied involved situations where the new requirements did not increase the level of service provided to the public, such as requirements to provide employees with unemployment insurance coverage, worker's compensation benefits, or to upgrade public buildings to comply with statewide elevator safety regulations. These requirements only increased the government's incidental cost of providing existing public services rather than requiring new services or programs.¹⁹³

The claimant also argues that SWRCB's reliance on "a 100-year-old line of cases on sovereign immunity" is inapplicable, and irrelevant. The claimant argues that more recently "Courts have determined '[t]he labels "governmental function" and "proprietary function" are of dubious value in terms of legal analysis in any context.'"¹⁹⁴ The claimant argues that Proposition 218 weakens the analogy to corporate or proprietary activities: "Water service provided by public

¹⁹² Exhibit E, Claimant's Rebuttal Comments, page 8.

¹⁹³ Exhibit E, Claimant's Rebuttal Comments, page 4.

¹⁹⁴ Exhibit E, Claimant's Rebuttal Comments, page 5 [citing *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands*, (1977) 75 Cal. App.3d 957, 968.].

agencies no longer carries the indicia of a proprietary function or private enterprise due to Proposition 218 (discussed below), which eliminates profit from water service charges.”¹⁹⁵

And, the claimant argues that “SWRCB’s reliance on the Service Duplication Law is confusing.”¹⁹⁶ The claimant asserts that the Service Duplication Law, which was adopted in 1965, “recognizes that water service was transitioning from a private to a predominantly governmental function by providing compensation to private utilities for lost business.”¹⁹⁷ The claimant maintains that “[n]ow, over 50 years later, that transition is substantially complete.”¹⁹⁸

Further, the claimant disputes the characterization by SWRCB and Finance that water service is largely a private enterprise. The claimant notes that even though SWRCB provides evidence that approximately 75 percent of drinking water systems are private entities, “the same tables show that 81% of the population served by drinking water systems statewide, or 33.8 million of 41.6 million people, receive their water service from public entities.”¹⁹⁹ The claimant argues that “[s]uch a large percentage of the State population receiving water service from public entities is strong evidence that water service is a governmental function, more persuasive than the fact that small, privately owned water systems outnumber large, publicly owned systems.”²⁰⁰

The claimant also asserts that it has incurred increased costs mandated by the state, and that the exceptions in Government Code section 17556 do not apply. The claimant alleges its total costs for fiscal year 2016-2017 to be \$351,577.26, and for fiscal year 2017-2018, \$47,815.67.²⁰¹ The order expressly provides that the claimant must conduct the lead sampling at no charge to the schools in its service area. The claimant concludes on this basis, and pursuant to article XIII C of the California Constitution, which prohibits a fee or charge that exceeds the proportional cost of service attributable to a parcel, that the claimant is unable to recoup the costs of the alleged mandate through fees for water service, because it cannot impose or increase fees on the schools

¹⁹⁵ Exhibit E, Claimant’s Rebuttal Comments, page 5 [Proposition 218 added articles XIII C and XIII D to the California Constitution, which generally require assessments, as well as fees or charges for property-related services, to be proportional to the benefit received by the payor, and to be limited to the amount necessary to provide the service or special benefit. As a general rule, any revenues received in excess of the proportional benefit or burden are deemed to be taxes, and thus are illegally collected absent a two-thirds voter approval.].

¹⁹⁶ Exhibit E, Claimant’s Rebuttal Comments, page 5.

¹⁹⁷ Exhibit E, Claimant’s Rebuttal Comments, page 5.

¹⁹⁸ Exhibit E, Claimant’s Rebuttal Comments, page 5.

¹⁹⁹ Exhibit E, Claimant’s Rebuttal Comments, page 5 [citing Exhibit C, SWRCB Comments, Attachment 101, pp. 406-409].

²⁰⁰ Exhibit E, Claimant’s Rebuttal Comments, page 5.

²⁰¹ Exhibit A, Test Claim, page 58.

in which it conducts lead testing, and it is legally proscribed from imposing or increasing fees on other water users.²⁰²

The claimant states in its rebuttal comments that the test claim order results in increased costs mandated by the state: “By mandating that the City perform lead testing for free, the Permit Amendment has ensnared the City in [a] constitutional web of fees and charges, where the only ways out are to spend local tax revenue or to seek reimbursement through this Commission.”²⁰³ The claimant argues that because the express language of the test claim order prohibits charging schools for the costs of sampling, “the cost of the new service is being absorbed by all City ratepayers.”²⁰⁴ The “constitutional web” the claimant is referring to is the substantive limitations on new fees or charges imposed by Proposition 218; article XIII D imposes a proportionality requirement, a prohibition on excessive fees, and a prohibition on new fees or charges for any service “unless that service is actually used by, or immediately available to, the owner of the property in question.”²⁰⁵ And although the “SWRCB believes that the Permit Amendment confers a direct benefit on all water ratepayers, not just the schools, in the form of increased property values and ensuring the City’s water does not contain lead,”²⁰⁶ the claimant argues that the benefits are not sufficiently direct:

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

²⁰² Exhibit A, Test Claim, page 54.

²⁰³ Exhibit E, Claimant’s Rebuttal Comments, page 9.

²⁰⁴ Exhibit E, Claimant’s Rebuttal Comments, page 9.

²⁰⁵ Exhibit E, Claimant’s Rebuttal Comments, page 10 [citing Cal. Const. art. XIII D, § 6].

²⁰⁶ Exhibit E, Claimant’s Rebuttal Comments, page 10.

Second, even assuming there is a plausible connection between lead testing at schools and higher property values in the surrounding neighborhoods, higher property values do not benefit all water ratepayers. Water ratepayers are both homeowners and renters. While a homeowner may benefit from a higher resale value of a home, a tenant will not. Higher property values cannot justify charging all water ratepayers for a service they are not receiving.²⁰⁷

Moreover, the claimant argues that any fees that might be imposed for lead testing are not imposed as an incident of property ownership, on an ongoing basis.²⁰⁸ Accordingly, the claimant argues that Proposition 26 controls:

Proposition 26 further tightened the restrictions on local government revenue imposed by Propositions 13 and 218 by defining a tax as “any levy, charge, or exaction of any kind imposed by a local government, except the following:”

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

A fee or charge is a tax that must be approved by the voters unless the fee or charge meets one of these seven exceptions. [Citing to Cal. Const., art. XIII C, § 2.] The last of the seven exceptions is for property-related fees and charges under Proposition 218, but because lead testing performed under the Permit Amendment is not provided as an incident of property ownership (discussed above), the City

²⁰⁷ Exhibit E, Claimant’s Rebuttal Comments, page 11.

²⁰⁸ Exhibit E, Claimant’s Rebuttal Comments, page 12.

cannot avail itself of that exception to raise water rates without voter approval. The third through sixth exceptions are inapplicable to a fee for lead testing because the City is not acting as a regulator in performing the service, the City is not charging the schools to enter City property, the City is not fining the schools for violating the law, and the City is not imposing a development fee, respectively. The first exception for “a specific benefit conferred or privilege granted directly to the payor” does not apply either, because the City is not issuing a school a permit or a license to engage in any activity.

This leaves only the second exception, which would ordinarily give the City sufficient fee authority in situations like this: “[a] charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.” [Citing to Cal. Const., art. XIII C, § 1(e)(2).] The City is providing lead testing services on school property at the request of each school, for which the City could ordinarily charge each school an amount equivalent to the cost of providing the service. The problem is the Permit Amendment prohibits the City from charging the schools, even though the schools are receiving the government service. The school is not the “payor,” so the second exception does not apply. Therefore, by default, the City’s water ratepayers become the “payor” even though they are not requesting or receiving the service. Without any applicable exceptions, charging water ratepayers for lead testing provided to schools for free is a tax subject to voter approval under Proposition 26.²⁰⁹

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

B. Department of Finance

Finance argues that “[w]hile water service is a local governmental function in some jurisdictions, it is not a function unique to local governments.”²¹⁰ Finance bases this conclusion on SWRCB’s statement that 450 of the 1,100 “public water systems” affected by permit amendments identical to the test claim order are privately owned and operated.²¹¹

Finance also argues that “claimants do have fee authority undiminished by Propositions 218 or 26.”²¹² Finance states that “Proposition 26 specifically excludes assessments and property-related fees imposed in accordance with Proposition 218 from the definition of taxes.”²¹³ Finance maintains that the alleged mandate “involves the provision of water services and the fee

²⁰⁹ Exhibit E, Claimant’s Rebuttal Comments, pages 12-13.

²¹⁰ Exhibit D, Finance’s Comments on the Test Claim, page 2.

²¹¹ Exhibit D, Finance’s Comments on the Test Claim, page 2.

²¹² Exhibit D, Finance’s Comments on the Test Claim, page 2.

²¹³ Exhibit D, Finance’s Comments on the Test Claim, page 2.

authority is subject at most to the majority protest provision under article XIII D, section 6(a).”²¹⁴ Finance further asserts that “as the State Board makes clear in its comments on this test claim, lead testing in K-12 schools provides a direct benefit to all water systems and each ratepayer, and the City may therefore set water rates sufficient to pay for the costs of compliance with the permit amendment.”²¹⁵

C. State Water Resources Control Board

SWRCB asserts that the test claim order is not subject to state mandate reimbursement because the order does not constitute a “new program or higher level of service” since it does not provide a peculiarly governmental service and is not unique to government. Additionally, and in the alternative, the claimant has fee authority sufficient to cover the costs of any required activities despite Proposition 218.

Specifically, SWRCB argues that the claimant’s operation of a PWS subject to the order “is not a function of service peculiar to government because public water systems are operated by both private and governmental entities.”²¹⁶ And, SWRCB argues that the order “imposes no unique requirements on the City because the State Water Board imposed the exact same lead testing in school requirements on over 1,100 publicly and privately owned water systems.”²¹⁷

SWRCB acknowledges that the Safe Drinking Water Act, which SWRCB is responsible for implementing, makes it the policy of the state to reduce to the lowest level feasible all concentrations of toxic chemicals that may cause cancer, birth defects, or other chronic illness. And, SWRCB recognizes that it is the policy of the state to establish standards at least as stringent as the federal Safe Drinking Water Act, and to protect public health and “establish a drinking water regulatory program that provides for the orderly and efficient delivery of safe drinking water throughout the state.”²¹⁸

However, in doing so, SWRCB argues that this order, one of 1,100 simultaneously adopted permit amendments, does not impose a state-mandated new program or higher level of service because the requirements of sampling for lead in K-12 schools apply to a variety of public and private entities, the only common characteristic of which is that the subject water systems are all PWSs that serve at least one K-12 school. SWRCB argues that the alleged mandate “relates to the City’s provision of drinking water as a public water system.”²¹⁹ SWRCB argues that the

²¹⁴ Exhibit D, Finance’s Comments on the Test Claim, page 2.

²¹⁵ Exhibit D, Finance’s Comments on the Test Claim, page 2.

²¹⁶ Exhibit C, SWRCB’s Comments on the Test Claim, page 8.

²¹⁷ Exhibit C, SWRCB’s Comments on the Test Claim, pages 8-9.

²¹⁸ Exhibit C, SWRCB’s Comments on the Test Claim, page 4.

