STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

March 20, 2025

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

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

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

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

Dear Mr. Hill and Mr. Palmucci:

The Revised Proposed Decision for the above-captioned matter is enclosed for your review.

**Hearing:** This matter is set for hearing on **Friday, March 28, 2025, at 10:00 a.m., at Park Tower, 980 9th Street, Second Floor Conference Room, Sacramento, California, 95814 and via Zoom**.

The Commission is committed to ensuring that its public meetings are accessible to the public and that the public has the opportunity to observe the meeting and to participate by providing written and verbal comment on Commission matters whether they are physically appearing at the in-person meeting location or participating via Zoom. If you want to speak during the hearing and you are in-person, please come to the table for the swearing in and to speak when your item is up for hearing. If you are participating via Zoom, you must use the "Raise Hand" feature in order for our moderators to know you need to be unmuted.

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**Testimony at the Commission Hearing**: If you plan to address the Commission on an agenda item, please notify the Commission Office not later than noon on the Tuesday prior to the hearing, March 25, 2025. Please also include the names of the people who will be speaking for inclusion on the witness list and the names and email addresses of the people who will be speaking remotely to receive a hearing panelist link in Zoom. When calling or emailing, identify the item you want to testify on and the entity you represent. The Commission Chairperson reserves the right to impose time limits on presentations as may be necessary to complete the agenda.

**Time to File Written Comments**: If you plan to file any written document, please note that Commission staff will include written comments filed at least 15 days in advance of the hearing in the Commissioners' hearing binders, a copy of which is available for public viewing at the Commission meeting. Additionally, written comments filed more than five days in advance of the meeting shall be included in the Commission's meeting binders, if feasible, or shall be provided to the Commission when the item is called, unless otherwise agreed by the Commission or the executive director. (Cal. Code Regs., tit. 2, § 1181.10(b)(1)(A-B).

However, comments filed less than five days in advance of the meeting, the commenter shall provide 12 copies to Commission staff at the in-person meeting. In the case of participation by teleconference, a PDF copy shall be filed via the Commission's dropbox at https://www.csm.ca.gov/dropbox.shtml at least 24 hours prior to the meeting. Commission staff shall provide copies of the comments to the Commission and shall place a copy on a table for public review when the item is called or, in the case of participation via teleconference, shall provide an electronic copy to the Commission and post a copy on the Commission's website, and may share the document with the Commission and the public using the "share screen" function. (Cal. Code Regs., tit. 2, § 1181.10(b)(1)(C)).

**Postponement**: If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

**Special Accommodations**: For any special accommodations such as a sign language interpreter, an assistive listening device, materials in an alternative format, or any other accommodations, please contact the Commission Office at least five to seven *working* days prior to the meeting.

Very truly yours,

Juliana F. Gmur
Executive Director

Hearing Date: March 28, 2025
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# ITEM 2

# TEST CLAIM

# REVISED PROPOSED DECISION

On Remand from *City of San Diego v. Commission on State Mandates*, Sacramento County Superior Court, Case No. 24WM000056

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

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

17-TC-03-R2

City of San Diego, Claimant

## EXECUTIVE SUMMARY

### Revised Proposed Decision

This revised Proposed Decision addresses the late comments filed by the claimant and the Water Board on March 13 and 14, 2025, on the Proposed Decision, respectively. Changes made to the Proposed Decision are in underline and strikeout.

### Overview

This Test Claim alleges reimbursable state-mandated activities arising from Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017 *which is applicable to the City of San Diego only*. This amendment applies to a domestic water supply permit issued to the City of San Diego (claimant) and requires the claimant's public water system,[1] beginning January 18, 2017, to submit to the State Water Resources Control Board's (State Water Board's) Division of Drinking Water a list of all K-12 schools it serves and to sample and test drinking water in K-12 schools for the presence of lead, upon the request of an authorized representative of the school made prior to November 1, 2019.

This Test Claim has been previously heard by the Commission and denied twice on separate grounds. The claimant successfully litigated both prior Decisions, resulting in final court decisions concluding the test claim order mandates a new program or higher level of service. On April 29, 2022, the Third District Court of Appeal issued an

[1] Public water systems are also known as "community water systems" which are public water systems that supply water to the same population year-round. (See Health and Safety Code section 116275(i).) These two terms are used interchangeably throughout the record.

unpublished opinion, finding that the test claim order imposes a new program or higher level of service in that "the provision of drinking water to schools is a peculiarly governmental function and the mandated testing of this water for lead is plainly a service to the public."[2] On October 31, 2024, the Sacramento County Superior Court entered judgment holding that the claimant was practically compelled and, thus, mandated by the state to comply with the test claim order.[3]

Thus, the only remaining issue is whether the test claim order imposes costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514, or whether the exception in Government Code section 17556(d) applies. Government Code section 17556(d) provides that that the Commission shall not find costs mandated by the state if it finds that the "local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

As described herein, staff finds that Government Code section 17556(d) does not apply in this case, that the test claim order imposes costs mandated by the state, and therefore the test claim order imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6. Staff recommends that the Commission approve this Test Claim.

## Procedural History

The State Water Board issued 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017. The claimant filed the Test Claim on January 11, 2018.[4] The State Water Board and the Department of Finance (Finance) filed comments on the Test Claim on August 13, 2018.[5] The claimant filed rebuttal comments on November 9, 2018.[6] On December 21, 2018, Commission staff issued the Draft Proposed Decision.[7] On January 11, 2019, the State Water Board and the claimant filed comments on the 2018 Draft Proposed Decision.[8] The Commission heard the Test Claim on March 22, 2019 and voted 6-1 to deny the claim on the ground that the test claim permit did not impose a new program or higher level of service.

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[2] Exhibit K (2), *City of San Diego v. Commission on State Mandates,* Unpublished Opinion (Apr. 29, 2022, Case No. C092800), page 13.

[3] Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056), pages 12-13.

[4] Exhibit A, Test Claim, page 1.

[5] Exhibit B, State Water Board's Comments on the Test Claim; Exhibit C, Finance's Comments on the Test Claim.

[6] Exhibit D, Claimant's Rebuttal Comments.

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

[8] Exhibit F, State Water Board's Comments on the 2018 Draft Proposed Decision; Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision.

On June 20, 2019, the claimant filed a petition for writ of mandate in Sacramento County Superior Court, and on July 30, 2020, the court denied the petition. The claimant appealed, and on April 29, 2022, the Third District Court of Appeal reversed the judgment issued by the superior court, finding that the test claim order imposes a new program or higher level of service.[9] The Court of Appeal directed the superior court to remand the matter to the Commission for further proceedings consistent with the appellate court's April 29, 2022 unpublished opinion. On November 16, 2022, the superior court issued a judgment and writ, commanding the Commission to set aside its March 22, 2019 decision denying the Test Claim and to consider in the first instance whether reimbursement is required.

On January 27, 2023, the Commission adopted the Order to Set Aside its March 22, 2019 Decision. On March 23, 2023, Commission staff issued the Draft Proposed Decision, which addressed the state mandate and fee authority issue.[10] On May 4, 2023, the claimant and the State Water Board filed comments on the 2023 Draft Proposed Decision.[11]

On December 1, 2023 the Commission heard the Test Claim on Remand and voted 4-2 to deny the claim on the ground the test claim order did not impose a state-mandated program.

On March 26, 2024, the claimant filed a petition for writ of mandate in Sacramento County Superior Court challenging the December 1, 2023 Decision. On October 31, 2024, the Sacramento County Superior Court issued a judgment, order, and writ, finding that the claimant was mandated by the state based on practical compulsion to comply with the test claim order, and commanding the Commission to set aside its December 1, 2023 Decision and to consider in the first instance whether reimbursement is required.[12] On January 24, 2025, the Commission adopted the Order to Set Aside its December 1, 2023 Decision.

This Proposed Decision was issued on February 26, 2025 for the March 28, 2025 Commission hearing. <u>On March 13, 2025, the claimant filed comments on the Proposed Decision.[13] On March 14, 2025, the State Water Board filed comments on the Proposed Decision.[14] On March 20, 2025, Commission staff issued the Revised Proposed Decision.</u>

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[9] Exhibit K (2), *City of San Diego v. Commission on State Mandates,* Unpublished Opinion (Apr. 29, 2022, Case No. C092800).

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

[11] Exhibit I, Claimant's Comments on the 2023 Draft Proposed Decision; Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision.

[12] Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056).

<u>[13] Exhibit L, Claimant's Comments on the Proposed Decision.</u>

<u>[14] Exhibit M, State Water Board's Comments on the Proposed Decision.</u>

## Commission Responsibilities

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

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[15]

## 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."[16]<br><br>Government Code section 17557(e) requires a test claim to be "submitted on or before June 30 following a fiscal year in order to establish eligibility for | *Timely filed with a potential period of reimbursement beginning January 18, 2017* – The effective date of the test claim order is January 18, 2017.[17] The claimant filed the Test Claim on January 11, 2018, less than 12 months after the effective date of the Order.[18] Therefore, the Test Claim is timely filed.<br><br>Because the Test Claim was filed on January 11, 2018, the potential period of reimbursement under |

[15] *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.

[16] Government Code section 17551(c).

[17] Exhibit A, Test Claim, page 104 (test claim order).

[18] Exhibit A, Test Claim, page 1.

| Issue | Description | Staff Recommendation |
|---|---|---|
| | reimbursement for that fiscal year." | Government Code section 17557 begins on July 1, 2016. However, since the test claim permit has a later effective date, the potential period of reimbursement for this claim begins on the permit's effective date, or January 18, 2017. |
| Does the test claim order impose a state-mandated program on the claimant? | On October 31, 2024, the Sacramento County Superior Court entered judgment holding that the claimant was practically compelled and, thus, mandated by the state to comply with the test claim order.[19] | *Yes* – By order of the Sacramento County Superior Court, the test claim order imposes a state-mandated program within the meaning of article XIII B, section 6. |
| Does the test claim order impose a new program or higher level of service? | On April 29, 2022, the Third District Court of Appeal issued an unpublished opinion in *City of San Diego v. Commission on State Mandates*, Court of Appeal, Third Appellate District, Case No. C092800, finding that the test claim order imposes a new program or higher level of service.[20] | *Yes* – by order of the Third District Court of Appeal, the test claim order imposes a new program or higher level of service in that "the provision of drinking water to schools is a peculiarly governmental function and the mandated testing of this water for lead is plainly a service to the public."[21] |
| Does the test claim order result in increased costs mandated by the state? | Article XIII B, section 6 of the California Constitution and Government Code section 17561(a) require reimbursement for all costs | *Yes* – The evidence in the record shows that the claimant's costs to comply |

[19] Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056), pages 12-13.

[20] Exhibit K (2), *City of San Diego v. Commission on State Mandates,* Unpublished Opinion (Apr. 29, 2022, Case No. C092800), page 13.

[21] Exhibit K (2), *City of San Diego v. Commission on State Mandates* Unpublished Opinion (Apr. 29, 2022, Case No. C092800), page 13.

| Issue | Description | Staff Recommendation |
|---|---|---|
| | mandated by the state. Government Code section 17564(a) requires that no payment be made unless the claim exceeds $1,000. In addition, a finding of costs mandated by the state means that none of the exceptions identified in Government Code section 17556 apply.[22]<br><br>The State Water Board and the Department of Finance contend that lead testing in K-12 schools provides a direct benefit to the water system as a whole and each ratepayer, and thus, the claimant may set water rates on property owners, including the schools that request the service, sufficient to pay for the costs of compliance with the permit amendment within the meaning of Government Code section 17556(d).[23]<br><br>The claimant contends that increasing property-related fees on schools is prohibited by the test claim order and would violate Propositions 218 and 26 if imposed on the remaining customers.<br><br>Government Code section 17556(d) provides that the | with the mandated test claim activities exceed $1,000.[24]<br><br>Staff finds that there are costs mandated by the state for the mandated activities and that the claimant does not have fee authority sufficient as a matter of law to pay for these activities within the meaning of Government Code section 17556(d).<br><br>The claimant does not have the authority to impose fees on the schools requesting lead testing to cover the increased costs to comply with the new state-mandated activities, either as a separate fee or by increasing existing water rates on all customers, including the schools receiving the service. This is based on the plain language of the test claim order and other documents issued by the State Water Board at the time the test claim order was adopted indicating that the claimant would pay for the services |

[22] Government Code section 17556.

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

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

| Issue | Description | Staff Recommendation |
|---|---|---|
| | Commission shall not find costs mandated by the state if it finds that, as a matter of law, the "local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." | and the services would be "free" to schools.[25]<br><br>In addition, the claimant does not have the authority to impose increased rates on the remaining water customers for the costs of the mandate. Although a property-related fee would satisfy article XIII D, sections 2 and 6(b)(4), the fee would violate article XIII D, section 6(b)(3) of the California Constitution (Proposition 218) as not proportional to the service attributable to each parcel since the schools cannot be charged, and makes the remaining customers subsidize the cost of the new mandated activities, which the courts have found to violate Proposition 218.[26]<br><br>Additionally, article XIII C (Proposition 26) prohibits the claimant from charging new or increased fees for the mandated activities on all ratepayers. |

[25] Exhibit A, Test Claim, page 107 (test claim order); Exhibit A, Test Claim, pages 115-116 (State Water Board's Media Release); Exhibit A, Test Claim, page 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).

[26] *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 937; *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493, 1505-1506.

## Staff Analysis

### A. This Test Claim Is Timely Filed Pursuant to Government Code Section 17551 and Has a Potential Period of Reimbursement Beginning January 18, 2017.

