CALIFORNIA Water Boards

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State Water Resources Control Board

May 4, 2023

VIA DROP BOX

Heather Halsey
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Commission on State Mandates
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COMMENTS OF THE STATE WATER RESOURCES CONTROL BOARD

Draft Proposed Decision *Lead Sampling in Schools: Public Water System No. 3710020*, 17-TC-03-R
On Remand from *City of San Diego v. Commission on State Mandates*, Court of Appeal, Third Appellate District, Case No. C092800; Judgement and Writ of Mandate issued by the Sacramento County Superior Court, Case No. 34-2019-90003169-CU-WM-GDS; Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017
City of San Diego, Claimant

Dear Ms. Halsey:

The State Water Resources Control Board (State Water Board) has reviewed the Draft Proposed Decision dated March 23, 2023. The State Water Board appreciates the careful and thoughtful work of the Commission on State Mandates (Commission) staff. The State Water Board submits the following comments on the Draft Proposed Decision.

I. The City of San Diego Has Not Been Practically Compelled to Comply with the Test Claim Order

The Draft Proposed Decision correctly concludes, and the City of San Diego (City) concedes, that the City is not legally compelled to comply with the lead testing requirements in Permit Amendment No. 2017PA-SCHOOLS (test claim order).[1] This is because state law permits, but does not require, the City to operate a public water system. Nonetheless, the Draft Proposed Decision finds that the City is practically compelled to continue operating its public water system. To support this finding, the Commission relies on two California Supreme Court cases, *City of Sacramento v. State of California*[2] and *Coast Community College Dist. v. Commission on State Mandates.*[3] Neither of these two decisions, nor the California Supreme Court's decision in

[1] Draft Proposed Decision at pp. 48-49.
[2] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.
[3] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 900.

Department of Finance v. Commission on State Mandates (Kern High School Dist.),[4] supports a finding of practical compulsion in this test claim.

Although the Supreme Court has held that federal law may practically compel a state mandate under article XIII B, section 9, subdivision (b), the Supreme Court has refused to extend the practical compulsion theory to a state mandate under article XIII B, section 6. In *City of Sacramento*, the Supreme Court addressed whether the relationship between the Federal Unemployment Tax Act and California's unemployment insurance program practically compelled the state to mandate new federal insurance requirements on local agencies.[5] In holding that it did, the court noted that the exercise of federal power under the cooperative federalism approach can be "coercive on the states and localities in every practical sense."[6] In particular, the court identified double taxation as a particularly severe penalty that would occur absent the state mandate, thus placing California businesses at a serious competitive disadvantage with counterparts in other states.[7] The Supreme Court declined to set forth any particular test for practical compulsion, cautioning that:

> A determination in each case must depend on factors such as the nature and purpose of the federal program; whether its design suggests an intent to coerce; when state and/or local participation began; the penalties, if any, assessed for withdrawal or refusal to participate or comply; and any other legal and practical consequences of nonparticipation, noncompliance, or withdrawal. Always, the courts and Commission must respect the governing principle of article XIII B, section 9, subd. (b): nether state nor local agencies may escape their spending limits when their participation in federal programs is truly voluntary.[8]

In *Kern High School Dist.,* the Supreme Court addressed whether increased notice and agenda requirements for school districts constituted state mandates under article XIII B, section 6.[9] The increased notice and agenda requirements applied to voluntary education programs in which claimants could, but were not required to, participate.[10] Citing the Supreme Court's decision in *City of Sacramento*, claimants argued that even if they were not legally compelled to participate in the underlying education programs, they were compelled as a practical matter to incur the increased costs associated with continued participation in the programs.[11] After observing the parties' positions on the issue, the court ultimately found it "unnecessary to resolve whether our reasoning in *City of Sacramento* [citation] applied with regard to the proper interpretation of the term 'mandate' to include only programs in which local entities are legally compelled to participate."[12] The court concluded that, even assuming the reasoning in *City of Sacramento* applies with regard to state mandate under article XIII B, section 6, claimants had "not faced 'certain and severe...penalties' such as double taxation and other 'draconian' consequences."[13]

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[4] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727.
[5] *City of Sacramento v. State of California*, 50 Cal.3d at p. 58.
[6] *Id.* at p. 74.
[7] *Ibid.*
[8] *Id.* at p. 76.
[9] *Department of Finance v. Commission on State Mandates*, 30 Cal.4th 727.
[10] *Id.* at pp. 745-746.
[11] *Id.* at p. 748.
[12] *Id.* at p. 751
[13] *Ibid.*