²¹⁹ Exhibit C, SWRCB’s Comments on the Test Claim, page 10.

provision of drinking water, in this context, is not a service that is “peculiar to government,” in the sense discussed in *County of Los Angeles v. State of California*.²²⁰

The term “public water system,” SWRCB explains, does not mean only those drinking water systems that are publicly owned; instead, “[a] public water system is defined as a system that provides water for human consumption to at least 15 or more connections or that regularly serves 25 or more people daily.”²²¹ And, SWRCB notes, “[o]f the 6,970 water systems currently operating in California, 5,314 are private entities and 1,656 are public entities.”²²² More importantly, SWRCB argues that the courts have found that reimbursement is only required for “programs” that are essential and basic to government, “peculiar” to government, or “traditional” governmental services.²²³ SWRCB argues that the provision of water, though sometimes a service provided by a governmental entity is not a traditional or essential service of government.

SWRCB argues that the rules developed by the courts are also consistent with a line of cases involving tort claims against local governments, prior to the adoption of the Government Claims Act. A threshold issue in each of those tort claims was whether sovereign immunity barred an action against the local government, and the courts distinguished cases in which sovereign immunity was available or not by characterizing the activity giving rise to the action as either “governmental” or “public,” or more in the nature of “corporate” or “private.”²²⁴ SWRCB asserts that municipal activities providing utilities or other “facilities of urban life,” are generally considered more in the nature of “corporate” services, rather than “government” services.²²⁵ SWRCB concludes “[a]lthough for the purposes of sovereign immunity, the distinction between the corporate and governmental functions of government is no longer relevant, this line of cases remains appropriate and persuasive authority for defining what constitutes a service peculiar to government.”²²⁶

SWRCB also argues that this interpretation “is underscored by the Service Duplication Law, which requires a local government to compensate a private water supplier when the local

²²⁰ Exhibit C, SWRCB’s Comments on the Test Claim, pages 9-10 [citing *County of Los Angeles v. State* (1987) 43 Cal.3d 46].

²²¹ Exhibit C, SWRCB’s Comments on the Test Claim, page 3 [citing Health and Safety Code § 116275(h)].

²²² Exhibit C, SWRCB’s Comments on the Test Claim, page 2 [citing May 2018 Water System Report, Attachment 101 (Exhibit C, p. 455)].

²²³ Exhibit C, SWRCB’s Comments on the Test Claim, pages 10-11.

²²⁴ Exhibit C, SWRCB’s Comments on the Test Claim, page 12 [citing *Chafor v. City of Long Beach* (1917) 174 Cal. 478; *Plaza v. City of San Mateo* (1954) 123 Cal.App.2d 103; *City of Concord v. Tony Freitas* (1956) 144 Cal.App.2d 822].

²²⁵ Exhibit C, SWRCB’s Comments on the Test Claim, page 12 [citing *In re Bonds of Orosi Public Utility District v. McHuiag* (1925) 196 Cal. 43].

²²⁶ Exhibit C, SWRCB’s Comments on the Test Claim, page 12 [citing *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, 219-220].

government extends service into the service area of the private supplier.²²⁷ SWRCB states that “[t]his statutory requirement for compensation...amounts to a legislative determination that water service is not a service that is or should be peculiar to local governments.”²²⁸

SWRCB concludes on this issue that “simply put, the provision of drinking water is not a function or service which is peculiar to local government.”²²⁹ SWRCB states that “statewide, the overwhelming majority (over 75 percent) of drinking water systems are privately owned.”²³⁰ SWRCB asserts that no state or federal law requires a city or county to operate a drinking water system, and “[i]ndeed, many cities and counties do not provide potable water to their residents and, instead, rely on private companies to provide drinking water to city and county residents.”²³¹ SWRCB argues that unlike the services at issue in *Carmel Valley* and *City of Sacramento*, “operating a public water system is not an ‘essential,’ ‘basic,’ ‘classical’ or ‘traditional’ governmental function.”²³²

With respect to the alternative test, requirements “uniquely” imposed on local government, and not applicable generally to all residents or entities, SWRCB argues that the order must be considered in the context of the SWRCB’s other permit amendments adopted simultaneously: “[w]hen viewed within this larger programmatic context, the Permit Amendment imposes no unique requirements on the City and is not a new program subject to subvention...”²³³ SWRCB explains:

[T]he City was one of more than 1,100 public water systems that received permit amendments substantially identical to the City’s Permit Amendment. The State Water Board issued these permit amendments within a few days of each other. Collectively, these permit amendments, including the Permit Amendment at issue in this Test Claim, effectuate the statewide lead testing of drinking water in schools program. Of the over 1,100 public water systems that received the permit amendments, approximately 450 water systems are privately owned. Accordingly, the Permit Amendment, as part of the State Water Board’s lead testing in schools program, imposed no unique requirements on the City that were not imposed on the privately owned water systems.²³⁴

²²⁷ Exhibit C, SWRCB’s Comments on the Test Claim, page 13 [citing Public Utilities Code § 1501 et seq.].

²²⁸ Exhibit C, SWRCB’s Comments on the Test Claim, page 13.

²²⁹ Exhibit C, SWRCB’s Comments on the Test Claim, page 13.

²³⁰ Exhibit C, SWRCB’s Comments on the Test Claim, page 13.

²³¹ Exhibit C, SWRCB’s Comments on the Test Claim, page 13.

²³² Exhibit C, SWRCB’s Comments on the Test Claim, page 13.

²³³ Exhibit C, SWRCB’s Comments on the Test Claim, page 13.

²³⁴ Exhibit C, SWRCB’s Comments on the Test Claim, page 14.

SWRCB also notes that “[v]iewing each individual drinking water permit in a vacuum, and not relative to other similarly situated water systems, could result in a determination that each requirement was unique to that particular water system because the drinking water permit only applies to that entity.”²³⁵ SWRCB concludes that “[t]his cannot be the result the voters intended...”²³⁶

Finally, SWRCB argues that Proposition 218 does not prevent the claimant from imposing or increasing water rates to recoup the costs of the alleged mandate. SWRCB argues that the claimant interprets its authority post-Proposition 218 too narrowly. Broadly, Proposition 218 requires new or increased fees to be proportional to the benefit received or the burden imposed on the local government related to the governmental service at issue. However, SWRCB argues that the lead testing required under the Order confers a direct benefit on all water system users as a whole.²³⁷ Additionally, SWRCB states that “[b]y requiring additional lead testing in schools, the Permit Amendment functionally extends the Lead and Copper rule by providing additional testing points which can inform the City about how the water chemistry in its distribution network may be impacting not only particular schools, but residences who obtain water from a common source or through a common delivery system.”²³⁸ SWRCB thus argues that “just as the testing of private residences under the Lead and Copper rule benefits the water system as a whole...the lead testing in K-12 schools provides a similar direct benefit to each ratepayer by providing additional testing inputs the City can use to optimize its water chemistry and quality...”²³⁹

In addition, SWRCB argues that lead testing in schools will help to maintain and possibly improve property values; and that school facilities are often used for community meetings and generally provide a benefit to the entire community.²⁴⁰

Based on these arguments SWRCB concludes that the activities alleged in the test claim order are not reimbursable.

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...

²³⁵ Exhibit C, SWRCB’s Comments on the Test Claim, page 14.

²³⁶ Exhibit C, SWRCB’s Comments on the Test Claim, page 14.

²³⁷ Exhibit C, SWRCB’s Comments on the Test Claim, page 15.

²³⁸ Exhibit C, SWRCB’s Comments on the Test Claim, page 16.

²³⁹ Exhibit C, SWRCB’s Comments on the Test Claim, page 16.

²⁴⁰ Exhibit C, SWRCB’s Comments on the Test Claim, page 16.

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.”²⁴¹ Thus, the subvention requirement of section 6 is “directed to state-mandated increases in the services provided by [local government] ...”²⁴²

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

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.²⁴³
2. The mandated activity either:
 - a. Carries out the governmental function of providing a service to the public; or
 - b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.²⁴⁴
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order.²⁴⁵
4. The mandated activity results in the local agency or school district incurring increased costs mandated by the state within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.²⁴⁶

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.²⁴⁷ The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.²⁴⁸ In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an

²⁴¹ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

²⁴² *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

²⁴³ *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

²⁴⁴ *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).

²⁴⁵ *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal3d 830, 835.

²⁴⁶ *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.

²⁴⁷ *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

²⁴⁸ *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

“equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”²⁴⁹

A. This Test Claim Is Timely Filed Pursuant to Government Code Section 17551.

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.”²⁵⁰

The effective date of the order is January 18, 2017.²⁵¹ The claimant filed the Test Claim on January 11, 2018, less than 12 months after the effective date of the order.²⁵² Therefore, the Test Claim is timely filed.

B. The Test Claim Order Does Not Impose a State-Mandated New Program or Higher Level of Service.

This Test Claim alleges new state-mandated activities and costs arising from an amendment to the claimant’s public water system permit adopted by SWRCB, Order No. 2017PA-SCHOOLS for the City of San Diego PWS No. 370020, which 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. A PWS may be a private company or a governmental entity and is 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.²⁵³ Under the order, upon request, the PWS must take samples to perform lead sampling, at one to five fixtures (e.g., drinking fountains or food preparation areas) on the school’s property, process those results at a certified laboratory, maintain records of the requests and the results, and provide the results, and if necessary, information to the school regarding possible remediation or other solutions if lead is detected in the fixtures above 15 parts per billion (ppb).

The activities required by the order are new, as compared against prior state and federal law. However, the activities alleged do not constitute a state-mandated new program or higher level of service subject to reimbursement under article XIII B, section 6 of the California Constitution.

²⁴⁹ *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].

²⁵⁰ Government Code section 17551(c).

²⁵¹ Exhibit A, Test Claim, page 104 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 1].

²⁵² Exhibit A, Test Claim, page 1.

²⁵³ 42 United States Code, section 300f(4).

1. The test claim order imposes new requirements on operators of public water systems.

As noted, the test claim order requires the claimant, upon request of a school in its service area, to test for the presence of lead in drinking water fixtures on school property at no charge to the school.

Specifically, the plain language of the order requires the claimant, as a PWS, to:

- Submit to SWRCB’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];²⁵⁴
- If a school representative requests lead sampling assistance in writing:
 - Respond in writing within 60 days and schedule a meeting with school officials to develop a sampling plan;²⁵⁵
 - Finalize a sampling plan and complete initial sampling within 90 days [or an alternative time schedule approved by DDW];²⁵⁶
 - 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;²⁵⁷
 - 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;²⁵⁸
 - Ensure samples are collected by an adequately trained water system representative;²⁵⁹

²⁵⁴ Exhibit A, Test Claim, page 105 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 2].

²⁵⁵ Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

²⁵⁶ Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

²⁵⁷ Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

²⁵⁸ Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

²⁵⁹ Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

- Submit the samples to an ELAP certified laboratory for analysis;²⁶⁰
- Require the laboratory to submit the data electronically to DDW;²⁶¹
- Provide a copy of the results to the school representative;²⁶²
- Within two business days of a result that shows an exceedance of 15 ppb, notify the school of the sample result;²⁶³
- If an initial sample shows an exceedance of 15 ppb:
 - Collect an additional sample within 10 days if the sample site remains in service;²⁶⁴
 - Collect a third sample within 10 business days after notification that a resample result is less than or equal to 15 ppb;²⁶⁵
 - 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;²⁶⁶
- Ensure that the water system receives the results of repeat lead samples from the laboratory in no more than 10 business days;²⁶⁷

²⁶⁰ Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

²⁶¹ Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

²⁶² Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

²⁶³ Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

²⁶⁴ Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

²⁶⁵ Exhibit A, Test Claim, page 106 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 3].

²⁶⁶ Exhibit A, Test Claim, page 107 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 4].