Government Code section 17551 states that local agency and school district test claims must be filed "not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later."[27] Section 1183.1(c) of the Commission's regulations defines 12 months as 365 days.[28]

The effective date of the order is January 18, 2017.[29] The claimant filed the Test Claim on January 11, 2018, less than 12 months after the effective date of the order.[30] Therefore, the Test Claim is timely filed.

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

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

This Test Claim alleges new state-mandated activities and costs arising from a permit amendment issued by the State Water Resources Control Board (State Water Board) to the City of San Diego's public water system, Order No. 2017PA-SCHOOLS. The test claim order is *applicable to the City of San Diego only*, and is one of over 1,100 permit amendments simultaneously issued to privately- and publicly-owned public water systems.[31,]

The test claim order is an amendment to the claimant's domestic water supply permit allowing its public water system to continue to provide drinking water. Under existing law, public water systems have to comply with the state and federal Lead and Copper Rule to protect public health by minimizing lead and copper levels in drinking water,

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[27] Government Code section 17551(c).

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

[29] Exhibit A, Test Claim, page 104 (test claim order).

[30] Exhibit A, Test Claim, page 1.

[31] This is unusual in that, generally, a test claim functions similarly to a class action and there are approximately 1,200 public water systems subject to the same exact requirements in separate amendments to their own permits, but no test claims were filed on those other permits. This Decision applies only to the San Diego permit.

primarily by reducing water corrosivity.[32] To determine the corrosivity of drinking water, the Lead and Copper Rule requires routine monitoring at kitchen or bathroom taps of residences and other buildings based on lead and copper action levels established by U.S. EPA.[33] At the time the test claim order was adopted, monitoring the taps at K-12 schools was not required by the Lead and Copper Rule.[34]

Beginning January 18, 2017, the test claim order requires the claimant to provide the State Water Board, 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, and upon a school's request made by November 1, 2019, *and at no charge to the school*, to 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). Beginning January 1, 2018, however, any lead testing conducted by the claimant on those public schools constructed or modernized before January 1, 2010, that did not request testing before January 1, 2018, is required by Health and Safety Code section 116227, and not by the test claim order.

This Test Claim has been previously heard by the Commission and denied twice on separate grounds. The claimant successfully litigated both prior Decisions, resulting in final court decisions concluding the test claim order mandates a new program or higher level of service.[35]

Thus, the only remaining issue is whether the test claim order imposes costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514, or whether the exception in Government Code section 17556(d) applies.

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[32] Exhibit A, Test Claim, pages 105-108 (test claim order); *Williams v. Moulton Niguel Water Dist.* (2018) 22 Cal.App.5th 1198, 1202, citing to Code of Federal Regulations, title 40, sections 141.80 and 141.81(b); Health and Safety Code sections 116525, 116271(k); California Code of Regulations, title 22, section 64670 et seq.

[33] *Williams v. Moulton Niguel Water Dist.* (2018) 22 Cal.App.5th 1198, 1203.

[34] Since 2021, federal Lead and Copper Rule regulations have required public water systems to collect samples from schools and childcare facilities within their distribution system that were constructed before 2014. (Code of Federal Regulations, title 40, section 141.92 (86 Fed. Reg. 4306, eff. Jan. 15, 2021).)

[35] Exhibit K (2), *City of San Diego v. Commission on State Mandates,* Unpublished Opinion (Apr. 29, 2022, Case No. C092800), page 13; Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056), pages 12-13.

The claimant's increased costs to comply with the mandated activities exceed $1,000 and, thus, satisfy the requirements in Government Code sections 17514 and 17564.[36]

Government Code section 17556(d) provides, however, that the Commission shall not find costs mandated by the state if the "local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." The California Supreme Court upheld the constitutionality of Government Code section 17556(d) in *County of Fresno,* finding that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes.[37] Thus, where the claimant has "authority, i.e., the right or power, to levy fees sufficient to cover the costs" of a state mandated program, reimbursement is not required, notwithstanding other factors that may make the exercise of that authority impractical or undesirable.[38]

The claimant generally has the statutory authority to collect property-related fees from its customers to provide water under the California Safe Drinking Water Act, and such fees include those costs under the Lead and Copper Rule.[39] However, the claimant contends that it does not have the authority to charge increased fees on the schools requesting service pursuant to the plain language of the test claim order, and is prohibited from imposing fees on the remaining water customers to cover the costs of the mandated activities pursuant to Propositions 218 and 26 (which added articles XIII C and XIII D to the California Constitution). The claimant argues that lead testing at schools is triggered by voluntary requests of the schools, is not incident to property ownership and is, thus, not a property-related service; the services required by the test claim order are not immediately available to customers other than the requesting schools; and any fee would exceed the proportional cost of the service attributable to each parcel and, thus, article XIII D, sections 2 and 6(b)(3) and (4) (Proposition 218) cannot be satisfied, and any fee would be considered a tax under article XIII C (Proposition 26).[40]

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[36] Exhibit A, Test Claim, pages 79 (Declaration of Rex Ragucos), 2767-2768.

[37] *County of Fresno v. State of California* (1990) 53 Cal.3d. 482, 487.

[38] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Connell v. Superior Court* (1997) 59 Cal.App.4th 382; 401-402; *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 564, citing to *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

[39] Health and Safety Code section 116590(b) ("A public water system may collect a fee from its customers to recover the fees paid by the public water system pursuant to this chapter [California Safe Drinking Water Act]."); Exhibit A, Test Claim, page 70 (Declaration of Doug Campbell, Senior Chemist of the Public Utilities Department, City of San Diego).

[40] Exhibit A, Test Claim, page 54; Exhibit D, Claimant's Rebuttal Comments, page 11.

The State Water Board contends – and Finance agrees – that Proposition 218 does not prevent the claimant from increasing water rates on property owners, including the schools receiving the service under the mandate, because lead testing confers a "direct benefit" to the water system as a whole and, by extension, each ratepayer. [41] Specifically, the State Water Board alleges that the mandated program "functionally extends" the Lead and Copper Rule and helps to maintain and possibly improve property values.[42]

Staff finds that the claimant does not have the authority to impose fees sufficient to cover the costs of the mandated activities pursuant to Government Code section 17556(d) and, thus, there are costs mandated by the state.

~~Pursuant to the plain language of the test claim order,~~ Staff finds the claimant does not have the authority to impose fees on schools requesting lead testing to cover the increased costs to comply with the new state-mandated activities, either as a separate fee or by increasing existing water rates on all customers, including the schools receiving the service.~~43~~ The test claim order states that the water system (i.e., the claimant) is responsible for all sampling and reporting costs as follows:

> 5. The water system is responsible for the following costs:
>
> a. Laboratory fees for all lead samples and reporting of the results to DDW and the school, and all laboratory coordination and instruction.
>
> b. All water system staff time dedicated to the tasks required by the provisions in this permit amendment.[44]

The State Water Board urges the Commission to interpret this language as prohibiting the claimant from charging the schools receiving service a *separate* fee for all costs of the service - but *not* prohibiting the claimant from increasing existing water rates on all customers, including the schools receiving the service (which would amount to roughly 50 cents per customer).[45] The State Water Board argues that the test claim order does not address "exactly how and with what fees and process the water system should pay for the costs."[46] In addition, the State Water Board's guidance and Frequently Asked

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[41] Exhibit B, State Water Board's Comments on the Test Claim, page 16; Exhibit C, Finance's Comments on the Test Claim, page 2; Exhibit M, State Water Board's Comments on the Proposed Decision, page 2.

[42] Exhibit B, State Water Board's Comments on the Test Claim, page 16.

~~[43] Exhibit A, Test Claim, page 107 (test claim order), 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).~~

[44] Exhibit A, Test Claim, page 107 (test claim order).

[45] Exhibit M, State Water Board's Comments on the Proposed Decision, page 2.

[46] Exhibit M, State Water Board's Comments on the Proposed Decision, page 3.

Questions documents do not address the question of what fees or other revenues the community water system may use to cover the costs.[47] Thus, there is no prohibition in the test claim order from charging schools the same rates as other customers for the increased costs. The State Water Board also submits a declaration from its deputy director, who worked on the language of the test claim order, stating that it was never the intent to exempt a school receiving lead testing from paying all normal rates, including any incremental charge associated with costs of complying with the Permit Amendment requirements.[48]

Based on the plain language of the test claim order and other State Water Board documents issued at the time the test claim order as adopted, staff disagrees with the State Water Boards' interpretation. Under the rules of statutory construction, the courts have explained that the primary task is to determine the Legislature's intent, or in this case the State Water Board's intent when adopting the test claim order.[49] The first step in the process is to examine the plain language, "which is the best indicator of legislative intent."[50] When interpreting a statute or executive order, courts generally give words their usual and ordinary meaning. If there is no ambiguity in the language, "we presume the lawmakers meant what they said, and we apply the term or phrase in accordance with that meaning. . . If, however, the statutory terms are ambiguous, then we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history."[51] Reports of legislative committees and analysts are useful indicators of legislative intent, but material showing the motive or understanding of the bill's author or other interested persons is generally not considered.[52] In addition, the courts have held that an administrative agency's interpretation of a statute that it routinely enforces is entitled to great weight. Ultimately, however, statutory construction is a matter of law and administrative interpretations "must be rejected where contrary to statutory intent."[53]

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[47] Exhibit M, State Water Board's Comments on the Proposed Decision, page 3.

[48] Exhibit M, State Water Board's Comments on the Proposed Decision, page 8 (Declaration of Darrin Polhemus).

[49] *McHugh v. Protective Life Insurance Co.* (2021) 12 Cal.5th 213, 227.

[50] *Joannou v. City of Rancho Palos Verdes* (2013) 219 Cal.App.4th 746, 752; *McHugh v. Protective Life Insurance Co.* (2021) 12 Cal.5th 213, 227.

[51] *Almond Alliance of California v. California Fish and Game Commission* (2022) 79 Cal.App.5th 337, 353.

[52] *Joannou v. City of Rancho Palos Verdes* (2013) 219 Cal.App.4th 746, 759; *McHugh v. Protective Life Insurance Co.* (2021) 12 Cal.5th 213, 241 (Courts will review the author's statements when the statements are part of committee materials and are relayed not as personal views, but as part of the Legislature's consideration of the bill.).

[53] *Skidgel v. California Unemployment Insurance Appeals Bd.* (2021) 12 Cal.5th 1, 10-11.

Here, the plain language of the test claim order states that the claimant is responsible for the costs of staff time under the order, and for "***all***" laboratory and reporting costs.[54] There is no language in the test claim order indicating that the schools would have to pay for this service or pay a portion of the costs of this service. The courts have held that "[i]f the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute)."[55]

However, in light of the interpretation by the State Water Board that this language does not prohibit the claimant from increasing fees on all rate payers including the schools receiving the service, and assuming there may be ambiguity in the plain language of the test claim order, the extrinsic evidence still supports the interpretation that the claimant has no authority to shift the costs of the mandated program to the schools receiving the mandated service. The following documents issued by the State Water Board at the time the test claim order was adopted state the following:

- On January 17, 2017 (the day before the effective date of test claim order),[56] the State Water Board issued a media release entitled "California Water Systems to Provide Lead Testing for Schools."[57] The media release contains the following statements:

  "In an effort to further safeguard California's water quality, K-12 schools in the state can receive ***free*** testing for lead under a new initiative announced today by the State Water Resources Control Board."[58]

  "The community water systems are responsible for the costs associated with collecting drinking water samples, analyzing them and reporting results through this new program."[59]

  "The Board's new requirement ensures schools that want lead testing can receive it for ***free***. The Board consulted with water systems and schools in developing the requirement."[60]

[54] Exhibit A, Test Claim, page 107 (test claim order).

[55] *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.

[56] Exhibit A, Test Claim, page 108 (test claim order).

[57] Exhibit A, Test Claim, page 115 (State Water Board's Media Release).

[58] Exhibit A, Test Claim, page 115 (State Water Board's Media Release), emphasis added.

[59] Exhibit A, Test Claim, page 116 (State Water Board's Media Release).

[60] Exhibit A, Test Claim, page 116 (State Water Board's Media Release), emphasis added.

- The State Water Board's "Frequently Asked Questions" document explains that the community water system that serves the school is responsible for ***all*** costs associated with collecting, analyzing, and reporting the results, as follows:[61]

> **6. Who pays for lead testing of drinking water in California schools?**
>
> The community water system that serves the school is responsible for ***all*** costs associated with collecting, analyzing, and reporting drinking water samples for lead testing at up to five locations at each school, and is required to meet with the authorized school representative to develop a sampling plan and review the sampling results. The community water system will *not* pay for any maintenance or corrections needed at the school if elevated lead levels are found in the drinking water, but is required to conduct repeat sampling at the school to confirm elevated lead levels and the effectiveness of any corrective action taken by the school.[62]

Thus, these documents support the interpretation that the lead testing services provided to schools by the claimant would be paid for by the claimant and although the State Water Board now contends that the intent of the test claim order was not to exempt a school receiving lead testing from paying all normal rates, including any incremental charge associated with the costs of complying with the test claim order, the plain language of the order and documents issued by the State Water Board state the opposite; that the service would be free.[63]

Accordingly, staff finds that increasing the existing water fees imposed on the schools requesting lead testing or imposing a separate fee on those schools violates the test claim order and the claimant has no authority to impose fees on these schools within the meaning of Government Code section 17556(d).