The Supreme Court, in *Coast Community College Dist. v. Commission on State Mandates,*[14] again considered extending the practical compulsion theory to a state mandate under article XIII B, section 6. At issue was new community college funding entitlement regulations which, if not followed, could result in the withholding of state funding and potential other penalties. Claimant community college districts alleged that new funding entitlement regulations for community colleges constituted state mandates, either under a legal or practical compulsion theory approach. The court rejected claimants' legal compulsion argument, finding that even in the face of potentially severe budget cuts, claimants were not legally required to comply with the funding requirements.[15] Turning to claimants' practical compulsion argument, the Supreme Court remanded the case back to the Court of Appeal because it had chosen not to address that issue in its decision.[16] In doing so, the Supreme Court reiterated that it had previously declined to resolve the issue of whether practical compulsion was a viable theory under article XIII B, section 6.[17]

By finding that the City is practically compelled to comply with the test claim order, the Commission creates new law in an area where the Supreme Court has expressed caution.[18] As has been contended in the Supreme Court proceedings:

> [A] finding of federal mandate under section nine of article XIII B has a wholly different purpose and effect as compared with a finding that a state mandate under section 6 of that article [and]....although a state mandate may result in reimbursement from the state to a local entity for costs incurred by the local entity, expenditures may result in reimbursement from the state to a local entity for costs incurred by the local entity, expenditures made in order to comply with a federal mandate are excluded from the constitutional spending cap imposed by article XIII B upon any affected state or local entity, because such expenditures are not considered to be an exercise of the state of local authority's discretionary spending authority.[19]

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

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[14] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800.
[15] *Id.* at p. 821.
[16] *Id.* at p. 822. The State Water Board is not aware of a Court of Appeal decision following remand.
[17] *Ibid.*
[18] The Supreme Court's remand in *Coast Community College Dist.* should not be viewed as a tacit endorsement of extending the practical compulsion theory to a mandate under article XIII B, section 6. The remand reflects that claimants' arguments were more appropriately viewed through the lens of practical, as opposed to legal compulsion, and that the Court of Appeal was the appropriate venue to resolve the issue in the first instance. (*Coast Community College Dist. v. Commission on State Mandates* 13 Cal.5th at pp. 821-822.
[19] *Department of Finance v. Commission on State Mandates*, 30 Cal.4th at p. 750.

The voluntary nature of operating a public water system distinguishes this test claim from the facts in the *City of Sacramento*. In the *City of Sacramento*, the local agencies were powerless to avoid the federal unemployment insurance requirements—either the state would mandate those requirements as part of its own certified program, or absent that, the federal requirements would apply directly. And, without the state mandate, local agencies would have been subject to severe and draconian penalties that they could not avoid. In contrast, the City has a true choice whether to operate a public water system, and as such, is not practically compelled to comply with the test claim permit.[20]

II. The City May Impose Fees Under Article XIII D to Comply With the Test Claim Order Requirements

The Draft Proposed Decision concludes that, under *Richmond v. Shasta Community Services Dist.*,[21] a water service fee imposed to address the lead testing requirements would not be a property-related fee within the meaning of article XIII D.[22] Consequently, the Draft Proposed Decision finds the City lacks authority under article XIII D to impose a fee to comply with the test claim order. The State Water Board disagrees with the Commission's application of *Richmond*. Additionally, because the lead testing requirements confer real and direct benefits on all ratepayers, fees may be imposed under article XIII D to cover the costs of permit compliance.

Richmond addressed whether a water district's fee for fire suppression as part of a new service connection fee was subject to the restrictions of article XIII D. In holding that fire suppression fees were not, the Supreme Court distinguished between a water connection fee, imposed by virtue of a voluntary decision by a property owner to obtain service, and a fee for ongoing water service, imposed upon a person as an incident of property ownership.[23] The court explained that:

> A fee for ongoing water service through an existing connection is imposed 'as an incident of property ownership' because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed 'as an incident of property ownership' because it results from the owner's voluntary decision to apply for the connection.[24]

Furthermore, in support of its decision, the Supreme Court noted that would be impossible to comply with article XIII D with respect to assessments for connection fees because the water district would be unable to determine which parcels would be subject to the proposed fee.[25]

The facts that drove the decision in *Richmond* are not present in this test claim. Any increased fee under article XIII D would be imposed on property owners who already receive water service, so this fee would be imposed as an incident of property ownership because it would

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[20] The State Water Board understands and appreciates that the City has provided no evidence that it wishes to transfer the public water system. As discussed further below, remaining in compliance with the City's drinking water permit by complying with the lead testing requirements provides a direct benefit to all ratepayers.

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

[22] Draft Proposed Decision at p. 58.

[23] *Richmond v. Shasta Community Services Dist.*, 32 Cal.4th at p. 427.

[24] *Id.* at p. 427.