²⁶⁷ Exhibit A, Test Claim, page 107 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 4].

- 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;²⁶⁸
- 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;²⁶⁹
- 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;²⁷⁰
 - The water system is not responsible for the costs of any corrective action or maintenance;²⁷¹
- Keep records of all requests for lead related assistance and provide the records to DDW, upon request;²⁷²
- Include in the annual Consumer Confidence Report a statement summarizing the number of schools requesting lead sampling.²⁷³

Both the claimant and SWRCB agree that these requirements are new, as compared against prior law.²⁷⁴

The Commission finds that the requirements imposed by the test claim order are new. Prior law, under the federal Safe Drinking Water Act, the California SDWA, and the federal and state Lead and Copper Rule, all address, in some manner, the existence of lead in drinking water. But none

²⁶⁸ Exhibit A, Test Claim, page 107 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 4].

²⁶⁹ Exhibit A, Test Claim, page 107 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 4].

²⁷⁰ Exhibit A, Test Claim, page 108 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 5].

²⁷¹ Exhibit A, Test Claim, page 108 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 5].

²⁷² Exhibit A, Test Claim, page 108 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 5].

²⁷³ Exhibit A, Test Claim, page 108 [Permit Amendment No. 2017PA-SCHOOLS, Issued to the City of San Diego, Public Water System No. 3710020, p. 5].

²⁷⁴ See Exhibit A, Test Claim, 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 C, SWRCB’s Comments on the Test Claim, 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.]

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, but the requirements of this order, for PWSs that supply water to K-12 schools to sample one to five drinking water fixtures on school property, upon request of the school, are new.

2. The requirements imposed by the test claim order are not mandated by the state, but are triggered by a local decision to provide water services and operate as a public water system.

The requirements of the test claim order are imposed on the claimant as a PWS. The requirements, however, are not mandated by the state. They are, instead, triggered by a local discretionary decision to provide water service and operate as a PWS.

Article XI, section 9(a) of the California Constitution provides that a “municipal corporation” may be established to operate public works to furnish light, water, power, heat, transportation, or means of communication.²⁷⁵ Prior to the amendment to prior article XI, section 19 in 1911 (since renumbered as article XI, section 9) to include this language, there was doubt whether a municipal corporation (which includes a city) even had authority to acquire and operate public utilities including specifically water and electricity services which were customarily provided by private entities. In *National City v. Fritz* the court stated: “The term ‘public utilities,’ with reference to the power of a municipal corporation to acquire and operate them, customarily embraces an enterprise which was usually engaged in by private corporations or individuals such as supplying water and electricity to the inhabitants. In this state it never has been the custom to have sewers operated privately. There was some doubt whether municipal corporations could acquire and operate such enterprises (public utilities) until the amendment to the Constitution (Cal.Const. Art. XI, sec. 19) in 1911 authorizing such corporations to supply their inhabitants with light, water, power, heat, transportation and means of communication...”²⁷⁶

And private companies still do provide these services as is recognized by article XI, section 9(b), which provides that private persons or corporations may also establish and operate public works for those same purposes “upon conditions and under regulations that the city may prescribe under its organic law.”²⁷⁷

The courts have interpreted article XI, section 9 (previously section 19) as granting authority, rather than imposing a duty:

By virtue of the amendment of 1911, general law cities and quasi-municipal corporations were given the right to engage in the service of water to the inhabitants of their territories. (*Morrison v. Smith Bros., Inc.* [1930] 211 Cal. 36.) However, service of water by a city is a proprietary function. (*In re Orosi Public Utility Dist.* [1925] 196 Cal. 43, 57-58; *City of Pasadena v. Railroad Com.* [1920] 183 Cal. 526, 529; *Marin Water etc. Co. v. Town of Sausalito* [1916] 168 Cal.

²⁷⁵ California Constitution, article XI, section 9(a).

²⁷⁶ *National City v. Fritz* (1949) 33 Cal.2d 635, 637.

²⁷⁷ California Constitution, article XI, section 9(b).

587, 595, overruled on other grounds in *Los Angeles Met. Transit Authority v. Public Utilities Com.* [1963] 59 Cal.2d 863, 869; *South City of Pasadena v. Pasadena Land etc. Co.* [1908] 152 Cal. 579, 593.) In supplying water to its inhabitants, a municipality acts in the same capacity as a private corporation engaged in a similar business, and not in its sovereign role. (*Nourse v. City of Los Angeles* [1914] 25 Cal.App. 384, 385.) Consequently, the authority granted to a city under article XI, section 19, is a “privileged power”; a city is not obliged to furnish water to its inhabitants and has no duty of supplying water, although it may do so. (*People ex rel. City of Downey v. Downey County Water Dist.* [1962] 202 Cal.App.2d 786, 792.) Conversely, a county water district has a legal duty to carry out its primary purpose of furnishing water to its inhabitants. (*Coachella Valley County Water Dist. v. Stevens* [1929] 206 Cal. 400, 406-407, 410-411; *Moore v. Twentynine Palms etc. Water Dist.* [1957] 156 Cal.App.2d 109, 111.)²⁷⁸

Under the Government Code, when interpreting statutes and constitutional provisions, “shall” is mandatory, and “may” is permissive.²⁷⁹ Article XI, section 9 provides that a municipal corporation *may* establish water service. Government Code section 38742 also provides that the legislative body of any city “*may*” contract for supplying the city with water for municipal purposes; *or* “*may*” “[a]cquire, construct, repair, and manage pumps, aqueducts, reservoirs, or other works necessary or proper for supplying water for the use of the city or its inhabitants or for irrigating purposes of the city.”

Thus, the law allows a city to operate as a PWS, and also allows a city to contract for the supply of the city’s water. But there is no state law that legally compels the claimant to operate a PWS, or to serve as the drinking water provider of last resort, or to include such obligations in its city charter.²⁸⁰ As indicated in the Background, if the city decides to operate a PWS, it is required by law to first submit an application to the SWRCB (or to the predecessor agency, the Department of Public Health) and receive a permit.²⁸¹

The claimant contends that the required activities are mandated by the state since its city charter “imposes a legal obligation and responsibility on the City to provide water service.”²⁸² However, the claimant’s obligations under its own city charter are self-imposed, and are no different than the circumstances in *City of Merced*,²⁸³ *Department of Finance (Kern High School*

²⁷⁸ *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274

²⁷⁹ Government Code section 14.

²⁸⁰ See *City of Merced v. State of California* (1984) 153 Cal.App.3d 777 [Finding that statute requiring compensation for business goodwill was not a state mandate because the requirement was triggered only by the discretionary local decision to exercise eminent domain.]

²⁸¹ Health and Safety Code sections 116525, 116271(k).

²⁸² Exhibit E, Claimant’s Rebuttal Comments, page 4.

²⁸³ *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.

Dist.),²⁸⁴ and *Department of Finance (POBRA)*²⁸⁵ in which test claimants sought reimbursement for costs incurred as a result of their own discretionary decisions.

In *City of Merced*, the claimant alleged reimbursable state-mandated costs under Code of Civil Procedure provisions requiring compensation for the loss of business goodwill when local entities exercised their eminent domain authority.²⁸⁶ The court found that the Legislature intended for the payment of goodwill to be discretionary because the legislation also stated the following:

Nothing in this title requires that the power of eminent domain be exercised to acquire property necessary to public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.

We agree that the Legislature intended the payment of goodwill to be discretionary. The above authorities reveal that whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised, then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost.²⁸⁷

In *Kern*, school districts sought reimbursement for certain notice and agenda requirements for school site councils and advisory bodies established pursuant to underlying funded programs.²⁸⁸ The Court found that, with respect to eight of the nine programs at issue, the claimant was not legally compelled to participate in the underlying program and therefore did not incur state-mandated costs pursuant to the notice and agenda requirements alleged. The Court explained its decision to follow *City of Merced*:

The truer analogy between that case and the present case is this: In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's

²⁸⁴ *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727.

²⁸⁵ *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355.

²⁸⁶ *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 781.

²⁸⁷ *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783.

²⁸⁸ *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 733.

obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.²⁸⁹

The Court further clarified that the “proper focus under a legal compulsion inquiry is upon the nature of claimants’ participation in the underlying programs themselves.”²⁹⁰ The Court “therefore conclude[d] that, as to eight of the nine funded programs, the statutory notice and agenda obligations exist and apply to claimants only because they have *elected* to participate in, or continue to participate in, the various underlying funded programs-and hence to incur notice and agenda costs that are a condition of program participation.”²⁹¹

In 2009, the Third District Court of Appeal in *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355 (*POBRA*) applied these cases to a school district request for reimbursement for costs required by statute on law enforcement agencies, including school districts, that are authorized, but not legally compelled, to employ peace officers.²⁹² The court noted that:

When the Legislature makes such a rule, it only says that if you participate you must follow the rule. This is not a rule that bears on compulsion to participate. (Cf. *Kern High School Dist.*, *supra*, 30 Cal.4th at p. 743, . . . [the proper focus of a legal compulsion inquiry is upon the nature of claimants’ participation in the underlying programs, not that costs incurred in complying with program conditions have been legally compelled].)²⁹³

Also in *Kern*, and later in *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355 (*POBRA*), it was argued that even if a local entity is not legally compelled to participate in a program or engage in activities that trigger additional state law requirements, such entity might be practically compelled to comply with new requirements, and that “[t]he absence of a reasonable alternative to participation is a de facto mandate.”²⁹⁴ The Court in *Kern*

²⁸⁹ *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 743.

²⁹⁰ *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 743.

²⁹¹ *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 745 [emphasis in original]. The Court also declined to consider or decide whether a reimbursable state mandate would arise where a local entity voluntarily elected to participate in a program and committed itself to doing so, and thereafter the state imposed additional requirements at a time when the local entity is not free to immediately end its participation. (30 Cal.4th 727, 745, Fn 15.)

²⁹² *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368.

²⁹³ *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1367.

²⁹⁴ *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 748. See also, *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1361-1362 [Commission found, and trial court agreed, that as a practical matter, school districts

held that while it would not “foreclose the possibility” that a reimbursable state mandate may arise in a situation that falls short of express legal compulsion, the entity would have to face “certain and severe ... penalties” such as “double ... taxation” or other “draconian” consequences if it discontinued participation in the program:

In essence, claimants assert that their participation in the education-related programs here at issue is so beneficial that, as a practical matter, they feel they must participate in the programs, accept program funds, and-by virtue of Government Code section 54952 and Education Code section 35147-incur expenses necessary to comply with the procedural conditions imposed on program participants. Although it is completely understandable that a participant in a funded program may be disappointed when additional requirements (with their attendant costs) are imposed as a condition of continued participation in the program, just as such a participant would be disappointed if the total amount of the annual funds provided for the program were reduced by legislative or gubernatorial action, the circumstance that the Legislature has determined that the requirements of an ongoing elective program should be modified does not render a local entity's decision whether to continue its participation in the modified program any less voluntary.