In addition, the claimant does not have the authority to impose fees on the remaining customers to cover the increased costs of the new state-mandated activities. Although such a fee would satisfy article XIII D, sections 2 and 6(b)(4), the fee would violate article XIII D, section 6(b)(3) of the California Constitution (Proposition 218) as not proportional to the service attributable to each parcel since the schools cannot be charged, and makes the remaining customers subsidize the cost of the new mandated activities. In addition, a levy would not fall under any exception to the definition of "taxes" in article XIII C (Proposition 26). In this respect, the Proposed Decision makes the following findings:

- The requirements mandated by the test claim order are conditions imposed by the state for the claimant to *continue* providing water service to its existing

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[61] Exhibit A, Test Claim, page 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*), emphasis added.

[62] Exhibit A, Test Claim, page 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*), emphasis added.

[63] Exhibit M, State Water Board's Comments on the Proposed Decision, page 8.

customers.[64] Health and Safety Code section 116525(a) provides that "No person shall operate a public water system unless he or she first submits an application to the department and receives a permit as provided in this chapter." And the Sacramento County Superior Court found that "Because the City operates its water system under a permit from the Board, it would not be able to continue to do so if its permit was suspended or revoked."[65] The test claim order applies to the "schools that are served water through a utility meter by July 1, 2017" and request testing and, therefore, the mandate is to test for lead in the schools already connected to the water distribution system.[66]

Although a school has a choice to request lead testing under the test claim order, its request is not based on a business decision of the school. The dual purpose of the test claim order is to "further safeguard California's water quality" generally and to "ensure we are continuing to protect our most vulnerable populations."[67] As indicated above, the schools that request service cannot be charged for these activities. And the mandated activities are not triggered by a voluntary decision of the other property owners. Thus, the *Richmond* and *Apartment Assn*. cases, which held that fees triggered by a voluntary action of the property owner are not property-related fees, are distinguishable and do not apply here.[68] Accordingly, any fee would satisfy the requirements of a property-related fee within the meaning of article XIII D, section 2.[69]

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[64] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 145 (Governor's Veto Message); see also, Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision, pages 5-6 ("The permit is subject to revocation or penalties for failure to comply. . . . 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.").

[65] Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056), page 9 ("Because the City operates its water system under a permit from the Board, it would not be able to continue to do so if its permit was suspended or revoked. (See Health & Saf. Code, § 116525, subd. (a).) . . . No city could reasonably ignore such an obligation [imposed by the test claim order] and roll the dice on whether 1.3 million residents will have their water service disrupted.").

[66] Exhibit A, Test Claim, page 105 (Test claim order).

[67] Exhibit A, Test Claim, page 115 (Media Release); see also, pages 104-105 (test claim order, paragraphs 4-6).

[68] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal. 4th 409, 426–427; *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 839-840.

[69] *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 216; *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 426–427; *Wolstoncroft v. County of Yolo* (2021) 68 Cal.App.5th 327, 344.

- A fee imposed on the claimant's remaining customers would satisfy article XIII D, section 6(b)(4), which requires that "No fee or charge may be imposed for a service *unless that service is actually used by, or immediately available to, the owner of the property in question*." Continued water service provided by the claimant is immediately available to and is used by the claimant's customers.[70] ~~In addition, the claimant's declarant states that in all instances where remediation was performed at the schools that had lead exceedances, follow-up sampling showed the source of the lead was removed and no problems to the city's water system were identified.~~[71] As the Sacramento County Superior Court found, "the City will incur costs to comply with the new lead testing requirement, and it has no reasonable alternative to continuing its water service operations in compliance with its permit. Simply ceasing water service is not a reasonable alternative given the critical importance of water service."[72] Thus, the service provided by the test claim order provides a benefit to all of its customers.

- However, a property-related fee cannot be imposed on the remaining customers and not on the schools without violating article XIII D, section 6(b)(3), which requires that the amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel. This requirement "ensures that the aggregate fee collected on *all* parcels is *distributed among those parcels in proportion to the cost of service for each parcel*."[73]

  Here, the cost of the overall service of providing water is higher because of the additional and new required activities mandated by the state.[74] These activities are performed *in addition* to the prior requirements imposed by the Lead and Copper Rule. As indicated in the test claim order, the claimant may not use any lead samples collected under the order to satisfy federal or state Lead and Copper Rule requirements.[75] The State Water Board nevertheless asserts that

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[70] See, for example, *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493, 1516, where the court held as follows: "Water service fees to fund the costs of capital-intensive operations to produce more or new water, such as the recycling plant at issue in this case, do not contravene article XIII, section 6, subdivision (b)(4) of the Constitution. While that provision precludes fees for a service not immediately available, both recycled water and traditional potable water are part of the same service—water service. And water service most assuredly is immediately available to City Water's customers now."

[71] ~~Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, pages 60-61.~~

[72] Exhibit K (3), 3. City of San Diego v. Commission on State Mandates, Judgment (Oct. 31, 2024, Case No. 24WM000056), pages 12-13.

[73] *Coziahr v. Otay Water District* (2024*)* 103 Cal.App.5th 785, 795, emphasis added.

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

[75] Exhibit A, Test Claim, page 108 (test claim order).

the benefits of the test claim order are similar to those under the Lead and Copper Rule, where the claimant tests individual residential homes and uses those test results to optimize corrosion control for the larger system.[76] The difference, however, is that under the Lead and Copper Rule, *all* customers share in the costs of lead testing. Here, the claimant is prohibited by the test claim order from passing those increased costs on to the schools receiving the lead testing. Thus, passing the increased costs on to the remaining customers, making the costs of service to their parcels higher than the cost of service to the schools receiving the additional lead testing, is no different than a water district recouping costs from irrigation users to keep costs to the remaining customers proportionately low (as in *City of Palmdale*) or using revenues from the top tiers to subsidize below-cost rates for the bottom tier (*Capistrano*), all of which violate article XIII D, section 6(b)(3).[77]

- Any fee imposed by the claimant on the remaining customers would not fall under any of the seven exceptions to the definition of a tax in article XIII C of the California Constitution (Proposition 26) and, thus, the fee would be considered a tax. Article XIII B, section 6 was specifically designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues and, thus, the test claim order imposes costs mandated by the state.[78]

Accordingly, this case is distinguishable from the stormwater fee analysis performed by the Third District Court of Appeal in *Department of Finance v. Commission on State Mandates*, where the court held that unless there is a showing that a fee cannot meet the substantive requirements of article XIII D, section 6(b) as a matter of law or undisputed fact, then the finding that a fee would meet the substantive requirements is implicit in the determination that permittees have the right or power to levy a fee.[79] Here, as a matter of law, a property-related fee cannot be imposed on school districts under the test claim order and cannot be imposed on the remaining property owners without violating article XIII C (Proposition 26) and article XIII D, section 6(b)(3) (Proposition 218).

In addition, no law or facts in the record support a finding that any of the other exceptions specified in Government Code section 17556 apply to this claim.

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[76] Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision, pages 5-6.

[77] *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 937; *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493, 1505-1506.

[78] *County of Fresno v. State of California* (1990) 53 Cal.3d. 482, 487.

[79] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 584-585.

## Conclusion

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

1. Submit to the State Water Board's Division of Drinking Water [DDW] a comprehensive list of the names and addresses of all K-12 schools served water through a utility meter [by the claimant] by July 1, 2017;[80]
2. If an authorized school representative of a private or public K-12 school in the claimant's service area requests lead sampling assistance in writing by November 1, 2019:
    a. Respond in writing within 60 days and schedule a meeting with school officials to develop a sampling plan;[81]
    b. Finalize a sampling plan and complete initial sampling within 90 days [or an alternative time schedule approved by DDW];[82]
    c. Collect one to five samples at each school, from regularly used drinking fountains, cafeteria or food preparation areas, or reusable bottle filling stations, selected according to the sampling plan, and using the sampling guidance provided in Appendix A;[83]
    d. Collect lead samples during the school year, on a Tuesday, Wednesday, Thursday, or Friday on a day that school is in session and has been in session for at least one day prior to the day of sampling;[84]
    e. Ensure samples are collected by an adequately trained water system representative;[85]
    f. Submit the samples to an ELAP certified laboratory for analysis;[86]
    g. Require the laboratory to submit the data electronically to DDW;[87]

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[80] Exhibit A, Test Claim, page 105 (test claim order).

[81] Exhibit A, Test Claim, page 106 (test claim order).

[82] Exhibit A, Test Claim, page 106 (test claim order).

[83] Exhibit A, Test Claim, page 106 (test claim order).

[84] Exhibit A, Test Claim, page 106 (test claim order).

[85] Exhibit A, Test Claim, page 106 (test claim order).

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

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

h. Provide a copy of the results to the school representative;[88]

i. Within two business days of a result that shows an exceedance of 15 ppb, notify the school of the sample result;[89]

j. If an initial sample shows an exceedance of 15 ppb:

- Collect an additional sample within 10 days if the sample site remains in service;[90]
- Collect a third sample within 10 business days after notification that a resample result is less than or equal to 15 ppb;[91]
- 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;[92]

k. Ensure that the water system receives the results of repeat lead samples from the laboratory in no more than 10 business days;[93]

l. Discuss the lead sample results with the school prior to releasing the sample results to the public, and within 10 days of receiving the results from the laboratory;[94]

m. Communicate with the school after lead sampling and assist the school with the interpretation of laboratory results and provide information regarding potential corrective actions if the results confirm lead levels above 15 ppb.[95] ***The water system is not responsible for the costs of any corrective action or maintenance***;[96]

n. Keep records of all requests for lead related assistance and provide the records to DDW, upon request;[97]

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

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

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

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

[92] Exhibit A, Test Claim, page 107 (test claim order).

[93] Exhibit A, Test Claim, page 107 (test claim order).

[94] Exhibit A, Test Claim, page 107 (test claim order).

[95] Exhibit A, Test Claim, page 108 (test claim order).

[96] Exhibit A, Test Claim, page 108 (test claim order).

[97] Exhibit A, Test Claim, page 108 (test claim order).

o. Include in the annual Consumer Confidence Report a statement summarizing the number of schools requesting lead sampling.[98]

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

**Staff Recommendation**

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

[98] Exhibit A, Test Claim, page 108 (test claim order).

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

| | |
|---|---|
| IN RE TEST CLAIM ON REMAND<br><br>Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017<br><br>Filed on January 11, 2018<br><br>City of San Diego, Claimant | Case No.: 17-TC-03-R2<br><br>*Lead Sampling in Schools: Public Water System No. 3710020*<br><br>DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7<br><br>On Remand from *City of San Diego v. Commission on State Mandates*, Sacramento County Superior Court, Case No. 24WM000056<br><br>(*Adopted March 28, 2025*) |

## DECISION

The Commission in State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on March 28, 2025. [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 Revised 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 | |
| Deborah Gallegos, Representative of the State Controller, Vice Chairperson | |
| Karen Greene Ross, Public Member | |
| Renee Nash, School District Board Member | |
| William Pahland, Representative of the State Treasurer | |
| Michele Perrault, Representative of the Director of the Department of Finance, Chairperson | |

| Member | Vote |
|---|---|
| Matt Read, Representative of the Director of the Governor's Office of Land Use and Climate Innovation | |

**Summary of the Findings**

This Test Claim alleges new state-mandated activities and costs arising from a permit amendment issued by the State Water Resources Control Board (State Water Board) to the City of San Diego's public water system, Order No. 2017PA-SCHOOLS. The test claim order is *applicable to the City of San Diego only*, and is one of over 1,100 permit amendments simultaneously issued to privately- and publicly-owned public water systems.[99, 100]

The test claim order is an amendment to the claimant's domestic water supply permit allowing its public water system to continue to provide drinking water. Under existing law, public water systems have to comply with the state and federal Lead and Copper Rule to protect public health by minimizing lead and copper levels in drinking water, primarily by reducing water corrosivity.[101] To determine the corrosivity of drinking water, the Lead and Copper Rule requires routine monitoring at kitchen or bathroom taps of residences and other buildings based on lead and copper action levels established by EPA.[102] At the time the test claim order was adopted, monitoring the taps at K-12 schools was not required by the Lead and Copper Rule.[103]

Beginning January 18, 2017, the test claim order requires the claimant to provide the State Water Board, 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, and

[99] This is unusual in that, generally, a test claim functions similarly to a class action and there are approximately 1,200 public water systems subject to the same exact requirements in separate amendments to their own permits, but no test claims were filed on those other permits. This Decision applies only to the San Diego permit.

[100] These systems are also known as "community water systems" which are public water systems that supply water to the same population year-round. (See Health and Safety Code section 116275(i).) The reader may find these two terms used interchangeably in some of the supporting documentation in the record.

[101] Exhibit A, Test Claim, pages 105-108 (test claim order); *Williams v. Moulton Niguel Water Dist.* (2018) 22 Cal.App.5th 1198, 1202, citing to Code of Federal Regulations, title 40, sections 141.80 and 141.81(b); Health and Safety Code sections 116525, 116271(k); California Code of Regulations, title 22, section 64670 et seq.

[102] *Williams v. Moulton Niguel Water Dist.* (2018) 22 Cal.App.5th 1198, 1203.

[103] Since 2021, federal Lead and Copper Rule regulations have required public water systems to collect samples from schools and childcare facilities within their distribution system that were constructed before 2014. (Code of Federal Regulations, title 40, section 141.92 (86 Fed. Reg. 4306, eff. Jan. 15, 2021).)

upon a school's request made by November 1, 2019, *and at no charge to the school*, to 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). Beginning January 1, 2018, however, any lead testing conducted by the claimant on those public schools constructed or modernized before January 1, 2010, that did not request testing before January 1, 2018, is required by Health and Safety Code section 116227, and not by the test claim order.