[25] *Id.* at p. 428.

require nothing besides normal ownership and use of property.[26] The Draft Proposed Decision erroneously concludes that because lead testing in a school is imposed at the request of the school a fee to recover the cost of that testing would not be a property related fee subject to Proposition 218. But Proposition 218 is not inapplicable simply because *someone* makes a voluntary decision that imposes the costs to be recovered by the fee. The issue is whether the *fee payer* requested the service, as was the case in *Richmond.* And, with respect to compliance with procedural provisions of article XIII D, the City could determine those parcels which would be subject to the proposed fee.[27] Accordingly, the Draft Proposed Decision's reliance on *Richmond* is misplaced.

Additionally, a fee imposed to comply with the lead testing requirements would meet all substantive elements of article XIII D, section 6, subdivision (b). Regarding subdivisions (b)(1) and (b)(2), the City has not claimed that it cannot impose a fee in the correct amount or use the fee for the appropriate purpose. Regarding subdivision (b)(5) of section 6, the City has not alleged, nor can it, that the fee imposed would be for general government services, such as police, fire, ambulance, or library services.

Regarding subdivisions (b)(3) and (b)(4) of section 6, the City claims that that lead testing in schools confers no direct benefit on the ratepayers. The City's argument reflects an unnecessarily constricted, and ultimately unworkable, definition of the service for which fees are being charged. The service at issue here is water service, and the issue is whether the cost for lead testing in schools may be included in those fees. It should not be necessary to demonstrate that every feature of the overall program provides a direct benefit to every customer. If cost is reasonably included as part of a program to provide safe drinking water fees to recover those costs should not be vulnerable to claims that not every household needs every part of the program.

Moreover, and as discussed more thoroughly in the State Water Board's August 13, 2018, comments on the test claim, the additional lead testing requirements functionally extend the Lead and Copper Rule (LCR) by adding additional sampling points that the City can use to optimize its corrosion control. Although the requesting schools may receive a direct benefit in terms of assessing school pipes and fixtures for lead, this does not diminish the additional benefit the water system as a whole receives from the additional lead sampling points. This division of benefits is similar to those under the existing LCR, where the City tests individual residential homes and uses those test results to optimize corrosion control for the larger system. All users with connections to the system benefit from using a select sample of connections, helping to assure provision of safe drinking water through the system. Although individual residents may derive additional benefits from lead testing in their homes, the City appears comfortable assessing property-related fees under article XIII D for compliance with the LCR.[28]

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[26] *Richmond v. Shasta Community Services Dist.,* 32 Cal.4th at p. 427.

[27] The State Water Board recognizes that because the performance of lead testing depends on a school's testing request, there may be some uncertainty regarding the amount of fees to charge. The State Water Board is not aware of any specific challenges this would create that are different than those inherent in forecasting all costs associated with operating and maintaining a large public water system.

[28] The State Water Board's August 13, 2018 comments also identify other benefits that the lead testing confers on ratepayers, such as maintaining and possibly improving home values, and ensuring that school sites remains safe places for community functions (meetings, sports activities, etc.) that benefit the larger community. (State Water Board Comments on Test Claim (Aug. 13, 2018) at p. 16).)

Additionally, a private entity or local government cannot operate a public water system without a permit from the State Water Board.[29] The permit is subject to revocation or penalties for failure to comply.[30] Thus, to continue to operate its public water system, the City must comply with the lead testing requirement to provide drinking water service within its service area. Compliance with permit conditions benefits all customers of the City because compliance is necessary for the public water system to continue operating as a utility providing drinking water service to any of the customers. Therefore, drinking water fees may spread the cost of compliance among all customers. There is no requirement that when drinking water requirements are set to protect sensitive groups such as children that the costs of compliance be imposed solely on households, businesses and public facilities that include or serve those sensitive groups. Because permit compliance is a condition necessary to enter or continue in the business of providing drinking water service, all customers benefit from the utility's compliance with permit requirements. Both public entities like the City and the privately-owned utilities that would step in if a public entity decided to cease providing drinking water service may appropriately include costs of compliance in the charges to its customers.

Finally, a fee imposed to comply with the test claim order would not be considered a tax under article XIII C of the Constitution. Article XIII C contains seven exceptions to its voter approval requirements, including "[a]ssessments and property related-related fees imposed in accordance with the provisions of Article XIII D."[31] As discussed above, a fee imposed to comply with the test claim order would be a property-related fee under article XIII D, and therefore, fall within the aforementioned exemption.

III. Conclusion

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

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

Very Truly Yours,

David Rice
Senior Staff Counsel

cc: Service List via CSM Dropbox

[29] Health & Saf. Code, § 116525, subd. (a).
[30] *Id.*, §§ 116625, 116650.
[31] Cal. Const., art. XIII C, § 1(3)(7).

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 May 5, 2023, I served the:

- **Claimant's Comments on the Draft Proposed Decision filed May 4, 2023**
- **State Water Board's Comments on the Draft Proposed Decision filed May 4, 2023**

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

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 5, 2023 at Sacramento, California.

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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 4/26/23

Claim Number: 17-TC-03-R

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

Claimant: City of San Diego

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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