[¶...¶]

In sum, the circumstances presented in the case before us do not constitute the type of nonlegal compulsion that reasonably could constitute, in claimants' phrasing, a “de facto” reimbursable state mandate. Contrary to the situation that we described in *City of Sacramento, supra*, 50 Cal.3d 51, a claimant that elects to discontinue participation in one of the programs here at issue does not face “certain and severe ... penalties” such as “double ... taxation” or other “draconian” consequences (*id.*, at p. 74), but simply must adjust to the withdrawal of grant money along with the lifting of program obligations. Such circumstances do not constitute a reimbursable state mandate for purposes of article XIII B, section 6.²⁹⁵

The court in *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355 (*POBRA*) also found that practical compulsion (or certain and severe ... penalties' such as 'double ... taxation' or other 'draconian' consequences) can be shown if a local government claimant makes a concrete showing, supported by substantial evidence in the record, that as a practical matter exercising the authority is the only reasonable means to carry out the entity's core mandatory function.²⁹⁶ The test claim statutes at issue in that case imposed duties on all law

and community college districts may be required to hire peace officers to maintain a safe campus].

²⁹⁵ *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 753-754.

²⁹⁶ *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368.

enforcement agencies that employ peace officers. School districts have the authority to employ peace officers, but, unlike counties and cities, are not required to employ peace officer.²⁹⁷ The court found that although school districts have a basic and mandatory duty to educate students, the provision of police protection is not an essential or basic function of school districts.²⁹⁸ The court further 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.”²⁹⁹ Thus, as described below, the court held that there was no showing that as a practical matter, exercising the authority to hire peace officers was the only reasonable means to carry out their core mandatory function to educate students.

The Commission submits that this case should be distinguishable 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.” [Citation omitted.] 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.

The Commission notes that *Carmel Valley Fire Protection Dist. v. State* characterizes police protection as one of “the most essential and basic functions of local government.” [Citation omitted.] However, that characterization is in the context of cities, counties, and districts that have as an ordinary, principal, and mandatory duty the provision of policing services within their territorial jurisdiction. A fire protection district perform must hire firefighters to supply that protection.

Thus, as to cities, counties, and such districts, new statutory duties that increase the costs of such services are prima facie reimbursable. This is true, notwithstanding a potential argument that such a local government’s decision is voluntary in part, as to the number of personnel it hires. [Citation omitted.] A school district, for example, has an analogous basic and mandatory duty to educate students. In the course of carrying out that duty, some “discretionary expulsions will necessarily occur. [Citation omitted.] Accordingly, *San Diego Unified School Dist.* suggests additional costs of “discretionary” expulsions should not be considered voluntary. Where, as a practical matter, it is inevitable that certain actions will occur in the administration of a mandatory program, costs

²⁹⁷ *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1368.

²⁹⁸ *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1367.

²⁹⁹ *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1367.

attendant to those actions cannot fairly and reasonably be characterized as voluntary under the rationale of *City of Merced*. [Citation omitted.]

However, the districts in issue are authorized, but not required, to provide their own peace officers and do not have provision of police protection as an essential and basic function. It is not essential unless there is a showing that, as a practical matter, exercising the authority to hire peace officers is the only reasonable means to carry out their core mandatory functions. As there is no such showing in the record, the Commission erred in finding that POBRA constitutes a state-mandated program for school districts and the special districts identified in Government Code section 3301. Similarly, the superior court erred in concluding as a matter of law that, “[a]s a practical matter,” the employment of peace officers by the local agencies is “not an optional program” and “they do not have a genuine choice of alternative measures that meet their agency-specific needs for security and law enforcement.”³⁰⁰

Here, state law does not legally compel the claimant to provide water services or to operate as a PWS, and there is no evidence in the record that the claimant is practically compelled and would suffer “certain and severe penalties or other draconian measures,” if the claimant decided to no longer provide water services to its residents or operate as a PWS. As noted above, the California Constitution clearly permits cities to establish and operate public works to provide water; however the next subdivision permits the same activities to be undertaken by a private entity and case law states that this an historically proprietary rather than a governmental function.³⁰¹ In supplying water to its inhabitants, a municipality acts in the same capacity as a private corporation engaged in a similar business, and not in its sovereign role.³⁰² Consequently, “the authority granted to a city under article XI, section 19, is a “privileged power”; a city is not obliged to furnish water to its inhabitants and has no duty of supplying water, although it may do so.”³⁰³

Accordingly, the Commission finds that requirements imposed by the test claim order are not mandated by the state, but are triggered by a local decision to provide water services and operate as a PWS.

³⁰⁰ *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1367-1368.

³⁰¹ California Constitution, article XI, section 9(a-b); *In re Orosi Public Utility Dist.* (1925) 196 Cal. 43, 57-58; *City of Pasadena v. Railroad Com.* (1920) 183 Cal. 526, 529; *Marin Water etc. Co. v. Town of Sausalito* (1916) 168 Cal. 587, 595, overruled on other grounds in *Los Angeles Met. Transit Authority v. Public Utilities Com.* (1963) 59 Cal.2d 863, 869; *South City of Pasadena v. Pasadena Land etc. Co.* [1908] 152 Cal. 579, 593.

³⁰² *Nourse v. City of Los Angeles* (1914) 25 Cal.App. 384, 385.

³⁰³ *People ex rel. City of Downey v. Downey County Water Dist.* (1962) 202 Cal.App.2d 786, 792.

3. The new requirements of the test claim order do not constitute a new program or higher level of service, within the meaning of article XIII B, section 6 of the California Constitution.

State mandate reimbursement is not required for any and all costs that might be incurred by local government as an incident of a change in law. Mandate reimbursement is required only when all elements of article XIII B, section 6 are met, including that the statute or executive order imposes a “new program or higher level of service.”³⁰⁴ The California Supreme Court explained in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, that a new program or higher level of service means a program that carries out of the governmental function of providing services to the public, or laws which, to implement a state policy, imposes unique requirements on local government and does not apply generally to all residents and entities in the state,” as follows:

Looking at the language of section 6 then, it seems clear that by itself the term “higher level of service” is meaningless. It must be read in conjunction with the predecessor phrase “new program” to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing “programs.” But the term “program” itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term – *programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.*³⁰⁵

The Court further held that “the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions *peculiar to government*, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities.”³⁰⁶ The law at issue in the *County of Los Angeles* case addressed increased worker’s compensation benefits for government employees, and the Court concluded that:

...section 6 has no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in worker’s compensation benefits that employees of private individuals or organizations receive. Workers’ compensation is *not* a program administered by local agencies to *provide service to the public.*³⁰⁷

³⁰⁴ California Constitution, article XIII B, section 6.

³⁰⁵ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (emphasis added).

³⁰⁶ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56-57 (emphasis added).

³⁰⁷ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58 (emphasis added).

The Court also concluded that the statute did not impose unique requirements on local government:

Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers. In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. [Citation omitted.] Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.³⁰⁸

In *City of Sacramento*, the Court considered whether a state law extending mandatory unemployment insurance coverage to include local government employees imposed a reimbursable state mandate.³⁰⁹ The Court followed *County of Los Angeles*, holding that “[b]y requiring local governments to provide unemployment compensation protection to their own employees, the state has not compelled provision of new or increased ‘service to the public’ at the local level...[nor] imposed a state policy ‘uniquely’ on local governments.”³¹⁰ Rather, the Court observed that most employers were already required to provide unemployment protection to their employees, and “[e]xtension of this requirement to local governments, together with the state government and nonprofit corporations, merely makes the local agencies ‘indistinguishable in this respect from private employers.’”³¹¹

A few other examples are instructive. In *Carmel Valley*, the claimants sought reimbursement from the state for protective clothing and equipment required by regulation, and the State argued that private sector firefighters were also subject to the regulations, and thus the regulations were not unique to government.³¹² The court rejected that argument, finding that “police and fire protection are two of the most essential and basic functions of local government.”³¹³ And since there was no evidence on that point in the trial court, the court held “we have no difficulty in

³⁰⁸ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56, 58.

³⁰⁹ *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

³¹⁰ *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67.

³¹¹ *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67. See also, *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190 [Finding that statute eliminating local government exemption from liability for worker's compensation death benefits for public safety employees “simply puts local government employers on the same footing as all other nonexempt employers.”]

³¹² *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521.

³¹³ *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537 [quoting *Verreos v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107].

concluding as a matter of judicial notice that the overwhelming number of fire fighters discharge a classic governmental function.”³¹⁴ Thus, the court found that the regulations requiring local agencies to provide protective clothing and equipment to firefighters carried out the governmental function of providing services to the public. The court also found that the requirements were uniquely imposed on government because:

The executive orders manifest a state policy to provide updated equipment to all fire fighters. Indeed, compliance with the executive orders is compulsory. The requirements imposed on local governments are also unique because fire fighting is overwhelmingly engaged in by local agencies. Finally, the orders do not generally apply to all residents and entities in the State but only to those involved in fire fighting.³¹⁵

Later, in *County of Los Angeles II*, counties sought reimbursement for elevator fire and earthquake safety regulations that applied to all elevators, not just those that were publicly owned.³¹⁶ The court found that the regulations were plainly not unique to government.³¹⁷ The court also found that the regulations did not carry out the governmental function of providing a service to the public, despite declarations by the county that without those elevators, “no peculiarly governmental functions and no purposes mandated on County by State law could be performed in those County buildings”³¹⁸ The court held that the regulations did not constitute an increased or higher level of service, because “[t]he regulations at issue do not mandate elevator service; they simply establish safety measures.”³¹⁹ The court continued:

In determining whether these regulations are a program, the critical question is whether the mandated program carries out the governmental function of providing services to the public, not whether the elevators can be used to obtain these services. Providing elevators equipped with fire and earthquake safety features simply is not “a governmental function of providing services to the public.” [FN 5 This case is therefore unlike *Lucia Mar, supra*, 44 Cal.3d 830, in which the court found the education of handicapped children to be a governmental function (44

³¹⁴ *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537.

³¹⁵ *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 538.

³¹⁶ *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538.

³¹⁷ *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

³¹⁸ *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

³¹⁹ *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1546.

Cal.3d at p. 835) and *Carmel Valley, supra*, where the court reached a similar conclusion regarding fire protection services. (190 Cal.App.3d at p. 537.)³²⁰

Here, SWRCB has argued that the test claim order, one of over 1,100 public water system permits amended simultaneously, is not a state-mandated new program or higher level of service because (1) of the 1,100 permits, approximately 450 were issued to privately-owned and operated drinking water suppliers; and (2) providing water, and testing for lead in that water, is not a peculiarly governmental function. SWRCB reaches its conclusion not only by analyzing *County of Los Angeles* and its progeny, discussed above, but also calling upon case law distinguishing between local government activities in a sovereign capacity and local government activities more in the nature of corporate or business activities, comparing the operation of a PWS to the latter category of activity. And, SWRCB notes the existence of the Service Duplication Law within the Public Utilities Code, which requires a local government to compensate a private water provider when it extends service into the private entity's service area.³²¹ SWRCB asserts that the existence of a compensation requirement implies that providing water service is not universally, or even predominantly, the purview of local government.

In its rebuttal comments, the claimant argues at length that providing water service *is* a governmental function of providing services to the public, and that the test claim order imposes unique requirements on the claimant. Specifically, the claimant asserts (1) that *County of Los Angeles* and the cases following only require that a governmental function be a function of providing services to the public, not that the function at issue must be “peculiar” to government;³²² (2) that the sovereign immunity cases cited by SWRCB no longer provide a useful determinant, especially after Proposition 218, for whether services provided by local entities are more in the nature of governmental services, or proprietary or corporate services;³²³ (3) that anything that a local government does pursuant to legal authority is a government function;³²⁴ (4) that the Service Duplication Law cited by SWRCB does not represent a legislative determination on water service as a non-governmental activity;³²⁵ (5) that even though SWRCB presents evidence that 75 percent of drinking water systems are private entities, it should be more persuasive that 81 percent of California residents are served by a governmental water provider;³²⁶ (6) that the “program” at issue is ensuring safe schools, which the courts have found to be a program within the meaning of article XIII B, section 6, and not providing

³²⁰ *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1546, Footnote 5.