This Test Claim has been previously heard by the Commission and denied twice on separate grounds. The claimant successfully litigated both prior decisions, resulting in final court decisions concluding the test claim order mandates a new program or higher level of service. On April 29, 2022, the Third District Court of Appeal issued an unpublished opinion, finding that the test claim order imposes a new program or higher level of service in that "the provision of drinking water to schools is a peculiarly governmental function and the mandated testing of this water for lead is plainly a service to the public."[104] On October 31, 2024, the Sacramento County Superior Court entered judgment holding that the claimant was practically compelled and, thus, mandated by the state to comply with the test claim order.[105]

Thus, the only remaining issue is whether the test claim order imposes costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514, or whether the exception in Government Code section 17556(d) applies.

The claimant's increased costs to comply with the mandated activities exceed $1,000 and, thus, satisfy the requirements in Government Code sections 17514 and 17564.[106]

Government Code section 17556(d) provides that the Commission shall not find costs mandated by the state, however, if it finds that the "local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." The California Supreme Court upheld the constitutionality of Government Code section 17556(d) in *County of Fresno,* finding that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes.[107] Thus, where the claimant has "authority, i.e., the right or power, to levy fees sufficient to cover the costs" of a state mandated program,

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[104] Exhibit K (2), *City of San Diego v. Commission on State Mandates*, Unpublished Opinion (Apr. 29, 2022, Case No. C092800), page 13.

[105] Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056), pages 12-13.

[106] Exhibit A, Test Claim, pages 79 (Declaration of Rex Ragucos), 2767-2768.

[107] *County of Fresno v. State of California* (1990) 53 Cal.3d. 482, 487.

reimbursement is not required, notwithstanding other factors that may make the exercise of that authority impractical or undesirable.[108]

The claimant generally has the statutory authority to collect property-related fees from its customers to provide water under the California Safe Drinking Water Act, and such fees include those costs under the Lead and Copper Rule.[109] However, the claimant contends that it does not have the authority to charge increased fees on the schools requesting service pursuant to the plain language of the test claim order, and is prohibited from imposing fees on the remaining water customers to cover the costs of the mandated activities pursuant to Propositions 218 and 26 (which added articles XIII C and XIII D to the California Constitution). The claimant argues that lead testing at schools is triggered by voluntary requests of the schools, is not incident to property ownership and is, thus, not a property-related service; the services required by the test claim order are not immediately available to customers other than the requesting schools; and any fee would exceed the proportional cost of the service attributable to each parcel and, thus, article XIII D, sections 2 and 6(b)(3) and (4) (Proposition 218) cannot be satisfied and any fee but would be considered a tax under article XIII C (Proposition 26).[110]

The State Water Board contends – and Finance agrees – that Proposition 218 does not prevent the claimant from increasing water rates on property owners, including schools that request the service, because lead testing confers a "direct benefit" to the water system as a whole and, by extension, each ratepayer.[111] Specifically, the State Water Board alleges that the mandated program "functionally extends" the Lead and Copper Rule and helps to maintain and possibly improve property values.[112]

The Commission finds that the claimant does not have the authority to impose fees sufficient to cover the costs of the mandated activities pursuant to Government Code section 17556(d) and, thus, there are costs mandated by the state.

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[108] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Connell v. Superior Court* (1997) 59 Cal.App.4th 382; 401-402; *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 564, citing to *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

[109] Health and Safety Code section 116590(b) ("A public water system may collect a fee from its customers to recover the fees paid by the public water system pursuant to this chapter [California Safe Drinking Water Act]."); Exhibit A, Test Claim, page 70 (Declaration of Doug Campbell, Senior Chemist of the Public Utilities Department, City of San Diego).

[110] Exhibit A, Test Claim, page 54; Exhibit D, Claimant's Rebuttal Comments, page 11.

[111] Exhibit B, State Water Board's Comments on the Test Claim, page 16; Exhibit C, Finance's Comments on the Test Claim, page 2.

[112] Exhibit B, State Water Board's Comments on the Test Claim, page 16.

The claimant does not have the authority to impose fees on the schools requesting lead testing to cover the increased costs to comply with the new state-mandated activities, either as a separate fee or by increasing existing water rates on all customers, including the schools receiving the service. This is based on the plain language of the test claim order and other documents issued by the State Water Board at the time the test claim order was adopted indicating that the claimant would pay for the services and the services would be "free" to schools.[113] ~~Pursuant to the plain language of the test claim order, the claimant does not have the authority to impose fees on schools requesting lead testing to cover the increased costs to comply with the new state-mandated activities.~~[114]

In addition, the claimant does not have the authority to impose fees on the remaining customers to cover the increased costs of the new state-mandated activities. Although such a fee would satisfy article XIII D, sections 2 and 6(b)(4), the fee would violate article XIII D, section 6(b)(3) of the California Constitution (Proposition 218) as not proportional to the service attributable to each parcel since the schools cannot be charged, and make the remaining customers subsidize the cost of the new mandated activities. In addition, a levy would not fall under any exception to the definition of "taxes" in article XIII C (Proposition 26). In this respect, the Commission makes the following findings:

- The requirements mandated by the test claim order are conditions imposed by the state for the claimant to *continue* providing water service to its existing customers.[115] Health and Safety Code section 116525(a) provides that "No person shall operate a public water system unless he or she first submits an application to the department and receives a permit as provided in this chapter." And the Sacramento County Superior Court found that "Because the City operates its water system under a permit from the Board, it would not be able to continue to do so if its permit was suspended or revoked."[116] The test claim

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[113] Exhibit A, Test Claim, page 107 (test claim order); Exhibit A, Test Claim, pages 115-116 (State Water Board's Media Release); Exhibit A, Test Claim, page 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).

~~[114] Exhibit A, Test Claim, page 107 (test claim order), 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).~~

[115] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 145 (Governor's Veto Message); see also, Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision, pages 5-6 ("The permit is subject to revocation or penalties for failure to comply. . . . 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.").

[116] Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056), page 9 ("Because the City operates its water

order applies to the "schools that are served water through a utility meter by July 1, 2017" and request testing and, therefore, the mandate is to test for lead in the schools already connected to the water distribution system.[117]

Although a school has a choice to request lead testing under the test claim order, its request is not based on a business decision of the school. The dual purpose of the test claim order is to "further safeguard California's water quality" generally and to "ensure we are continuing to protect our most vulnerable populations."[118] As indicated above, the schools that request service cannot be charged for these activities. And the mandated activities are not triggered by a voluntary decision of the other property owners. Thus, the *Richmond* and *Apartment Assn*. cases, which held that fees triggered by a voluntary action of the property owner are not property-related fees, are distinguishable and do not apply here.[119] Accordingly, any fee would satisfy the requirements of a property-related fee within the meaning of article XIII D, section 2.[120]

- A fee imposed on the claimant's remaining customers would satisfy article XIII D, section 6(b)(4), which requires that "No fee or charge may be imposed for a service *unless that service is actually used by, or immediately available to, the owner of the property in question*." Continued water service provided by the claimant is immediately available to and is used by the claimant's customers.[121] ~~In addition, the claimant's declarant states that in all instances where remediation~~

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system under a permit from the Board, it would not be able to continue to do so if its permit was suspended or revoked. (See Health & Saf. Code, § 116525, subd. (a).) . . . No city could reasonably ignore such an obligation [imposed by the test claim order] and roll the dice on whether 1.3 million residents will have their water service disrupted.").

[117] Exhibit A, Test Claim, page 105 (Test claim order).

[118] Exhibit A, Test Claim, page 115 (Media Release); see also, pages 104-105 (test claim order, paragraphs 4-6).

[119] *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal. 4th 409, 426–427; *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 839-840.

[120] *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 216; *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 426–427; *Wolstoncroft v. County of Yolo* (2021) 68 Cal.App.5th 327, 344.

[121] See, for example, *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493, 1516, where the court held as follows: "Water service fees to fund the costs of capital-intensive operations to produce more or new water, such as the recycling plant at issue in this case, do not contravene article XIII, section 6, subdivision (b)(4) of the Constitution. While that provision precludes fees for a service not immediately available, both recycled water and traditional potable water are part of the same service—water service. And water service most assuredly is immediately available to City Water's customers now."

~~was performed at the schools that had lead exceedances, follow-up sampling showed the source of the lead was removed and no problems to the city's water system were identified.~~[122] As the Sacramento County Superior Court found, "the City will incur costs to comply with the new lead testing requirement, and it has no reasonable alternative to continuing its water service operations in compliance with its permit. Simply ceasing water service is not a reasonable alternative given the critical importance of water service."[123] Thus, the service provided by the test claim order provides a benefit to all of its customers.

- However, a property-related fee cannot be imposed on the remaining customers and not on the schools without violating article XIII D, section 6(b)(3), which requires that the amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel. This requirement "ensures that the aggregate fee collected on *all* parcels is *distributed among those parcels in proportion to the cost of service for each parcel*."[124]

  Here, the cost of the overall service of providing water is higher because of the additional and new required activities mandated by the state.[125] These activities are performed *in addition* to the prior requirements imposed by the Lead and Copper Rule. As indicated in the test claim order, the claimant may not use any lead samples collected under the order to satisfy federal or state Lead and Copper Rule requirements.[126] The State Water Board nevertheless asserts that the benefits of the test claim order are similar to those under the Lead and Copper Rule, where the claimant tests individual residential homes and uses those test results to optimize corrosion control for the larger system.[127] The difference, however, is that under the Lead and Copper Rule, *all* customers share in the costs of lead testing. Here, the claimant is prohibited by the test claim order from passing those increased costs on to the schools receiving the lead testing. Thus, passing the increased costs on to the remaining customers, making the costs of service to their parcels higher than the cost of service to the schools receiving the additional lead testing, is no different than a water district recouping costs from irrigation users to keep costs to the remaining customers proportionately low (as in *City of Palmdale*) or using revenues from the top tiers

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[122] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, pages 60-61.

[123] Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056), pages 12-13.

[124] *Coziahr v. Otay Water District* (2024*)* 103 Cal.App.5th 785, 795, emphasis added.

[125] Exhibit A, Test Claim, pages 79 (Declaration of Rex Ragucos), 2767-2768.

[126] Exhibit A, Test Claim, page 108 (test claim order).

[127] Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision, pages 5-6.

to subsidize below-cost rates for the bottom tier (*Capistrano*), all of which violate article XIII D, section 6(b)(3).[128]

- Any fee imposed by the claimant on the remaining customers would not fall under any of the seven exceptions to the definition of a tax in article XIII C of the California Constitution (Proposition 26) and, thus, the fee would be considered a tax. Article XIII B, section 6 was specifically designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues and, thus, there are costs mandated by the state.[129]

Accordingly, this case is distinguishable from the stormwater fee analysis performed by the Third District Court of Appeal in *Department of Finance v. Commission on State Mandates*, where the court held that unless there is a showing that a fee cannot meet the substantive requirements of article XIII D, section 6(b) as a matter of law or undisputed fact, then the finding that a fee would meet the substantive requirements is implicit in the determination that permittees have the right or power to levy a fee.[130] Here, as a matter of law, a property-related fee cannot be imposed on school districts under the test claim order and cannot be imposed on the remaining property owners without violating article XIII C (Proposition 26) and article XIII D, section 6(b)(3) (Proposition 218).

In addition, no law or facts in the record support a finding that any of the other exceptions specified in Government Code section 17556 apply to this claim.

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

1. Submit to the State Water Board's Division of Drinking Water a comprehensive list of the names and addresses of all K-12 schools served water through a utility meter [by the claimant] by July 1, 2017;[131]

2. If an authorized school representative of a private or public K-12 school in the claimant's service area requests lead sampling assistance in writing by November 1, 2019:

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[128] *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 937; *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493, 1505-1506.

[129] *County of Fresno v. State of California* (1990) 53 Cal.3d. 482, 487.

[130] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 584-585.

[131] Exhibit A, Test Claim, page 105 (test claim order).

a. Respond in writing within 60 days and schedule a meeting with school officials to develop a sampling plan;[132]

b. Finalize a sampling plan and complete initial sampling within 90 days [or an alternative time schedule approved by DDW];[133]

c. Collect one to five samples at each school, from regularly used drinking fountains, cafeteria or food preparation areas, or reusable bottle filling stations, selected according to the sampling plan, and using the sampling guidance provided in Appendix A;[134]

d. Collect lead samples during the school year, on a Tuesday, Wednesday, Thursday, or Friday on a day that school is in session and has been in session for at least one day prior to the day of sampling;[135]

e. Ensure samples are collected by an adequately trained water system representative;[136]

f. Submit the samples to an ELAP certified laboratory for analysis;[137]

g. Require the laboratory to submit the data electronically to DDW;[138]

h. Provide a copy of the results to the school representative;[139]

i. Within two business days of a result that shows an exceedance of 15 ppb, notify the school of the sample result;[140]

j. If an initial sample shows an exceedance of 15 ppb:

- Collect an additional sample within 10 days if the sample site remains in service;[141]

[132] Exhibit A, Test Claim, page 106 (test claim order).

[133] Exhibit A, Test Claim, page 106 (test claim order).

[134] Exhibit A, Test Claim, page 106 (test claim order).

[135] Exhibit A, Test Claim, page 106 (test claim order).

[136] Exhibit A, Test Claim, page 106 (test claim order).

[137] Exhibit A, Test Claim, page 106 (test claim order).

[138] Exhibit A, Test Claim, page 106 (test claim order).

[139] Exhibit A, Test Claim, page 106 (test claim order).

[140] Exhibit A, Test Claim, page 106 (test claim order).

[141] Exhibit A, Test Claim, page 106 (test claim order).

- Collect a third sample within 10 business days after notification that a resample result is less than or equal to 15 ppb;[142]
- 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;[143]

k. Ensure that the water system receives the results of repeat lead samples from the laboratory in no more than 10 business days;[144]

l. Discuss the lead sample results with the school prior to releasing the sample results to the public, and within 10 days of receiving the results from the laboratory;[145]

m. Communicate with the school after lead sampling and assist the school with the interpretation of laboratory results and provide information regarding potential corrective actions if the results confirm lead levels above 15 ppb.[146] ***The water system is not responsible for the costs of any corrective action or maintenance***;[147]

n. Keep records of all requests for lead related assistance and provide the records to DDW, upon request;[148]

o. Include in the annual Consumer Confidence Report a statement summarizing the number of schools requesting lead sampling.[149]

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

[142] Exhibit A, Test Claim, page 106 (test claim order).

[143] Exhibit A, Test Claim, page 107 (test claim order).

[144] Exhibit A, Test Claim, page 107 (test claim order).

[145] Exhibit A, Test Claim, page 107 (test claim order).

[146] Exhibit A, Test Claim, page 108 (test claim order).

[147] Exhibit A, Test Claim, page 108 (test claim order).

[148] Exhibit A, Test Claim, page 108 (test claim order).

[149] Exhibit A, Test Claim, page 108 (test claim order).

## COMMISSION FINDINGS

### I. Chronology

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|---|---|
| 01/18/2017 | Permit Amendment No. 2017PA-SCHOOLS for City of San Diego PWS 3710020 was adopted by the State Water Board's Division of Drinking Water.[150] |
| 01/11/2018 | The claimant filed the Test Claim.[151] |
| 08/13/2018 | The State Water Board filed comments on the Test Claim.[152] |
| 08/13/2018 | Finance filed comments on the Test Claim.[153] |
| 11/09/2018 | The claimant filed its rebuttal comments.[154] |
| 12/21/2018 | Commission staff issued the Draft Proposed Decision.[155] |
| 01/11/2019 | The State Water Board filed comments on the Draft Proposed Decision.[156] |
| 01/11/2019 | The claimant filed comments on the Draft Proposed Decision.[157] |
| 03/22/2019 | The Commission heard the Test Claim and voted 6-1 to deny the claim on the ground there was no new program or higher level of service. |
| 06/20/2019 | The claimant filed a petition for writ of mandate in Sacramento County Superior Court. |
| 07/30/2020 | Sacramento County Superior Court denied the claimant's petition for writ of mandate. |
| 09/25/2020 | The claimant appealed the denial of its petition for writ of mandate to the Third District Court of Appeal. |
| 04/29/2022 | The Third District Court of Appeal reversed the judgment issued by Sacramento County Superior Court. |
| 11/16/2022 | Sacramento County Superior Court issued a judgment and writ commanding the Commission to set aside its March 22, 2019 Decision and to consider in the first instance whether reimbursement is required. |

[150] Exhibit A, Test Claim, page 14.

[151] Exhibit A, Test Claim.

[152] Exhibit B, State Water Board's Comments on the Test Claim.

[153] Exhibit C, Finance's Comments on the Test Claim.

[154] Exhibit D, Claimant's Rebuttal Comments.

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

[156] Exhibit F, State Water Board's Comments on the 2018 Draft Proposed Decision.

[157] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision.

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|---|---|
| 01/27/2023 | The Commission adopted the Order setting aside its March 22, 2019 Decision. |
| 03/23/2023 | Commission staff issued the Draft Proposed Decision for the May 23, 2023 Commission hearing.[158] |
| 04/07/2023 | The State Water Board filed a request for an extension of time to file comments on the Draft Proposed Decision and postponement of the hearing until July 28, 2023, which was approved for good cause. |
| 04/11/2023 | Finance filed a request for extension of time to file comments on the Draft Proposed Decision, which was approved for good cause. |
| 04/12/2023 | The claimant filed a request for extension of time to file comments on the Draft Proposed Decision, which was approved for good cause. |
| 05/04/2023 | The claimant and the State Board filed comments on the Draft Proposed Decision.[159] |
| 06/21/2023 | The Commission cancelled the July 28, 2023 Commission Meeting and set a new hearing date of September 22, 2023. |
| 09/06/2023 | Commission staff issued the Proposed Decision for the September 22, 2023 Commission hearing. |
| 09/08/2023 | The claimant filed a request for extension of time to file comments on the Proposed Decision and postponement of hearing. |
| 09/12/2023 | The Commission denied the claimant's request for extension of time to file comments on the Proposed Decision and granted the request for postponement of hearing, setting the hearing for December 1, 2023. |
| 12/01/2023 | The Commission heard the Test Claim and voted 4-2, with one abstention to deny the claim on the ground the test claim order did not impose a state-mandated program. |
| 03/26/2024 | The claimant filed a petition for writ of mandate in Sacramento County Superior Court. |
| 10/31/2024 | Sacramento County Superior Court issued a judgment, order, and writ, finding that the claimant was mandated by the state based practical compulsion to comply with the test claim order, and commanding the Commission to set aside its December 1, 2023 Decision and to consider in the first instance whether reimbursement is required.[160] |

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

[159] Exhibit I, Claimant's Comments on the 2023 Draft Proposed Decision; Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision.

[160] Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056).

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|---|---|
| 01/24/2025 | The Commission adopted the Order setting aside its December 1, 2023 Decision. |
| 02/26/2025 | Commission staff issued the Proposed Decision for the March 28, 2025 Commission hearing. |
| 03/13/2025 | The claimant filed comments on the Proposed Decision.[161] |
| 03/14/2025 | The State Water Board filed comments on the Proposed Decision.[162] |
| 03/20/2025 | Commission staff issued the Revised Proposed Decision for the March 28, 2025 Commission hearing. |

## II. Background

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

### A. Lead as an Environmental Health Risk

Lead is toxic and has "no known value to the human body."[163] 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."[164] 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.[165] 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.[166] Higher lead levels can cause severe neurological problems and ultimately death.[167]

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

[161] Exhibit L, Claimant's Comments on the Proposed Decision.

[162] Exhibit M, State Water Board's Comments on the Proposed Decision.

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

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

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

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

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

human activity."[168] 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.[169] In 1984, burning leaded gasoline was the largest source of lead emissions in the air, and so the Environmental Protection Agency (EPA) phased out and eventually banned leaded gasoline.[170] 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."[171] 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.[172]

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.[173] 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.'"[174] 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."[175] 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."[176] Accordingly, the primary regulatory approach, as discussed below, is to require water systems to

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[168] Exhibit K (7), *Public Health Statement, Lead, CAS # 7439-92-1*, page 2.

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

[170] Exhibit K (7), *Public Health Statement, Lead, CAS # 7439-92-1*, page 4.

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

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

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

[174] Exhibit K (7), *Public Health Statement, Lead, CAS : 7439-92-1*, pages 3-4.

[175] Exhibit K (7), *Public Health Statement, Lead, CAS # 7439-92-1*, page 4.

[176] Exhibit K (7), *Public Health Statement, Lead, CAS # 7439-92-1*, page 4.

prioritize monitoring, and to implement and maintain corrosion control treatment to minimize toxic metals leaching into water supplies.

To potentially close some of the gaps in lead exposure prevention, the California Legislature in 1992 enacted the Lead-Safe Schools Protection Act,[177] which acknowledged the potential dangers of lead exposure, especially in children, and required the State Department of Health Services to assess the risk factors of schools and "determine the likely extent and distribution of lead exposure to children from paint on the school, soil in play areas at the school, drinking water at the tap, and other potential sources identified by the department for this purpose.[178] The Act did not specifically require testing of drinking water, but only required the Department to assess risk factors, of which drinking water was one.

## B. Prior Law on Drinking Water

### 1. Federal Law

In 1974 Congress passed the federal Safe Drinking Water Act, authorizing U.S. EPA to set health-based standards for drinking water supplies, which U.S. EPA, the states, and drinking water systems work together to meet.[179] 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.[180] U.S. EPA states that there are over 170,000 public water systems providing drinking water to Americans, to which the Act applies.[181]

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.[182] The purpose of the Lead and Copper Rule "is to protect public health by minimizing lead and copper levels in drinking water, primarily by reducing water corrosivity."[183] Lead and copper enter drinking water primarily though corrosion of service and plumbing lines and plumbing materials. To determine the corrosivity of

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[177] Education Code section 32240 et seq.

[178] Education Code section 32242.

[179] Exhibit K (11), U.S. EPA, *Understanding the Safe Drinking Water Act,* https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf (accessed on February 21, 2023), page 1.

[180] United States Code, title 42, section 300f(4).

[181] Exhibit K (11), U.S. EPA, *Understanding the Safe Drinking Water Act*, https://www.epa.gov/sites/production/files/2015-04/documents/epa816f04030.pdf (accessed on February 21, 2023), page 2.

[182] Code of Federal Regulations, title 40, section 141.80 et seq.

[183] *Williams v. Moulton Niguel Water Dist.* (2018) 22 Cal.App.5th 1198, 1202, citing to Code of Federal Regulations, title 40, sections 141.80 and 141.81(b).

drinking water, the Lead and Copper Rule requires routine monitoring at kitchen or bathroom taps of residences and other buildings based on action levels established by EPA.[184]

The federal action level for lead "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]."[185] The number of samples required depends on the size of the drinking water system, and any history of prior exceedances.[186] An action level exceedance is not a violation of the Rule, but the exceedance may trigger requirements that include additional water quality monitoring and source identification, corrosion control treatment, public education, notification to all customers with a lead service line, reporting, and lead service line replacement.[187]

Since 2021, federal Lead and Copper Rule regulations have required public water systems to collect samples from schools and childcare facilities within their distribution system that were constructed before 2014.[188]

### 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."[189] These provisions do not provide a right to the delivery of water, but merely provide that drinking water delivered by a public water system must be of a certain quality, and reasonably free of pollutants, to the extent feasible. The Act goes on to state:

> (e) This chapter is intended to ensure that the water delivered by public water systems of this state shall at all times be pure, wholesome, and potable. This chapter provides the means to accomplish this objective.
>
> (f) It is the intent of the Legislature to improve laws governing drinking water quality, to improve upon the minimum requirements of the federal Safe Drinking Water Act Amendments of 1996, to establish primary

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[184] *Williams v. Moulton Niguel Water Dist.* (2018) 22 Cal.App.5th 1198, 1203.

[185] Code of Federal Regulations, title 40, section 141.80(c).

[186] See Exhibit K (5), *Lead and Copper Rule: A Quick Reference Guide*, 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).

[187] *Williams v. Moulton Niguel Water Dist.* (2018) 22 Cal.App.5th 1198, 1202; Code of Federal Regulations, title 40, sections 141.80-141.91.

[188] Code of Federal Regulations, title 40, section 141.92 (86 Fed. Reg. 4306, eff. Jan. 15, 2021).

[189] Health and Safety Code section 116270.

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.[190]

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.[191] The State Water Board issues drinking water supply permits to all California "public water systems," which may be privately or government owned and which are defined the same as under the federal Act as "a system for the provision of water for human consumption through pipes or other constructed conveyances that has 15 or more service connections or regularly serves at least 25 individuals daily at least 60 days out of the year."[192]

In 1995, the State adopted a Lead and Copper Rule to reduce water corrosivity, 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.[193]

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[190] Health and Safety Code section 116270.

[191] California Constitution, article XI, section 9. Article XI, section 9(a) provides that "[a] municipal corporation *may* establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication." Article XI, section 9(b) also provides that "[p]ersons or corporations may establish and operate works for supplying those services upon conditions and under regulations that the city may prescribe under its organic law." Article XII asserts government regulatory authority, via the Public Utilities Commission, over "private corporations or persons that own, operate, control, of manage a line, plant, or system for …the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public…" However, nothing in article XI or XII creates or implies a right to the delivery of any such services, or any mandatory duty on local government to provide such services.

[192] 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 State Water Board, effective July 1, 2014); "Public Water Systems" are defined in Health and Safety Code section 116275(h) and United States Code, title 42, section 300f(4).

[193] See California Code of Regulations, title 22, section 64670 et seq.; Exhibit B, State Water Board's Comments on the Test Claim, pages 5-6.

> Under the [Lead and Copper Rule] (LCR), public water systems are required to test water for lead at a set number of service connections (depending on the number of customers served by the system) that are at a higher risk for lead in the tap water due to their plumbing characteristics. Water suppliers are not required to test every customer's tap. Schools that are served by community water systems are generally not included in the LCR testing; only residential connections are included.[194]

Public water systems conduct water sampling once every six months for lead. If a system has 90th percentile levels that do not exceed the action levels for lead for two consecutive periods, it may reduce sampling to once every three years and reduce the number of sites required to be sampled.[195]

However, 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.[196] In addition, a water system with a lead action level exceedance is required to offer to sample the tap water of any customer who requests it, but the system is not required to pay for collecting or analyzing the sample.[197]

The courts have described the California Lead and Copper Rule as follows:

> Under the Lead and Copper Rule, public water distribution systems must identify sampling sites within the distribution system. (Regs., § 64682, subd. (a).) These sampling sites must each contain lead solder or lead pipes or be served by a lead service line. (Regs., § 64682, subd. (c)-(f).) One-liter tap and service line water samples must be drawn after letting the water sit in the distribution system for at least six hours. (Regs., §§ 64671.25, 64683, subds.(a)-(c).) The Lead and Copper Rule specifies the number and frequency of samples to be drawn. (Regs., §§ 64684–64685.) Subsequent analysis of the samples is to be done in accordance with federal regulations governing the monitoring of contaminants in public water systems. (Regs., § 64672; 40 C.F.R. §§ 141.23, 141.89(a).)
>
> The Lead and Copper Rule establishes a threshold concentration, one microgram per liter, below which the lead level shall be considered zero. (Regs., § 64672, subd. (c)(3).) Public water systems must report their test results on a regular basis (Regs., § 64691) and, depending on those results, must take steps to install corrosion control, treat the system source water, remove lead service lines, and/or issue warning notices to

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[194] Exhibit A, Test Claim, page 105 (Test claim order).