³²¹ Exhibit C, SWRCB's Comments on the Test Claim, pages 9-13.

³²² Exhibit E, Claimant's Rebuttal Comments, page 4.

³²³ Exhibit E, Claimant's Rebuttal Comments, page 5.

³²⁴ Exhibit E, Claimant's Rebuttal Comments, page 5.

³²⁵ Exhibit E, Claimant's Rebuttal Comments, page 5.

³²⁶ Exhibit E, Claimant's Rebuttal Comments, page 5.

water;³²⁷ and finally, (7) that the test claim order does not apply generally to all residents and entities in the state, but implements a state policy of providing safe drinking water to students by requiring local water providers to test for lead on school property.³²⁸

As analyzed herein, the Commission finds that the test claim order does not impose a new program or higher level of service.

a. The requirements of the test claim order are not uniquely imposed on government.

The claimant contends that the test claim order imposes unique requirements on the claimant that do not apply generally to all residents and entities in the State and, therefore constitutes a new program or higher level of service:

The Permit Amendment applies specifically to the City. It does not apply generally to all residents and entities in the State. Even collectively considering all 1,100 permit amendments issued by SWRCB, they only apply to local water agencies with schools in their service areas, not to everyone in the State. The Permit Amendment does not require lead testing be performed for all state residents and entities either, only for schools. Collectively, the permit amendments apply uniquely to water agencies in the same way the Court found the requirement for fire protective gear applied uniquely to public and private fire protection agencies. The permit amendments do not need to exclusively apply to publicly-owned water agencies to satisfy the uniqueness element of the second test.

Under the second test, examples of laws that apply generally to all residents and entities in the state include requirements to provide employees with unemployment insurance coverage, worker's compensation benefits, or to upgrade public buildings to comply with statewide elevator safety regulations. Subvention was denied in these cases because the requirements applied to everyone, not just to local government. Unlike these examples, though, the Permit Amendment only applies to the City. Those in the State who do not provide water service do not have to comply with the Permit Amendment.

The Permit Amendment satisfies all the elements of the second test. The Permit Amendment is implementing a State policy of providing safe drinking water to school students. The policy is implemented by obligating local water agencies to test for lead on school property. The obligation to test for lead does not apply generally to all residents and entities in the State, but uniquely to local water agencies. Therefore, the Permit Amendment is a new program eligible for reimbursement under the second test established by the Supreme Court.³²⁹

The Commission disagrees with the claimant and finds that the requirements of the test claim order are not uniquely imposed on government.

³²⁷ Exhibit E, Claimant's Rebuttal Comments, pages 6-7.

³²⁸ Exhibit E, Claimant's Rebuttal Comments, pages 7-8.

³²⁹ Exhibit E, Claimant's Rebuttal Comments, page 8.

It is correct that the test claim order, is uniquely addressed to *a* local government entity (the City of San Diego, in its capacity as the operator of a PWS in this instance). However, it is but one of 1,128 permit amendments adopted near-simultaneously, more than a third of which were issued to privately owned PWSs, with the same requirements to perform lead sampling upon request of a school district. Privately owned PWS's subject to lead testing requirements due to a permit amendment include mutual water companies organized under the Corporations Code,³³⁰ and investor-owned utilities regulated under the Public Utilities Code.³³¹ And, as instructed by the courts interpreting article XIII B, section 6 of the California Constitution, this test claim order cannot be considered in isolation; it must be construed in context with other similar permits

³³⁰ Corporations Code section 14300 et seq.. See, e.g., Exhibit C, SWRCB Comments on the Test Claim, Permit Amendments issued to entities described as “mutual water company” or “mutual water association”: pages 897 [Ali Mutual Water Co.]; 1053 [Aromas Hills Mutual Water Association]; 1092 [Arrowhead Villas Mutual Service Co.]; 1139 [Atascadero Mutual Water Co.]; 1153 [Averydale Mutual Water Co.]; 1340 [Bedel Mutual Water Co.]; 1392 [Bellflower-Somerset MWC]; 1414 [Best Road Mutual Water Co.]; 1427 [Beverly Grand Mutual Water]; 1623 [Box Springs Mutual Water Co.].

³³¹ See, Exhibit X, List of Regulated Water and Sewer Utilities, California Public Utilities Commission, August 17, 2018. See, e.g., Exhibit C, SWRCB Comments on the Test Claim, Permit Amendments issued to investor-owned utilities regulated by PUC: pages 1265 [Bakman Water Co.]; 1292 [Bass Lake Water Co.]; 1455 [Big Basin Water Co.]; 1862-1939 [California Water Service Company: King City, Las Lomas, Oak Hills, Salinas Hills, Salinas, Stockton]; 1940 [California American Water, Coronado]; 2105 [California Water Service, Bear Gulch]; 2133-2177 [California Water Service: East Los Angeles, Hermosa/Redondo; Palos Verdes]; 2193-2220 [California Water Service: Westlake, Los Altos Suburban]; 2240 [California Water Service, South San Francisco]; 2380-2414 [Cal-Water Service Co.: Chico, Hamilton City, Marysville, Oroville, Willows]; 2508 [Canada Woods Water Co.]; 2661 [Cazadero Water Co.]; 5956 [CWS Bakersfield]; 6034 [CWS Selma]; 6060-6098 [CWS: Visalia, Dixon, Livermore]; 6194-6214 [Del Oro Water Co.: Magalia, Paradise Pines, Stirling Bluffs]; 6481 [East Pasadena Water Co.]; 6541 [Easton Estates Water Co.]; 6725 [Erskine Creek Water Co.]; 7077 [Fruitridge Vista Water Co.]; 7192 [Golden State Water Co., Clearlake]; 7315 [Golden State Water Co., Wrightwood]; 7395 [Great Oaks Water Co.]; 7408 [Green Acres Mobile Home Estates]; 7880 [Havasu Water Co.]; 8078 [Hillview Water Co., Oakhurst/Sierra Lakes]; 8524 [Kenwood Village Water Co.]; 8866 [Lake Alpine Water Co.]; 9021 [Las Flores Water Co.]; 9270 Little Bear Water Co.; 9426 Lukins Brothers Water Co.; 9768 [Mesa Crest Water Co.]; 10082 [Mountain Mesa Water Co.]; 10217 Nacimiento Water Co.; 10871 Penngrove Water Co.; 10925 [Pierpoint Springs Water Co.]; 11066 [Point Arena Water Works]; 11478 [Rio Plaza Water Co.]; 11542 [Rolling Green Utilities]; 11803-11845 [San Gabriel Valley Water Co., El Monte, Montebello, Fontana]; 11915 [San Jose Water Co.]; 12959 [Southern California Edison Co., Santa Catalina]; 12975 [Spreckels Water Co.]; 13163-13213 [Suburban Water Systems, Covina, Glendora, La Mirada]; 14361 [Warring Water Service, Inc.]; 14411 [Weimar Water Co.]; 14426 [West San Martin Water Works, Inc.]; 14649 [Yerba Buena Water Co.].

issued by SWRCB to PWSs.³³² For example, the test claim statute in *City of Sacramento* expressly extended unemployment insurance to public sector employees without altering the law applicable to private sector employees.³³³ The California Supreme Court, however, considered the statute in context and held that the statute did not impose requirements unique to local government and, thus, did not impose a new program or higher level of service: “Extension of this requirement to local governments, together with the state government and nonprofit corporations, merely makes the local agencies ‘indistinguishable in this respect from private employers.’”³³⁴ The Court also observed that it would “have an anomalous result” if the State could “avoid subvention under *County of Los Angeles* standards by imposing new obligations on the public and private sectors at the same time,” while “if it chose to proceed by stages, extending such obligations first to private entities, and only later to local governments, it would have to pay.”³³⁵ Similarly, the test claim statute in *City of Richmond v. Commission on State Mandates* eliminated a statutory exemption from providing workers’ compensation death benefits to local safety members, which put local government employers on the same footing as all other nonexempt employers, requiring that they provide the workers’ compensation death benefit.³³⁶ The court found that the statute did not impose a new program or higher level of service, even though the statute itself, considered in isolation, affected only local government.³³⁷

As indicated above, the provision of water through a public water system, to a school or any other customer, is not unique to government. Article XI, section 9 of the California Constitution provides that a municipal corporation, or a private person or corporation, may be established to operate public works to furnish water.³³⁸ This provision was adopted by voter initiative to make clear that cities or other local entities had authority to organize to provide such services, which had previously been provided primarily by private entities.³³⁹ Moreover, as noted the term “public water system” does not mean a water system owned or operated by a governmental entity; California’s SDWA defines a PWS 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

³³² See *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190 [Elimination of a previous statutory exemption from part of worker’s compensation law was not a new program, uniquely imposed on government, even though the statute itself, considered in isolation, affected only local government.].

³³³ *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

³³⁴ *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67 [quoting *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 58].

³³⁵ *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 69.

³³⁶ *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197.

³³⁷ *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197-1198.

³³⁸ California Constitution, article XI, section 9(a-b).

³³⁹ *In re Bonds of Orosi Public Utility Dist.* (1925) 196 Cal. 43, 55 [“The adoption of the amendment definitely settled and removed all doubt from the question of the right of cities and towns to own and operate the kind of public utilities designated by the Constitution.”].

day for at least 60 days out of the year.³⁴⁰ In addition, the Act defines several other water systems that might deliver drinking water and would be regulated under the Act, including, but not limited to, a “community water system,” defined as a public water system that serves yearlong residents; and a “state small water system,” defined as a system that serves at least five but not more than 14 service connections and does not regularly serve at least 25 persons for more than 60 days out of the year.³⁴¹ Accordingly, SWRCB provides evidence that there are 6,970 water systems of various types currently operating in California, 5,314 of which (approximately 76 percent) are privately owned and operated, and 1,656 of which are public entities.³⁴²

Therefore, this Test Claim is distinguishable from *Carmel Valley*, in which the court noted that it did not have evidence in the record of the existence or prevalence of private fire-fighting teams or private fire personnel, but accepted it as a matter of judicial notice that the overwhelming majority of fire fighters discharge a governmental service.³⁴³ Here, the evidence shows that the test claim order is one permit of more than 1,100 issued to drinking water suppliers that serve at least one K-12 school, a substantial number of which are non-governmental entities.

This Test Claim most closely resembles *County of Los Angeles II*.³⁴⁴ In that case, earthquake safety regulations applied to all elevators, and affected the local government only insofar as the local entity operated buildings that contained working elevators.³⁴⁵ Here, the test claim order affects the claimant only because the claimant provides drinking water through a PWS to K-12 schools within its service area, and those schools have requested testing.

The claimant asserts that the lead sampling requirements of the test claim order “do not apply generally to all residents and entities in the State, but uniquely to local water agencies,”³⁴⁶ but that statement misconstrues the test,³⁴⁷ and misstates the facts. The Court in *County of Los Angeles* reasoned that the “drafters and the electorate” that shaped and adopted article XIII B, section 6, intended to require mandate reimbursement for “programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local government and do not apply generally to all

³⁴⁰ Health and Safety Code 116275(h).

³⁴¹ See Health and Safety Code section 116275(h-k; n-o).