[195] California Code of Regulations, title 22, section 64675.5(a)(1).

[196] See, e.g., California Code of Regulations, title 22, sections 64673 and 64674 (Describing monitoring and corrosion control measures to be taken if an elevated lead level is detected for small, medium, and large water systems).

[197] California Code of Regulations, title 22, section 64679.

residents served by the distribution system. (Regs., §§ 64673–64680.)

[¶¶]

The Lead and Copper Rule includes detailed context-specific sampling procedures. (Regs., §§ 64671.25, 64682–64685.) These procedures include the requirement that a "water system" identify and take samples at between 5 and 100 sites over at least two six-month periods. (Regs., § 64684, subds. (a), (b).) *The pool of sites is limited to residences containing copper pipes with lead solder, lead pipes, or pipes serviced by lead service lines*. (Regs., § 64682, subds. (c)-(g).) These sampling requirements limit the applicability of the Lead and Copper Rule. The rule cannot be applied outside a public water system.[198]

Approximately 500 schools within California are themselves permitted as a "public water system," because they have their own water supply, such as a well.[199] Those schools are already required to test their taps for lead and copper under the Lead and Copper Rule and the test claim order does not apply to schools that are already regulated as public water systems.[200] However, most schools are served by community water systems that are not required to test for lead specifically at the school's taps.[201]

### C. The Test Claim Order; An Amendment to the City of San Diego's Domestic Water Supply Permit

Both the federal and state law have long required drinking water systems to monitor their customers' water supplies for exceedances and to take corrective action as necessary. However, that monitoring has been mostly limited to residential service connections, as a proxy for the presence of lead within the greater drinking water system.[202]

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

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[198] *Mateel Environmental Justice Foundation v. Edmund A. Gray, Co.* (2003) 115 Cal.App.4th 8, 21-22, emphasis added.

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

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

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

[202] Exhibit A, Test Claim, page 105 (Test claim order); Exhibit B, State Water Board'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").

to those drinking water sources; provide alternative drinking water sources if the school did not have the minimum number of drinking fountains required by law; and provide access to free, fresh, and clean drinking water during meal times in the food service areas of the schools under its jurisdiction.[203] SB 334 was vetoed by then-Governor Brown, whose veto message expressed concern that the bill could create a very expensive reimbursable state mandate.[204] The veto message instead directed the State Water Board to examine the scope of the potential problem by incorporating water quality testing in schools as part of the state's Lead and Copper Rule.[205]

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

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

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

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

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

- Ensure the water system receives the results of repeat samples no more than 10 business days after the date of collection;
- Do not release lead sampling data to the public for 60 days, unless in compliance with a Public Records Act request;
- Discuss the results with the school prior to releasing the results to the public.[206]

The order further states that the water system may not use any lead samples collected under the order to satisfy federal or state Lead and Copper Rule requirements.[207] Thus, the lead testing requirements imposed by the test claim order must be done in addition to the testing and monitoring requirements imposed by the Lead and Copper Rule.

The test claim order further requires the water system to 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.[208]

The test claim order requires the claimant to provide testing to both private and public K-12 schools, upon request of the school. Under the test claim order, the claimant's public water system must assist those schools to which it serves drinking water with "at least one or more of grades Kindergarten through 12th grade," when a request for one-time assistance is made in writing by an authorized school representative.[209] "Authorized school representative" is defined as "the superintendent or designee of a school, governing board or designee of a charter school, or administrator or designee of a private school."[210]

The test claim order also requires the claimant to pay for these activities by stating the following:

> 5. The water system is responsible for the following costs:
>
>  a. Laboratory fees for all lead samples and reporting of the results to DDW and the school, and all laboratory coordination and instruction.
>
>  b. All water system staff time dedicated to the tasks required by the provisions in this permit amendment.[211]

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[206] Exhibit A, Test Claim, pages 105-107 (test claim order).

[207] Exhibit A, Test Claim, page 108 (test claim order).

[208] Exhibit A, Test Claim, page 108 (test claim order).

[209] Exhibit A, Test Claim, pages 105-106 (test claim order); see also, Exhibit A, Test Claim, page 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).

[210] Exhibit A, Test Claim, pages 105-106 (test claim order).

[211] Exhibit A, Test Claim, page 107 (test claim order).

The State Water Board's "Frequently Asked Questions" document explains that the community water system that serves the school is responsible for all costs associated with collecting, analyzing, and reporting the results as follows:

> **6. Who pays for lead testing of drinking water in California schools?**
>
> The community water system that serves the school is responsible for all costs associated with collecting, analyzing, and reporting drinking water samples for lead testing at up to five locations at each school, and is required to meet with the authorized school representative to develop a sampling plan and review the sampling results. The community water system will *not* pay for any maintenance or corrections needed at the school if elevated lead levels are found in the drinking water, but is required to conduct repeat sampling at the school to confirm elevated lead levels and the effectiveness of any corrective action taken by the school.[212]

The "Frequently Asked Questions" document also states the following:

> The community water system that serves the school is responsible for all costs associated with collecting, analyzing, and reporting drinking water samples for lead testing at California schools required by the January 17, 2017 permit action and the water system is also required to meet with the authorized school representative to develop a sampling plan and review the sampling results. The community water system will *not* pay for any maintenance or corrections needed at the school.[213]

"Community water systems" or "water systems" are defined as public water systems that supply water to the same population year-round, and as indicated earlier, the claimant is a community water system.[214] Thus, pursuant to the test claim order, the claimant, as a community water system, "is responsible for all costs associated with collecting, analyzing, and reporting drinking water samples for lead testing at California schools" as stated in the Frequently Asked Questions document issued by the State Water Board.

The State Water Board's media release reiterates "The Board's new requirement ensures schools that want lead testing can receive it for free."[215]

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[212] Exhibit A, Test Claim, page 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).

[213] Exhibit A, Test Claim, page 123 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).

[214] See Health and Safety Code section 116275(i).

[215] Exhibit A, Test Claim, page 115 (State Water Board's Media Release). See also, Exhibit B, State Water Board's Comments on the Test Claim, page 7 ["An important element of the lead testing in schools program is that the requesting schools receive the lead testing at no charge."].

The claimant explains its compliance with the test claim order in a Declaration from Doug Campbell, a Senior Chemist for the claimant's Public Utilities Department who oversaw the implementation of the test claim order, as follows:

> 7. The City is on a reduced monitoring program approved by the SWRCB and is only required to test 50 residences every three years under the federal and state lead and copper rules, as the City's past test results have not exceeded action levels at the 90th percentile.
> 8. The City tested 262 schools from the date of the Permit Amendment until January 7, 2019. Elevated levels with values greater than 15 ppb were discovered in five fixtures on four school sites.
> 9. Three of the four school sites took remedial action to replace the fixtures. When the City retested after the schools took remedial action, lead levels were Not Detected or below the 15-ppb action level. One school did not perform any remediation, as it is no longer located in the facility.
> 10. All remediations conducted by the schools consisted of replacement of fixtures or drinking fountains, or replacement of plumbing lines internal to the schools themselves. In all instances where remediation was performed, follow-up sampling has shown that the source of lead was removed. The City has not identified any problems with City water through the Permit Amendment.[216]

The sample letter the claimant prepared for schools to request lead sampling states "The City of San Diego will assist and provide a one-time lead sampling (up to five locations) without charge to [School Name] or [School District]."[217] The claimant's website further stated "The City will provide sampling and lead analysis at no charge for schools located within our service area, which encompasses multiple school districts."[218]

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

Effective January 1, 2018 (almost one year after the effective date of the test claim order), Health and Safety Code section 116277 (AB 746) required community water systems[219] serving a public school constructed before January 1, 2010, and that did not previously request lead testing, to affirmatively test for lead in those schools' potable

[216] Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, pages 60-61.

[217] Exhibit A, Test Claim, page 141.

[218] Exhibit A, Test Claim, page 244.

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

water system by July 1, 2019.[220] The section became inoperative July 1, 2019, and was repealed effective January 1, 2020.[221] Section 116277 states in its entirety as follows:

> (a)(1) A community water system that serves a schoolsite of a local educational agency with a building constructed before January 1, 2010, on that schoolsite shall test for lead in the potable water system of the schoolsite on or before July 1, 2019.
>
> (2) The community water system shall report its findings to the schoolsite within 10 business days after the community water system receives the results from the testing laboratory or within two business days if it is found that the schoolsite's lead level exceeds 15 parts per billion.
>
> (3) If the lead level exceeds 15 parts per billion, the community water system shall also test a water sample from the point in which the schoolsite connects to the community water system's supply network to determine the lead level of the water entering the schoolsite from the community water system's water supply network.
>
> (b)(1) A local educational agency shall allow the community water system access to each of the local educational agency's schoolsites that are subject to subdivision (a) to conduct testing.
>
> (2) If the lead level exceeds 15 parts per billion, the local educational agency shall notify the parents and guardians of the pupils who attend the schoolsite or preschool where the elevated lead levels are found.
>
> (c)(1) If lead levels exceed 15 parts per billion, the local educational agency shall take immediate steps to make inoperable and shut down from use all fountains and faucets where the excess lead levels may exist. Additional testing may be required to determine if all or just some of the school's fountains and faucets are required to be shut down.
>
> (2) Each local educational agency shall work with the schoolsites within its service area to ensure that a potable source of drinking water is provided for students at each schoolsite where fountains or faucets have been shut down due to elevated lead levels. Providing a potable source of drinking water may include, but is not limited to, replacing any pipes or fixtures that are contributing to the elevated

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

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

lead levels, providing onsite water filtration, or providing bottled water as a short-term remedy.

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

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

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

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

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

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

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

(1) “Local educational agency” means a school district, county office of education, or charter school located in a public facility.

(2) “Potable water system” means water fountains and faucets used for drinking or preparing food.

(g) This section shall become inoperative on July 1, 2019, and, as of January 1, 2020, is repealed.[222]

Thus, AB 746 requires preparation of a sampling plan, repeat testing when lead levels exceed 15 ppb, notification procedures based on sampling results, and requires the

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

local educational agency to take action if lead levels exceed 15 ppb.[223] AB 746 does not require testing in the following situations: (1) The schoolsite was constructed or modernized after January 1, 2010; (2) The local educational agency of the schoolsite is currently permitted as a public water system and is currently required to test for lead; (3) The local educational agency completed lead testing after January 1, 2009, and posts this information on its website; (4) The local educational agency has requested testing from its community water system consistent with the requirements of AB 746.[224]

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

> As of July 1, 2019, the Division of Drinking Water (DDW), in collaboration with the California Department of Education, has completed the initiative to test for lead in drinking water at all public K-12 schools. California Assembly Bill 746 (AB 746) published on October 12, 2017, effective January 1, 2018, *required community water systems to test lead levels, by July 1, 2019, in drinking water at all California public, K-12 school sites that were constructed before January 1, 2010*.
>
> Prior to the passage of AB 746, in early 2017, the DDW and Local Primacy Agencies issued amendments to the domestic water supply permits of approximately 1,200 community water systems so that schools that are served by a public water system could request assistance from their public water system to conduct water sampling for lead and receive technical assistance if an elevated lead sample was found. These amendments allowed the private schools to continue to request sampling and assistance after the passage of AB 746.[225]

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

> In February 2017, the safety of drinking water was questioned after elevated levels of lead, copper, and bacteria were discovered at three campuses in the San Ysidro School District. In addition, Folsom Cordova Unified started testing water last year at schools built before 1960 that have galvanized steel pipes. The testing was prompted by elevated levels of copper, iron, and lead in water coming from a classroom tap in 2015 at Cordova Lane Center, which serves preschoolers and special education students.

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

[224] Health and Safety Code section 116277(e) (as added by Stats. 2017, ch. 746) (AB 746); see also Exhibit B, State Water Board's Comments on the Test Claim, page 7.

[225] Exhibit K (10), State Water Board, *Lead Sampling in Schools*, https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/leadsamplinginschools.html (accessed on January 30, 2023), page 1.

> Because testing drinking water at schools is not mandatory, it is unknown whether these are isolated incidents or roughly representative of school districts around the state. Conducting sample tests at each schoolsite is one way to determine the scope of the problem.[226]

The same legislative analysis describes lead testing provided under the test claim order and the other substantially similar permit amendments as "more limited in scope compared to the bill's requirements."[227]

## III. Positions of the Parties

### A. City of San Diego

The claimant alleges that the test claim order imposes a reimbursable state-mandated program and required the claimant's public water system to perform lead testing, at no charge, on the property of all schools that receive water from their system, upon request.[228] The claimant asserts that it does not receive any dedicated state or federal funds, or any other non-local agency funds dedicated to this program.[229]

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.[230] 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 provisions in articles XIII C and XIII D of the California Constitution, which were added by Propositions 218 and 26, that it is unable to recoup the costs of the alleged mandate through fees for water service, because it cannot impose or increase fees on the schools in which it conducts lead testing, and it is legally proscribed from imposing or increasing fees on other water users.[231] The claimant raises the following points:

- The City's Public Utilities Department is funded almost entirely by ratepayers or through financing secured by ratepayer revenue. Proposition 218 imposes restrictions on ratepayer funds. The Public Utilities Department does not have "general purpose funds" available outside of these restrictions.[232]

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[226] Exhibit K (4), Concurrence in Senate Amendments, Analysis of AB 746, as amended September 8, 2017, page 3.