³⁴² Exhibit C, SWRCB’s Comments on the Test Claim, pages 2; 455-457. However, the claimant argues, and SWRCB concedes, that the largest water systems are publicly owned, and therefore the majority of Californians are served by a publicly owned water system. (Exhibit C, SWRCB’s Comments on the Test Claim, p. 2; Exhibit E, Claimant’s Rebuttal Comments, p. 5.)

³⁴³ *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537.

³⁴⁴ *County of Los Angeles v. Dept. of Industrial Relations* (1989) 214 Cal.App.3d 1538.

³⁴⁵ *County of Los Angeles v. Dept. of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

³⁴⁶ Exhibit E, Claimant’s Rebuttal Comments, pages 8-9.

³⁴⁷ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

residents and entities in the state.”³⁴⁸ The claimant asserts that because the test claim order applies only to PWSs, and not “all residents and entities in the State,” that it should be considered “uniquely [imposed on] local water agencies.”³⁴⁹ This reasoning misinterprets and misapplies the words “generally” and “uniquely,” which the Court used to illustrate the difference between a generally applicable law that results indirectly, or incidentally, in costs to local government; and a law that specifically and directly imposes new “unique” requirements on local government.³⁵⁰

First, *general*, does not mean *universal*: “The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided.”³⁵¹ Accordingly, the idea that a law would “apply generally to all residents and entities in the State” should not be taken to mean that a law must apply broadly to *all* persons and entities without limitation or caveat; laws may apply to a class of persons or entities, or to a defined set of circumstances, and still be considered to apply *generally*.³⁵²

Second, and relatedly, a law that applies to a class of persons or entities whose members are both governmental and private cannot be said to apply *uniquely* to local government, as the claimant asserts. Rather, the requirements of the test claim order are applicable to all PWS’s that serve at least one K-12 school, and there is evidence in the record, absent in *Carmel Valley*,³⁵³ that there are a substantial number of PWS’s affected by the policy that are privately owned. Thus, the requirements are not *unique* to government at all; rather, they apply to the claimant and similarly-situated local agencies by virtue of their decision to own or operate a PWS, but they also apply to PWSs that are not local government agencies; approximately 450 privately owned PWSs are subject to the same requirements. The claimant notes that in *City of Sacramento*,³⁵⁴ *County of Los Angeles*,³⁵⁵ and *County of Los Angeles II*,³⁵⁶ “[s]ubvention was denied in these

³⁴⁸ *County of Los Angeles v. State* (1987) 43 Cal.3d 46, 56.

³⁴⁹ Exhibit E, Claimant’s Rebuttal Comments, pages 8-9.

³⁵⁰ *County of Los Angeles v. State* (1987) 43 Cal.3d 46, 56-57.

³⁵¹ *Tidewater Marine Western v. Bradshaw* (1996) 14 Cal.4th 557, 571.

³⁵² *Ex parte Weisberg* (1932) 215 Cal. 624, 629 [“A law is general and uniform and affords equal protection in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided that such class is founded upon some natural or intrinsic or constitutional distinction between the persons composing it and others not embraced in it.”]

³⁵³ *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537 [“Our record on this point is incomplete because the issue was not presented below. Nonetheless, we have no difficulty in concluding as a matter of judicial notice that the overwhelming number of fire fighters discharge a classical governmental function.”]

³⁵⁴ *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

³⁵⁵ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

³⁵⁶ *County of Los Angeles v. Dept. of Industrial Relations* (1989) 214 Cal.App.3d 1538.

cases because the requirements applied to everyone, not just to local government.”³⁵⁷ The same must hold true regarding the lead testing requirements of the test claim order, which apply to “everyone” that operates a PWS that serves K-12 schools.

Accordingly, the requirements of the test claim order are not uniquely imposed on local government.

- b. The test claim order does not impose a governmental function of providing a service to the public within the meaning of article XIII B, section 6.

The claimant also asserts that the test claim order imposes a new program or higher level of service on the following grounds: *County of Los Angeles* and the cases following only require that a governmental function be a function of providing services to the public, not that the function at issue must be “peculiar” to government;³⁵⁸ anything a local government does pursuant to legal authority is a government function;³⁵⁹ even though SWRCB presents evidence that 75 percent of drinking water systems are private entities, it should be more persuasive that 81 percent of California residents are served by a governmental water provider;³⁶⁰ and, alternatively, the “program” at issue is ensuring safe schools, and not providing water, which the courts have found to be a program within the meaning of article XIII B, section 6.³⁶¹

The Commission finds that the test claim order does not impose a governmental function of providing a service to the public within the meaning of article XIII B, section 6 of the California Constitution.

As discussed above, the California Supreme Court in *County of Los Angeles* defined a program subject to article XIII B, section 6, as “*programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.*”³⁶² The Court went on to explain, referencing the ballot arguments that declared that section 6 “[w]ill not allow the state government to force programs on local governments without the state paying for them,” that “the phrase ‘to force programs on local governments’ confirms that the intent underlying section 6 was to require reimbursement to local agencies for the *costs involved in carrying out functions peculiar to government*, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities.”³⁶³ On that basis, the Court reasoned that workers compensation was not a governmental *program* at all, both because it is not administered by local government (it is administered by the State), and

³⁵⁷ Exhibit E, Claimant’s Rebuttal Comments, page 8.

³⁵⁸ Exhibit E, Claimant’s Rebuttal Comments, page 4.

³⁵⁹ Exhibit E, Claimant’s Rebuttal Comments, page 5.

³⁶⁰ Exhibit E, Claimant’s Rebuttal Comments, page 5.

³⁶¹ Exhibit E, Claimant’s Rebuttal Comments, pages 6-7.

³⁶² *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (emphasis added).

³⁶³ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57.

because, pursuant to the test claim statute, private and public employers have the same obligations under the law.³⁶⁴

In the years since, the courts have applied and interpreted this test to *confirm* the existence of a *governmental* program within the meaning of article XIII B, section 6 to include the following: protective clothing and equipment for firefighters;³⁶⁵ education of “handicapped” children;³⁶⁶ reducing racial or ethnic segregation in public schools;³⁶⁷ providing due process in expulsion proceedings in public schools;³⁶⁸ and providing due process in disciplinary proceedings for peace officers employed by cities and counties.³⁶⁹ In *Carmel Valley*, addressing fire protective clothing and equipment, the court observed that the underlying government service at issue is a “peculiarly governmental function,” and that police and fire protection are “two of the most essential and basic functions of local government.”³⁷⁰ The same was echoed in *POBRA*, relative to the due process for city and county peace officer disciplinary proceedings.³⁷¹ *Lucia Mar*, *Long Beach*, and *San Diego Unified* all addressed alleged reimbursable mandates in the realm of education,³⁷² for which the governmental duty of a school district is clearly expressed in the California Constitution,³⁷³ and for which the court in *Long Beach* expressly recognized that education is a “peculiarly governmental function,” notwithstanding the existence of private schools.³⁷⁴ The California Supreme Court also identified, in an earlier decision cited and relied

³⁶⁴ *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 57-58.

³⁶⁵ *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521.

³⁶⁶ *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830.

³⁶⁷ *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155.

³⁶⁸ *San Diego Unified School Dist. v. Commission* (2004) 33 Cal.4th 859.

³⁶⁹ *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355.

³⁷⁰ *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537 [citing *County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481; *Verreros v. City and County of San Francisco* (1976) 63 Cal.App.3d 86, 107].

³⁷¹ *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1367 [An “ordinary, principal and mandatory duty” for cities and counties and some special districts to provide “policing services within their territorial jurisdiction.”].

³⁷² *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830; *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155; *San Diego Unified School Dist. v. Commission* (2004) 33 Cal.4th 859.

³⁷³ California Constitution, article IX, sections 2 [providing for a State Superintendent of Public Instruction]; 3 [providing for a Superintendent of Schools in each county]; 5 [“The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year.”].

³⁷⁴ See *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172.

upon in part in *Carmel Valley*, that “tax administration, and mental hospital administration” are “functions peculiarly ‘governmental’ in nature.”³⁷⁵

At the same time the courts have *rejected* mandate reimbursement in the following cases, finding that they did *not* involve a governmental function of providing a service to the public: fire and earthquake safety features for elevators in buildings open to the public;³⁷⁶ elimination of a government and nonprofit employer exemption from contributing to unemployment insurance;³⁷⁷ awarding attorneys’ fees against a local government under Code of Civil Procedure section 1021.5;³⁷⁸ and the elimination of an exemption for local governments employing public safety workers from requirements to pay workers’ compensation death benefits.³⁷⁹ The cases disapproving reimbursement therefore involved either costs and activities related to public employees;³⁸⁰ or generally-applicable laws that impacted local government by virtue of some other circumstance (i.e., the award of attorneys’ fees for litigants successful against local government, and the applicability of elevator safety regulations in public buildings).³⁸¹

Unlike *Carmel Valley*, *Lucia Mar*, *Long Beach*, *San Diego Unified*, and *POBRA*, the test claim order in this case does not involve an essential and *peculiarly governmental* function.³⁸² The test claim order here relates to the provision of drinking water through a PWS, which is fundamentally distinct from the other examples discussed above: providing water service for a fee, and to ratepayers/customers, is far different from providing police or fire protection, or free and appropriate public education, or tax administration or mental hospital care, to all residents of the jurisdiction regardless of their ability to pay which are core governmental functions.

Furthermore, as noted above, there is no legal requirement for local agencies to be involved in providing water, and historically the authority of local agencies to do so was in question. Article XI, section 9(a) of the California Constitution provides that a municipal corporation *may* be established to operate public works to furnish light, water, power, heat, transportation, or means

³⁷⁵ *County of Sacramento v. Superior Court* (1972) 8 Cal.3d 479, 481 [cited by *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537].

³⁷⁶ *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538.

³⁷⁷ *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

³⁷⁸ *County of Fresno v. Lehman* (1991) 229 Cal.App.3d 340.

³⁷⁹ *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190.

³⁸⁰ *City of Sacramento v. State of California* (1990) 50 Cal.3d 51; *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190. See also, *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46.

³⁸¹ *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538; *County of Fresno v. Lehman* (1991) 229 Cal.App.3d 340.

³⁸² See, e.g., *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1367; *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 172.

of communication.³⁸³ However, section 9(b) provides that *private persons or corporations* may also establish and operate works for those same purposes “upon conditions and under regulations that the city may prescribe...”³⁸⁴ As noted above, the courts have interpreted article XI, section 9 to provide authority to provide public utilities, but not a duty.³⁸⁵ Accordingly, SWRCB provides evidence that there are 6,970 water systems currently operating in California, 5,314 of which are privately owned and operated, and 1,656 of which are public entities.³⁸⁶ And, as many as two million Californians “are served either by the estimated 250,000 to 600,000 private domestic wells, or by water systems serving fewer than 15 service connections.”³⁸⁷ Thus, the provision of drinking water through a PWS is not only not necessary in all cases and in all parts of the State, it is also an activity and function that, where necessary or expedient, can be fulfilled by a private person or corporation.³⁸⁸ It bears repeating that the term “public water system” does not mean a water system owned or operated by a governmental entity; a “public water system” is defined only by the number of connections,³⁸⁹ and is distinguished from a “community water system,” a “noncommunity water system,” a “nontransient noncommunity water system,” a “state small water system,” and a “transient noncommunity water system,” by the size of each system.³⁹⁰ Neither the California SDWA, nor federal LCR, defines these entities any differently whether owned and operated by a public entity or by a private person or corporation.

The claimant challenges SWRCB’s evidence that approximately 75 percent of water systems throughout the state, or 5,314 of 6,970, are privately owned or operated. The claimant states that while it “has no means to verify the accuracy of this data,” the same data provided by SWRCB “demonstrate that public agencies serve 81% of people in the State who have drinking water service.”³⁹¹ The claimant argues that the number of people statewide receiving drinking water from a publicly owned utility “is strong evidence that water service is a governmental function,

³⁸³ California Constitution, article XI, section 9(a).

³⁸⁴ California Constitution, article XI, section 9(b).

³⁸⁵ *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 275.

³⁸⁶ Exhibit C, SWRCB’s Comments on the Test Claim, page 2. See also, Exhibit C, SWRCB’s Comments on the Test Claim, pages 455; 457 [Listing the number of public and private water systems, respectively, governed by each county and water district].

³⁸⁷ Exhibit X, *A Guide for Private Domestic Well Owners*, California State Water Resources Control Board Groundwater Ambient Monitoring and Assessment (GAMA) Program, March 2015, page 6.

³⁸⁸ See California Constitution, article XI, section 9(b); Corporations Code section 14300 et seq.

³⁸⁹ A public water system is defined as having 15 or more service connections, serving 25 or more persons at least 60 days out of the year.

³⁹⁰ Health and Safety Code section 116275(h-k; n-o).

³⁹¹ Exhibit E, Claimant’s Rebuttal Comments, page 5.

more persuasive than the fact that small, privately owned water systems outnumber large, publicly owned systems.”³⁹²

However, the relative number of *persons* served by privately or publicly owned water systems is not persuasive evidence that water service is a governmental function; the majority of persons served by publicly owned water systems is merely a function of the size and capacity of the publicly owned systems, and presumably also a more dense and urbanized ratepayer/customer base.³⁹³ In addition, as many as two million California residents still rely on private domestic wells or water systems with fewer than 15 service connections for their drinking water, rather than a PWS.³⁹⁴ The specific requirements of this test claim order apply beyond local government entities, as discussed above; the requirements apply to any and every PWS that decides to supply water and serves at least one K-12 school. Substantial evidence has been presented that as many as one-third of affected entities are privately held or operated.³⁹⁵

Finally, the claimant argues that the “program” at issue in this Test Claim is not providing water through a PWS at all; rather “[t]he lead testing program in the Permit Amendment carries out a...governmental function of ensuring safe schools.”³⁹⁶ The claimant asserts that the history of the test claim order, including failed SB 334 and the associated veto message, “demonstrates [the order’s] purpose is to provide safe schools, a governmental function, while shifting financial responsibility to local water agencies.”³⁹⁷ The claimant argues that “[h]ad SB 334 become law and schools had to test water for lead to confirm their students had safe, clean drinking water, the schools would have been performing a governmental function subject to reimbursement from the state.”³⁹⁸ The claimant concludes that the required testing “does not lose its characterization as a ‘governmental function of providing services to the public’ under the Supreme Court’s test, merely because the obligation is transferred from schools to water agencies.”³⁹⁹

³⁹² Exhibit E, Claimant’s Rebuttal Comments, page 5.

³⁹³ Exhibit C, SWRCB’s Comments on the Test Claim, page 2.

³⁹⁴ Exhibit C, SWRCB’s Comments on the Test Claim, page 2; Exhibit X, *A Guide for Private Domestic Well Owners*, California State Water Resources Control Board Groundwater Ambient Monitoring and Assessment (GAMA) Program, March 2015, page 6.

³⁹⁵ See Exhibit E, Claimant’s Rebuttal Comments, pages 34-35 [SWRCB Media Release, January 17, 2017 (“The Board is requiring all community water systems to test school drinking water upon request by the school’s officials.”)]; Exhibit C, SWRCB’s Comments on the Test Claim, page 2. See also, Exhibit C, SWRCB’s Comments on the Test Claim, pages 455; 457 [Listing the number of public and private water systems, respectively, governed by each county and water district]

³⁹⁶ Exhibit E, Claimant’s Rebuttal Comments, page 6.

³⁹⁷ Exhibit E, Claimant’s Rebuttal Comments, page 7.

³⁹⁸ Exhibit E, Claimant’s Rebuttal Comments, page 7.

³⁹⁹ Exhibit E, Claimant’s Rebuttal Comments, page 7.

The Commission disagrees. As noted in the Background, SB 334 proposed to amend the “Lead-Safe Schools Protection Act” in the Education Code to require 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 to provide access to free, fresh, and clean drinking water during meal times in the food service areas of the schools under its jurisdiction.⁴⁰⁰ The governor vetoed SB 334, believing that it would impose a reimbursable mandate of “uncertain but possibly very large magnitude.”⁴⁰¹

There is no dispute that school districts, as part of the educational services they provide to students, have an existing affirmative duty to protect students and to keep the school premises safe and welcoming. The courts have found that

A special relationship is formed between a school district and its students resulting in the imposition of an affirmative duty on the school district to take all reasonable steps to protect its students. This affirmative duty arises, in part, based on the compulsory nature of education. (*Rodriguez v. Inglewood Unified School Dist.* (1986) 186 Cal.App.3d 707, 714-715; ... see also Cal.Const., art. 1, § 28, subd. (c) [students have inalienable right to attend safe, secure, and peaceful campuses]; Ed. Code, § 48200 [children between 6 and 18 years subject to compulsory full-time education].) “The right of all students to a school environment fit for learning cannot be questioned. Attendance is mandatory and the aim of all schools is to teach. Teaching and learning cannot take place without the physical and mental well-being of the students. The school premises, in short, must be safe and welcoming.” (*In re William G.* (1985) 40 Cal.3d 550, 563 ...) ⁴⁰²

In addition, existing law requires school districts to furnish and repair school property and to “keep the schoolhouses in repair during the time school is taught therein”⁴⁰³

The test claim order, and similar orders issued by the SWRCB, require a PWS to test for the presence of lead in drinking water fixtures on school property *upon request of a school in its service area*. A PWS has no duty to ensure safe schools, as alleged by the claimant; the schools maintain and exercise that duty with their request for lead testing. The claimant, and other public entities operating water systems that serve K-12 schools, are subject to the test claim order by virtue of their decision to provide water. Like maintaining elevators, providing water is not a *governmental* function, as explained in the above analysis.

⁴⁰⁰ Senate Bill 334 sought to amend Education Code sections 32242 and 38086, and add sections 32241.5, 32246, and 32249 to the Education Code. Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 148 [SB 334, Legislative Counsel’s Digest].

⁴⁰¹ Exhibit E, Claimant’s Rebuttal Comments, page 7 [quoting Governor’s Veto Message, SB 334 (Oct. 9, 2015)].

⁴⁰² *M.W. v. Panama Buena Vista Union School Dist.* (2003) 110 Cal.App.4th 508, 517. (Exhibit D, Finance’s Comments on the Test Claim.)

⁴⁰³ Education Code sections 17565 and 17593.

Therefore, the test claim order does not impose a *governmental* function of providing a service to the public within the meaning of article XIII B, section 6 of the California Constitution.

- c. The cases addressing tort claims for damages, which distinguished between proprietary and governmental functions, and the “Service Duplication Law” support the finding that the test claim order does not impose a *governmental* function of providing a service to the public within the meaning of article XIII B, section 6.

Additionally, a “line of cases decided prior to California’s adoption of the Government Claims Act, and which involved tort claims for damages against local governments,” is consistent with and reinforces the distinction between “governmental” functions or programs that may be the subject of mandate reimbursement, and those functions that are not “governmental” and are not subject to mandate reimbursement. Specifically, SWRCB asserts that local entities act in either a “governmental” or “public” capacity, or a “corporate” or “private” capacity, and that the same distinction used to determine whether sovereign immunity attached to a particular action is consistent with, and provides an analogy to, the concept of a governmental function or “program” in the mandates context.⁴⁰⁴

The “proprietary” versus “governmental” distinction traces back to the common law jurisprudence on the scope of sovereign immunity, prior to the adoption of the Government Claims Act. In order to resolve questions of government liability the courts had been forced to draw a distinction between activities that are *governmental* in nature, and thus entitled to immunity, and those that are more “corporate” or “proprietary” and not so entitled.⁴⁰⁵ The Court described a local government providing water, light, heat, or power as “not acting in its governmental capacity as a sovereign, but...in a proprietary capacity.”⁴⁰⁶ The Court later explained that it was “now a generally accepted proposition that,” when a local government “undertakes to supply...utilities and facilities of urban life...it is, in fact, *engaging in business* upon municipal capital and for municipal purposes.”⁴⁰⁷

The claimant argues, to the contrary, that essentially any service that a local government has authority to provide, or any activity that local government may engage in under its police power, is a local government function, and that the distinction between governmental and “proprietary” or “corporate” activity is no longer a useful determinant: “Water service provided by public

⁴⁰⁴ Exhibit C, SWRCB Comments on the Test Claim, page 12.

⁴⁰⁵ Exhibit C, SWRCB’s Comments on the Test Claim, page 12.

⁴⁰⁶ Exhibit C, SWRCB’s Comments on the Test Claim, page 12 [quoting *City of Pasadena v. Railroad Commission of California* (1920) 183 Cal. 526 (disapproved of on other grounds by *County of Inyo v. Public Utilities Commission* (1980) 26 Cal.3d 154)].

⁴⁰⁷ Exhibit C, SWRCB’s Comments on the Test Claim, page 12 [quoting *In re Bonds of Orosi Public Utility District v. McHuaig* (1925) 196 Cal. 43]. See also, *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 275 [“In supplying water to its inhabitants, a municipality acts in the same capacity as a private corporation engaged in a similar business, and not in its sovereign role.”].

agencies no longer carries the indicia of a proprietary function or private enterprise due to Proposition 218...., which eliminates profit from water service charges.”⁴⁰⁸ The claimant cites authority that it maintains undermines the usefulness of the distinction: in *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* the court held that “[t]he labels ‘governmental function’ and ‘proprietary function’ are of dubious value in terms of legal analysis in any context.”⁴⁰⁹ The court went on to say that the distinction, developed for and applied in government tort claims, was “manifestly unsatisfactory” and “operated both ‘illogically’ and ‘inequitably.’”⁴¹⁰ In *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County*, also cited by the claimant, the court stated broadly that anything local government is authorized to do “constitutes a function of government, and when a municipality acts pursuant to granted authority it acts as government and not as a private entrepreneur.”⁴¹¹

First, the Commission disagrees that Proposition 218 has any bearing on whether water service is a “governmental” function. The claimant argues that the existence of Proposition 218 demonstrates that utility services such as water are “governmental,” not “proprietary” functions, because a local government engaging in utility services does not have the ability to set its rates at a level that will maintain profitability. The claimant assumes, without analysis or evidence, that a private utility supplier would be able to do so. However, the comparison is poor: a private utility entity is hardly an unfettered profit generator, because it is required by law to charge only rates that are just and reasonable, subject to the regulation and control of the Public Utilities Commission.⁴¹² In short, the limitations of Proposition 218, applicable to a publicly owned PWS, even to the extent they may be more stringent than the the limitations applicable to a privately owned utility, do not alter the fundamental nature of the service or function being provided – in this case a function that the city is not required by law to perform – to provide water service.

⁴⁰⁸ Exhibit E, Claimant’s Rebuttal Comments, page 5.

⁴⁰⁹ *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968.

⁴¹⁰ *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968.

⁴¹¹ *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325.

⁴¹² See Public Utilities Code 451; 454; 728 [“Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules, practices, or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix, by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force.”].