[227] Exhibit K (4), Concurrence in Senate Amendments, Analysis of AB 746, as amended September 8, 2017, page 2.

[228] Exhibit A, Test Claim, page 14.

[229] Exhibit A, Test Claim, pages 16-17; 52-53.

[230] Exhibit A, Test Claim, page 58.

[231] Exhibit A, Test Claim, page 54; Exhibit D, Claimant's Rebuttal Comments, page 9.

[232] Exhibit A, Test Claim, page 53.

- Outside of the Public Utilities Department, the City has general fund revenue from taxes and fees that do not exceed the cost of the services provided pursuant to Proposition 26.[233]
- Property-related fees for water service provided by the Public Utilities Department are governed by Proposition 218. Under Proposition 218, the revenue from the fee cannot exceed the cost to provide the property-related service, and the amount of the fee cannot exceed the proportional cost of the service attributable to the parcel.[234] The claimant argues:

  > Because of these restrictions, the PUD cannot stand idle and simply absorb the cost of lead testing for schools without violating Proposition 218. Testing for lead on school property, which is outside PUD's water distribution system, has no relationship to providing water service to other City customers. Allowing water ratepayer funds to absorb the cost of lead testing would result in PUD water service fees "exceed[ing] the proportional cost of the service attributable to the parcel" because all ratepayers would be contributing to the cost of a service provided only to parcels with schools.[235]

- Lead testing in schools is not a property-related service that could properly be funded through water rates. A "property-related service" is defined as a public service having a direct relationship to property ownership (Cal. Const. art. XIII D, § 2(h)). Services provided due to the activities of property owners are not property-related services under Proposition 218.[236]

The claimant states that 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,"[237] 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

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[233] Exhibit A, Test Claim, page 53.

[234] Exhibit A, Test Claim, page 54 (citing to California Constitution, article XIII D, section 6(b)(1) and (3)).

[235] Exhibit A, Test Claim, page 54.

[236] Exhibit A, Test Claim, pages 54-55 (citing *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 427 and *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 841-84).

[237] Exhibit D, Claimant's Rebuttal Comments, page 10.

immediately available to them. The schools, as the exclusive and direct recipients of lead testing under the Permit Amendment, benefit the most in that the testing assesses school pipes and fixtures for sources of lead. Lead testing is not available to the rest of the City's water ratepayers under the Permit Amendment, so they do not receive the benefit of having their own properties evaluated. The benefits of higher property values and testing of City water that SWRCB says are direct benefits to all ratepayers, are really collateral or incidental benefits. Any water rate increase apportioning the cost of lead testing among City ratepayers would fall primarily on schools, the direct and primary beneficiary of the lead testing. The Permit Amendment, however, prohibits charging a school for lead testing. A school is being charged for lead testing whether the City sends the school an invoice when the testing is done, or passes on the cost of lead testing to a school through a water rate increase.

Second, even assuming there is a plausible connection between lead testing at schools and higher property values in the surrounding neighborhoods, higher property values do not benefit all water ratepayers. Water ratepayers are both homeowners and renters. While a homeowner may benefit from a higher resale value of a home, a tenant will not. Higher property values cannot justify charging all water ratepayers for a service they are not receiving.[238]

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.[239] 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

[238] Exhibit D, Claimant's Rebuttal Comments, page 11.

[239] Exhibit D, Claimant's Rebuttal Comments, page 12.

marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

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

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

charging water ratepayers for lead testing provided to schools for free is a tax subject to voter approval under Proposition 26.[240]

The claimant filed comments on the Proposed Decision, agreeing Government Code section 17556(d) does not apply to the test claim order and, thus, there are costs mandated by the state. The claimant, however, requests the Decision be modified to find that California Constitution article XIII D, section 6(b)(4) is not satisfied since only the schools (and not all rate payers) directly benefited from the service mandated by the test claim order as follows:

> The City requests correction of the Commission's finding that "the service provided under the test claim order benefits all water users connected to the water system" and, therefore, satisfies article XIII D, section 6(b)(4). Proposed Decision, p. 75. The Commission misreads the City's declaration by Doug Campbell in stating, "the claimant's declarant states that in all instances where remediation was performed at the schools that had lead exceedances, follow-up sampling showed the source of the lead was removed and no problems to the city's water system were identified." Proposed Decision, pp. 75-76.
>
> Mr. Campbell *did not* state that lead testing at schools resulted in removing lead from the City's water; he stated the opposite:
>
> > All remediations conducted by the schools consisted of replacement of fixtures or drinking fountains, or replacement of plumbing lines internal to the schools themselves. In all instances where remediation was performed, follow-up sampling has shown that the source of lead was removed. **The City has not identified any problems with City water through the Permit Amendment.**
>
> Supplemental Declaration of Doug Campbell, ¶ 10 (Exhibit 5 of the City's Comments on the Commission's December 21, 2018 Draft Proposed Decision; enclosed here as Exhibit A) [emphasis added].
>
> In other words, the schools' fixtures, drinking fountains, and plumping [sic] caused lead to enter the schools' water *alone*. Therefore, replacing those fixtures, drinking fountains, and plumping only fixed the schools' lead issue. Accordingly, given that only the schools benefited from the lead testing, article XIII D, section 6(b)(4) is not satisfied.[241]

Accordingly, the claimant asserts that the test claim order ~~results in increased costs mandated by the state, and~~ imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

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[240] Exhibit D, Claimant's Rebuttal Comments, pages 12-13.

[241] Exhibit L, Claimant's Comments on the Proposed Decision, page 2.

### B. Department of Finance

Finance contends there are no costs mandated by the state since the claimant has fee authority sufficient to cover the costs of the required activities pursuant to Government Code section 17556(d). Finance argues that "claimants do have fee authority undiminished by Propositions 218 or 26."[242] Finance states that "Proposition 26 specifically excludes assessments and property-related fees imposed in accordance with Proposition 218 from the definition of taxes."[243] Finance maintains that the alleged mandate "involves the provision of water services and the fee authority is subject at most to the majority protest provision under article XIII D, section 6(a)."[244] Finance further asserts that "as the State Water Board makes clear in its comments on this test claim, lead testing in K-12 schools provides a direct benefit to the water system as a whole and each ratepayer, and the City may therefore set water rates sufficient to pay for the costs of compliance with the permit amendment."[245]

### C. State Water Resources Control Board

The State Water Board asserts that the test claim order is not subject to state mandate reimbursement because the claimant has fee authority sufficient to cover the costs of any required activities pursuant to Government Code section 17556(d).[246] The State Water Board further argues that Proposition 218 does not prevent the claimant from imposing or increasing water rates to recoup the costs of the alleged mandate. In this respect, the State Water Board argues that the lead testing required by the test claim order confers a direct benefit on all water system users as a whole because it functionally extends the Lead and Copper Rule by providing additional water quality data of systemwide importance, which in turn "will help to maintain and possibly improve property values."[247]

The State Water Board further contends, in response to the Draft Proposed Decision issued in March 2023, that reliance on the *Richmond* case to find that a fee incident to property ownership could not be imposed, is misplaced and that the facts here are distinguishable from *Richmond*.[248] In addition, the State Water Board argues that a fee would satisfy all of the substantive requirements of article XIII B, section 6(b) as follows:

> Additionally, a fee imposed to comply with the lead testing requirements would meet all substantive elements of article XIII D, section 6, subdivision

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[242] Exhibit C, Finance's Comments on the Test Claim, page 2.

[243] Exhibit C, Finance's Comments on the Test Claim, page 2.

[244] Exhibit C, Finance's Comments on the Test Claim, page 2.

[245] Exhibit C, Finance's Comments on the Test Claim, page 2.

[246] Exhibit B, State Water Board's Comments on the Test Claim, pages 8-17.

[247] Exhibit B, State Water Board's Comments on the Test Claim, pages 15-16.

[248] Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision, pages 4-5.

(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 [sic] 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 test 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. [Fn. omitted.][249]

The State Water Board filed comments on the Proposed Decision agreeing "that the Permit Amendment prohibits the City from assessing schools receiving testing services a separate fee in addition to their regular water rates," "which could be more than several thousand dollars."[250] The State Water Board disagrees, however, "that the Permit Amendment prohibits the City from charging schools receiving test services the same rates or increased fees as all other customers."[251] In this respect, the State

[249] Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision, page 5.

[250] Exhibit M, State Water Board's Comments on the Proposed Decision, page 2.

[251] Exhibit M, State Water Board's Comments on the Proposed Decision, page 2.

Water Board contends for the reasons below that the claimant is authorized by law to increase fees on all rate payers, including the schools receiving the testing, to pay for the cumulative costs of the program, which it estimates at 50 cents per customer.[252]

The State Water Board argues that while the test claim order requires the claimant to be responsible for "Laboratory fees for all lead samples and reporting of the results to DDW and the school, and all laboratory coordination and instruction" and "All water system staff time dedicated to the tasks required by the provisions in this permit amendment," it does not address "exactly how and with what fees and process the water system should pay for the costs."[253] In addition, the guidance and Frequently Asked Questions documents do not address the question of what fees or other revenues the community water system may use to cover the costs.[254] The State Water Board states the following:

> By interpreting the Permit Amendment to prohibit the City from charging schools receiving testing any fees, including the same 50 cent fee applicable to all other customers, the Proposed Decision appears to conclude that requiring the community water system to be responsible for the costs means that it cannot spread the costs among its fee payers unless it exempts the schools receiving the testing from that charge. This interpretation assumes that, to comply with the Permit Amendment, the City would be forced to alter its billing system to effectively exempt a school receiving testing from paying a one-time charge of approximately 50 cents (or charge the schools a cumulative 50 cents less than other customers from a fee or fees covering all costs of service, including the lead testing). This interpretation is without any factual or legal basis.[255]

The State Water Board contends "[t]he Permit Amendment is focused on whether the City may charge the schools instead of covering the costs for which the City is responsible out of generally applicable revenues."

> The Proposed Decision's interpretation might be plausible if the cost of compliance was so significant that it required the City to charge a one-time fee or increase its baseline rates to accommodate the costs of testing. But, here, using an assumed total cost of compliance with the Permit Amendment of $650,000 and recognizing that the City's Water Enterprise Fund budget from 2023 was $618,683,116, [fn. omitted] the City's cost of compliance was approximately .001 of the annual budget. There is no reason to assume that the Permit Amendment had any specific fees in mind, other than a fee charged solely to the schools.

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[252] Exhibit M, State Water Board's Comments on the Proposed Decision, page 2.

[253] Exhibit M, State Water Board's Comments on the Proposed Decision, page 3.

[254] Exhibit M, State Water Board's Comments on the Proposed Decision, page 3.

[255] Exhibit M, State Water Board's Comments on the Proposed Decision, page 3.

> The more reasonable interpretation, consistent with the intent and purpose of the Permit Amendment language, is that the City was authorized to use revenues from all customers, including schools, to pay for the costs of compliance.[256]

The State Water Board submits a declaration from Darrin Polhemus, the Deputy Director for the State Water Resources Control Board's Division of Drinking Water, who worked directly on the language in the test claim order.[257] Mr. Polhemus declares the following:

> 5. The purpose and intent of the language contained in section 5 [of the test claim order] was to prevent the City from issuing a separate fee, in addition to the regular rates the schools pay for water service, for the testing and analysis required by the Permit Amendment. The section 5 language was neither intended to, nor drafted in a manner to, exempt a school receiving lead testing from paying all normal rates, including any incremental charge associated with costs of complying with the Permit Amendment requirements.
>
> 6. The section 5 language addressed concerns that if the City chose to issue a separate fee to each school receiving lead testing to cover the costs of the lead testing services, schools would choose not to request the lead testing. Failure to test would pose a particular health risk to those children as children are more susceptible to the health risks from lead.
>
> 7. Additionally, requiring all ratepayers to share the costs of compliance reflects the State Water Board's belief that lead testing in schools provides a tremendous community benefit in terms of healthier children, healthier community members who use the schools for non-school events, and additional information regarding lead in the water system. Similarly, the State Water Board requires other specific testing by water systems for the protection of subgroups or distinct populations such as after a system has received significant damage from a wildfire and testing for benzene is required before full use of water can be restored to those areas.[258]

Thus, the State Water Board urges the Commission to find the proportionality requirement in article XIII D, section 6(b)(3) is satisfied; that any fees imposed on all rate payers for the increased costs of the mandated program do not violate Proposition 218; that the fees would fall under the exemptions to the definition of a tax under Proposition 26; and, therefore there are no costs mandated by the state pursuant to Government Code section 17556(d).

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[256] Exhibit M, State Water Board's Comments on the Proposed Decision, pages 3-4.

[257] Exhibit M, State Water Board's Comments on the Proposed Decision, page 7.

[258] Exhibit M, State Water Board's Comments on the Proposed Decision, page 8.

## IV. Discussion

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

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

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[259] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[260]

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.[261]
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.[262]
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.[263]
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

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

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

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

[262] *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).

[263] *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.

exception identified in Government Code section 17556 applies to the activity.[264]

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.[265] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[266] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[267]

### A. This Test Claim Is Timely Filed Pursuant to Government Code Section 17551 and Has a Potential Period of Reimbursement Beginning January 18, 2017.

Government Code section 17551(c) states that test claims "shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later."[268]

The effective date of the order is January 18, 2017.[269] The claimant filed the Test Claim on January 11, 2018, less than 12 months after the effective date of the order.[270] Therefore, the Test Claim is timely filed.