More importantly, while the cases cited by the claimant discount the value of the distinction between *governmental* and *proprietary* or *corporate* functions,⁴¹³ they do so on grounds other than the nature of the service provided. In both cases the court is weighing the rights of a utility (in *Northeast Sacramento* an apparent publicly owned utility) to place its service lines along or under a public roadway, against the power of a public agency to force relocation of those service lines at the utility's expense.⁴¹⁴ This makes the applicability of the cited language to the mandates context suspect, at best. And, in each case, the claimant has selectively quoted language that undermines the *governmental* versus *proprietary* distinction, despite contrary language in the same opinion.⁴¹⁵ In addition, *neither* court finds the distinction to be dispositive of the issues.⁴¹⁶

In *Pacific Telephone and Telegraph Co.*, the company sought compensation from the City and the Redevelopment Agency for expenses resulting from the abandonment of a street that carried its service lines, which in turn necessitated relocation of the lines] under two theories including “because the city and the agency were acting in a proprietary capacity.”⁴¹⁷ But the court held that “[a] utility’s right to compensation should depend, not on whether municipal activity is ‘governmental’ or ‘proprietary,’ but on whether compensation has been required by the Legislature [such as under the Community Redevelopment Law], or whether there has been a

⁴¹³ *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968; *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325.

⁴¹⁴ *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 961-961; *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 318.

⁴¹⁵ *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 969 [“Under traditional tests, such enterprises were uniformly treated as being proprietary in nature.”]; *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325 [“...as we have seen a district furnishing a domestic water supply is said to be performing a proprietary act.”].

⁴¹⁶ *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968 [“A utility’s right to compensation should depend, not on whether municipal activity is ‘governmental’ or ‘proprietary,’ but on whether compensation has been required by the Legislature, or whether there has been a constitutionally compensable taking or damaging of a valuable property right.”]; 970 [“PT&T’s contention that it is entitled to compensation on the theory that the city and the agency were acting in a proprietary capacity is without merit.”]; *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325 [To maintain the ‘governmental versus proprietary function’ as a test in the determination of relocation cost allocation is no less specious.”].

⁴¹⁷ *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968.

constitutionally compensable taking or damaging of a valuable property right.”⁴¹⁸ And, the court also noted, in declining to consider *City of Los Angeles v. Los Angeles Gas & Electric Corp.*⁴¹⁹ and *Postal-Tel.Co. v. San Francisco*,⁴²⁰ both of which addressed utilities compelled to relocate service lines to accommodate another, publicly owned utility, that “[u]nder traditional tests,” public utility businesses carried on by a municipality “were uniformly treated as being proprietary in nature.”⁴²¹ *Northeast Sacramento County Sanitation Dist.* addressed a dispute between a water utility district and a sewer utility district, wherein the sanitation district constructed sewers in and under the same roads where water lines had already been laid, which required relocation of the water mains. Each asserted a “governmental” status superior to the other’s “proprietary” interest: the sanitation district argued that it stood in the shoes of the County because the County Board of Supervisors also served as its Board of Directors; while the water district, the court observed, not only held a “favorable position in the area of eminent domain,” but also had been given certain rights and privileges under the Water Code usually held by municipalities.⁴²² However, the court found that neither had superior rights, and the language that the claimant cites, that “whatever local government is authorized to do constitutes a function of government...”⁴²³ is, in context, an observation that between a water district and a sanitation district, neither has a greater claim to a “governmental” purpose or a benefit to the public; and therefore neither has superior rights. The court concluded that “each district when performing the identical type of function – the laying of pipe lines in a public street – should pay its own way,” and therefore since the water district’s lines were first in time, the sanitation district must pay for the necessary relocation.⁴²⁴

And, in 1967, the year after *Northeast Sacramento*, the Fourth District Court of Appeal decided *Glenbrook Development Co.*⁴²⁵ As discussed above, the court in *Glenbrook Development Co.*

⁴¹⁸ *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 968.

⁴¹⁹ 251 U.S. 32.

⁴²⁰ 53 Cal.App. 188.

⁴²¹ *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands* (1977) 75 Cal.App.3d 957, 969 [Declining to consider *City of Los Angeles v. Los Angeles Gas & Electric Corp.*, 251 U.S. 32 and *Postal Tel.-Cable Co. v. San Francisco*, 53 Cal.App. 188, because both involve utility relocations to accommodate another utility].

⁴²² *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 322.

⁴²³ *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325.

⁴²⁴ *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County* (1966) 247 Cal.App.2d 317, 325-326.

⁴²⁵ *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267.

found that that cities have no legal duty to provide water to their citizens, and reiterated and again endorsed the view that “service of water by a city is a proprietary function.”⁴²⁶

Thus, the cases cited by SWRCB support the conclusion that the test claim order does not impose a *governmental* function of providing a service to the public within the meaning of article XIII B, section 6, and the cases cited by the claimant are not relevant to the mandate issue here and are dicta,⁴²⁷ at best.

Finally, the Public Utilities Code contains a provision known as the “Service Duplication Law,” which requires a local government to compensate a privately owned drinking water supplier if the local entity extends service into the service area of the private supplier.⁴²⁸ SWRCB argues that this compensation requirement “amounts to a legislative determination that water service is not a service that is or should be peculiar to local governments.”⁴²⁹ The claimant argues instead that “[i]f anything, the Service Duplication Law recognizes that water service was transitioning from a private to a predominantly governmental function by providing compensation to private utilities for lost business.”⁴³⁰ The claimant asserts that “[n]ow, over 50 years later, that transition is substantially complete.”⁴³¹

The Commission finds that the Service Duplication Law weighs against finding that water service is a governmental function. Public Utilities Code section 1501 provides as follows:

The Legislature recognizes the substantial obligation undertaken by a privately owned public utility which is franchised under the Constitution or by a certificate of public convenience and necessity to provide water service in that the utility must provide facilities to meet the present and prospective needs of those in its service area who may request service. At the same time, the rates that may be charged for water service by a regulated utility are fixed by the Public Utilities Commission at levels which assume that the facilities so installed will remain used and useful in the operation of the utility for a period of time measured by the physical life of such facilities.

The Legislature finds and declares that the potential loss of value of such facilities which may result from the construction and operation by a political subdivision of

⁴²⁶ *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 275 [“In supplying water to its inhabitants, a municipality acts in the same capacity as a private corporation engaged in a similar business, and not in its sovereign role.”].

⁴²⁷ “Dicta” is a legal term which is short for “obiter dictum” and which in Latin means “something said in passing” and is a comment made while delivering a judicial opinion, but it is unnecessary to the decision in the case and therefore not precedential.

⁴²⁸ Exhibit C, SWRCB’s Comments on the Test Claim, page 13 [citing Pub. Util. Code § 1501 et seq.].

⁴²⁹ Exhibit C, SWRCB’s Comments on the Test Claim, page 13.

⁴³⁰ Exhibit E, Claimant’s Rebuttal Comments, page 5.

⁴³¹ Exhibit E, Claimant’s Rebuttal Comments, page 5.

similar or duplicating facilities in the service area of such a private utility often deters such private utility from obtaining a certificate or extending its facilities to provide in many areas a water supply essential to the health and safety of the citizens thereof.

The Legislature further finds and declares that it is necessary for the public health, safety, and welfare that privately owned public utilities regulated by the state be compensated for damages that they may suffer by reason of political subdivisions extending their facilities into the service areas of such privately owned public utilities.⁴³²

Sections 1503 and 1504 contain the operative provisions. In section 1503, the Legislature “finds and declares that whenever a political subdivision constructs facilities to provide or extend water service, or provides or extends such service, to any service area of a private utility with the same type of service, such an act constitutes a taking of the property of the private utility for a public purpose to the extent that the private utility is injured by reason of any of its property employed in providing water service being made inoperative, reduced in value or rendered useless...”⁴³³

Section 1504 requires the “political subdivision” to compensate for the taking: “Just compensation for the property so taken for public purposes shall be as may be mutually agreed by the political subdivision and the private utility or as ascertained and fixed by a court...”⁴³⁴

Section 1504 further provides that if the compensation required is equal to the just compensation value of all the property of the private utility, the political subdivision may provide for the acquisition of all such property (i.e., condemn the property in eminent domain).⁴³⁵

As the Legislative intent language in section 1501 states, the Legislature “recognize[d] the substantial obligation undertaken by a privately owned public utility...” including facilities and equipment, and that the Public Utilities Commission limits the rates that may be charged by such utilities “at levels which assume that the facilities so installed will remain used and useful...” for the life of the equipment or facilities.⁴³⁶ In addition, the Legislature recognized that “the potential loss of value of such facilities...often deters such private utility from...extending its facilities to provide in many areas a water supply essential to the health and safety of the citizens thereof.”⁴³⁷

The intent language shows that the purpose of the Service Duplication Law was to provide a remedy to protect the investment of privately owned utilities providing water service, and to mitigate the deterrent or chilling effect of local government potentially encroaching upon a private water supplier’s service area and customers. And, while sections 1503 and 1504 of the

⁴³² Public Utilities Code section 1501.

⁴³³ Public Utilities Code section 1503.

⁴³⁴ Public Utilities Code section 1504.

⁴³⁵ Public Utilities Code section 1504.

⁴³⁶ Public Utilities Code section 1501.

⁴³⁷ Public Utilities Code section 1501.

Public Utilities Code may have become necessary due to a pattern of municipalities extending duplicative service in certain areas and thus undermining the value of privately owned facilities or equipment, there is no indication that the Legislature intended to convert the provision of water service to a governmental function, as the claimant seems to imply. And indeed the acknowledgement of a deterrent effect and the statutory requirement of compensation suggests that the Legislature believed that private utility companies serving water in areas of the State would continue to be necessary into the future, and for that reason their investments should be protected, lest private entities choose not to offer such services in the first instance. The courts have observed that this is especially important with respect to water utilities.⁴³⁸ Without the Service Duplication Law, infringement on the service area of a private water utility, and the potential loss of business, might not be compensable at all, unless the facilities and equipment were fully acquired by eminent domain.⁴³⁹ The Service Duplication Law, in short, is a Legislative innovation designed to protect the viability of private water utilities, in recognition of their long term necessity to provide water in certain areas of the State.

Accordingly, the line of cases addressing tort claims for damages, which distinguished between proprietary and governmental functions, and the “Service Duplication Law,” support the finding that the test claim order does not impose a *governmental* function of providing a service to the public within the meaning of article XIII B, section 6.

V. Conclusion

Based on the foregoing analysis, the Commission denies this Test Claim and finds that the test claim order does not mandate a new program or higher level of service.

Accordingly, no findings are made on the issue of whether the test claim order results in increased costs mandated by the state within the meaning of Government Code sections 17514 and 17556.

⁴³⁸ *Cucamonga County Water Dist. v. Southwest Water Co.* (1971) 22 Cal.App.3d 245, 259 [“The special importance attached to efficient and economical use and distribution of water in the arid western states, and the provision of the California Constitution that the use of all water is subject to regulation by the State (Cal.Const. Art. XIV) justifies the classification under consideration here.”]

⁴³⁹ *Cucamonga County Water Dist. v. Southwest Water Co.* (1971) 22 Cal.App.3d 245, 259

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 21, 2018, I served the:

- **Draft Proposed Decision, Schedule for Comments, and Notice of Hearing issued December 21, 2018**

Lead Sampling in Schools: Public Water System No. 3710020, 17-TC-03
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 21, 2018 at Sacramento, California.



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

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 12/21/18

Claim Number: 17-TC-03

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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