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

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[264] *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.

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

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

[267] *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).

[268] Government Code section 17551(c).

[269] Exhibit A, Test Claim, page 104 (test claim order).

[270] Exhibit A, Test Claim, page 1.

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

This Test Claim alleges new state-mandated activities and costs arising from an amendment to the claimant's public water system permit adopted by the State Water Board, Order No. 2017PA-SCHOOLS for the City of San Diego PWS No. 3710020. The test claim order requires the claimant, as the operator of a "public water system" that serves a number of K-12 schools, to perform lead sampling upon request of a school at no cost to the school.[271] Under the order, upon request, the claimant must take samples to perform lead sampling, at one to five fixtures (e.g., drinking fountains or food preparation areas) on the school's property, process those results at a certified laboratory, maintain records of the requests and the results, and provide the results, and if necessary, information to the school regarding possible remediation or other solutions if lead is detected in the fixtures above 15 parts per billion (ppb).

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

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

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

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

1. Submit to the State Water Board's Division of Drinking Water a comprehensive list of the names and addresses of all K-12 schools served water through a utility meter [by the claimant] by July 1, 2017;[272]
2. If a school representative requests lead sampling assistance in writing by November 1, 2019:[273]
   a. Respond in writing within 60 days and schedule a meeting with school officials to develop a sampling plan;[274]

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

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

[272] Exhibit A, Test Claim, page 105 (test claim order).

[273] Exhibit A, Test Claim, page 105 (test claim order).

[274] Exhibit A, Test Claim, page 106 (test claim order).

b. Finalize a sampling plan and complete initial sampling within 90 days [or an alternative time schedule approved by DDW];[275]

c. Collect one to five samples at each school, from regularly used drinking fountains, cafeteria or food preparation areas, or reusable bottle filling stations, selected according to the sampling plan, and using the sampling guidance provided in Appendix A;[276]

d. Collect lead samples during the school year, on a Tuesday, Wednesday, Thursday, or Friday on a day that school is in session and has been in session for at least one day prior to the day of sampling;[277]

e. Ensure samples are collected by an adequately trained water system representative;[278]

f. Submit the samples to an ELAP certified laboratory for analysis;[279]

g. Require the laboratory to submit the data electronically to DDW;[280]

h. Provide a copy of the results to the school representative;[281]

i. Within two business days of a result that shows an exceedance of 15 ppb, notify the school of the sample result;[282]

j. If an initial sample shows an exceedance of 15 ppb:

- Collect an additional sample within 10 days if the sample site remains in service;[283]
- Collect a third sample within 10 business days after notification that a resample result is less than or equal to 15 ppb;[284]

[275] Exhibit A, Test Claim, page 106 (test claim order).

[276] Exhibit A, Test Claim, page 106 (test claim order).

[277] Exhibit A, Test Claim, page 106 (test claim order).

[278] Exhibit A, Test Claim, page 106 (test claim order).

[279] Exhibit A, Test Claim, page 106 (test claim order).

[280] Exhibit A, Test Claim, page 106 (test claim order).

[281] Exhibit A, Test Claim, page 106 (test claim order).

[282] Exhibit A, Test Claim, page 106 (test claim order).

[283] Exhibit A, Test Claim, page 106 (test claim order).

[284] Exhibit A, Test Claim, page 106 (test claim order).

- Collect at least one more lead sample at a sample site where the school has completed some corrective action following an initial lead sample result over 15 ppb;[285]

k. Ensure that the water system receives the results of repeat lead samples from the laboratory in no more than 10 business days;[286]

l. Do not release the lead sampling data to the public for 60 days following receipt of the initial lead sampling results unless in compliance with a Public Records Act request for specific results;[287]

m. Discuss the lead sample results with the school prior to releasing the sample results to the public, and within 10 days of receiving the results from the laboratory;[288]

n. Communicate with the school after lead sampling and assist the school with the interpretation of laboratory results and provide information regarding potential corrective actions if the results confirm lead levels above 15 ppb.[289] ***The water system is not responsible for the costs of any corrective action or maintenance***;[290]

o. Keep records of all requests for lead related assistance and provide the records to DDW, upon request;[291]

p. Include in the annual Consumer Confidence Report a statement summarizing the number of schools requesting lead sampling.[292]

Both the claimant and the State Water Board agree that these requirements are new, as compared against prior law.[293]

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[285] Exhibit A, Test Claim, page 107 (test claim order).

[286] Exhibit A, Test Claim, page 107 (test claim order).

[287] Exhibit A, Test Claim, page 107 (test claim order).

[288] Exhibit A, Test Claim, page 107 (test claim order).

[289] Exhibit A, Test Claim, page 108 (test claim order).

[290] Exhibit A, Test Claim, page 108 (test claim order).

[291] Exhibit A, Test Claim, page 108 (test claim order).

[292] Exhibit A, Test Claim, page 108 (test claim order).

[293] 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 B, State Water Board'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).

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

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

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

Under the test claim order, the claimant's public water system must assist those schools to which it serves drinking water with "at least one or more of grades Kindergarten through 12th grade," when a request for one-time assistance is made in writing by an authorized school representative by November 1, 2019.[294] "Authorized school representative" is defined as "the superintendent or designee of a school, governing board or designee of a charter school, or administrator or designee of a private school."[295]

The State Water Board explained in its frequently asked questions documents regarding the lead sampling program that the "schools" which can request lead sampling include all K-12 schools in the water system's service area that are listed in the California School Directory, including both private and public K-12 schools.

> **Which schools can request lead testing of their drinking water?**
>
> The DDW permit action requires community water systems to assist any school in their service area that is listed in the California School Directory. This directory includes schools for grades K-12, including private, charter,

[294] Exhibit A, Test Claim, pages 105-106 (test claim order).

[295] Exhibit A, Test Claim, pages 105-106 (test claim order).

magnet and non-public schools. The directory does *not* include preschools, daycare centers, or postsecondary schools.[296]

From January 1, 2018 through July 1, 2019, however, Health and Safety Code section 116277 required a community water system[297] serving any public school constructed or modernized prior to January 1, 2010, to test for lead in the school's potable water system[298] by July 1, 2019, except for schools exempted from the requirement. There is no requirement in section 116277 that a school first make a request for testing.

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

In addition, by its plain language, Health and Safety Code section 116277 applies only to "schoolsite[s] of a local educational agency with a building constructed or modernized before January 1, 2010"[299] and does *not* apply if the "schoolsite was constructed or modernized after January 1, 2010."[300] Section 116277 defines "local educational agency" as "a school district, county office of education, or charter school located in a public facility."[301] Thus, section 116277 applies to all public schools constructed or modernized before January 1, 2010, but does *not* apply to those public schools constructed or modernized after January 1, 2010, or to private schools. As indicated in the Background, the State Water Board's summary of Health and Safety Code section

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[296] Exhibit A, Test Claim, page 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*), emphasis in original.

[297] "Community water system" is a public water system that supplies water to the same population year-round, and would include the claimant. (See Health and Safety Code section 116275(i).)

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

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

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

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

116227 agrees that the requirements of section 116227 apply only to public schools.[302] Moreover, of those public schools constructed or modernized before January 1, 2010, only those that already completed lead testing before January 1, 2009, or requested lead testing before the enactment of section 116227 (i.e., those that requested testing under the test claim order before January 1, 2018) are exempt from the requirements of section 116227.[303]

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

Finally, the test claim order requires the claimant to submit to the State Water Board's Division of Drinking Water a comprehensive list of the names and addresses of all K-12 schools to which it serves water by July 1, 2017, which is *prior* to the effective date of Health and Safety Code section 116277.[304] Section 116277 was not effective until January 1, 2018 and contains no similar requirement. Thus, this requirement is imposed solely by the test claim order.

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

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[302] Exhibit K (10), State Water Board, *Lead Sampling in Schools*, https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/leadsamplinginschools.html (accessed on January 30, 2023), page 1 ("As of July 1, 2019, the Division of Drinking Water (DDW), in collaboration with the California Department of Education, has completed the initiative to test for lead in drinking water at all public K-12 schools. California Assembly Bill 746 (AB 746) published on October 12, 2017, effective January 1, 2018, required community water systems to test lead levels, by July 1, 2019, in drinking water at all California public, K-12 school sites that were constructed before January 1, 2010.").

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

[304] Exhibit A, Test Claim, page 105 (test claim order). The effective date of Health and Safety Code section 116277 is January 1, 2018.

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

When determining whether a test claim statute or order compels compliance and, thus, creates a state-mandated program for purposes of reimbursement under article XIII B, section 6, the courts have identified two distinct theories: legal compulsion and practical compulsion.[305] Activities undertaken at the option or discretion of local government, without legal or practical compulsion, do not trigger a state-mandated program within the meaning or article XIII B, section 6.[306] The California Supreme Court has described legal compulsion as follows:

> Legal compulsion occurs when a statute or executive action uses mandatory language that require[s] or command[s] a local entity to participate in a program or service… Stated differently, legal compulsion is present when the local entity has a mandatory, legally enforceable duty to obey. This standard is similar to the showing necessary to obtain a traditional writ of mandate, which requires the petitioning party to establish the respondent has a clear, present, and usually ministerial duty to act. ... Mandate will not issue if the duty is ... mixed with discretionary power.
>
> Thus, as a general matter, a local entity's voluntary or discretionary decision to undertake an activity cannot be said to be legally compelled, even if that decision results in certain mandatory actions.[307]

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.[308] The courts have interpreted article XI, section 9 (previously section 19) as granting authority, rather than imposing a duty.[309]

Under the Government Code, when interpreting statutes and constitutional provisions, "shall" is mandatory, and "may" is permissive.[310] 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

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

[306] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 73-76; *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727; *Department of Finance v. Commission on State Mandates* (POBRA) (2009) 170 Cal.App.4th 1355, 1365-1366.

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

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

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

[310] Government Code section 14.

with water for municipal purposes; *or* "*may*" "[a]cquire, construct, repair, and manage pumps, aqueducts, reservoirs, or other works necessary or proper for supplying water for the use of the city or its inhabitants or for irrigating purposes of the city."

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

Nonetheless, even where a local government entity is not legally compelled to perform required activities, it may be practically compelled to do so. As the California Supreme Court recently stated in *Coast Community College Dist. v. Commission on State Mandates*, practical compulsion "arises when a statutory scheme does not command a local entity to engage in conduct, but rather induces compliance through the imposition of severe consequences that leave the local entity no reasonable alternative but to comply."[311]

On October 31, 2024, the Sacramento County Superior Court issued a judgment with an attached ruling on submitted matter, which found the claimant was practically compelled to comply with the test claim order as follows:

> The bottom line is the City will incur costs to comply with the new lead testing requirement, and it has no reasonable alternative to continuing its water service operations in compliance with its permit. Simply ceasing water service is not a reasonable alternative given the critical importance of water service. Continuing to operate while ignoring the permit condition and hoping for no enforcement action from the Board, or continuing to operate despite a permit revocation, are not reasonable alternatives either. Selling the water system, as established by the City's uncontroverted evidence, is not a viable alternative under these circumstances. The City is, therefore, practically compelled to comply with the new permit condition, and the Commission erred in finding otherwise.[312]

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

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[311] *Coast Community College Dist. v. Commission on State Mandates* (2022) 13 Cal.5th 800, 816; see also *Department of Finance v. Commission on State Mandates* (*Kern High School Dist*.) (2003) 30 Cal.4th 727, 754 (where no "legal" compulsion exists, "practical" compulsion may be found if the local agency faces "certain and severe…penalties" such as "double…taxation" or other "draconian" consequences if they fail to comply with the statute).

[312] Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056), pages 12-13.

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

For the test claim order to be subject to subvention pursuant to article XIII B, section 6 of the California Constitution, the order must impose a new program or higher level of service. A new program or higher level of service is defined as a program that carries out the governmental function of providing services to the public, or, in implementing a state policy, imposes unique requirements on local government that do not apply generally to all residents and entities in the state.[313]

On April 29, 2022, the Third District Court of Appeal issued an unpublished opinion in *City of San Diego v. Commission on State Mandates*, finding that the test claim order imposes a new program or higher level of service in that "the provision of drinking water to schools is a peculiarly governmental function and the mandated testing of this water for lead is plainly a service to the public."[314] The Court stated its conclusion that the permit establishes a new program and remanded the claim back to the Commission to determine the remaining issues as follows:

> On the City's appeal, we reverse. For reasons we will cover below, we conclude that the State Board's new condition requires local governments to support "a new program" within the meaning of article XIII B, section 6. But because the City's showing that the State Board's permit condition establishes a "new program" is a necessary, though not sufficient, showing for reimbursement, we stop short of holding that the state must reimburse the City for the costs of compliance. We leave it to the Commission to consider in the first instance whether reimbursement is appropriate on these facts following remand.[315]

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

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

To be reimbursable, the mandated activities must also result in increased costs mandated by the state. Article XIII B, section 6 of the California Constitution and Government Code section 17561(a) require reimbursement for all costs mandated by the state, unless there is an express exemption in article XIII B, section 6. Government Code section 17514 defines "costs mandated by the state" as any increased costs that

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

[314] Exhibit K (2), *City of San Diego v. Commission on State Mandates,* Unpublished Opinion (Apr. 29, 2022, Case No. C092800), page 13.

[315] Exhibit K (2), *City of San Diego v. Commission on State Mandates,* Unpublished Opinion (Apr. 29, 2022, Case No. C092800), page 2.

a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) further requires that no claim shall be made nor shall any payment be made unless the claim exceeds $1,000. In addition, a finding of costs mandated by the state means that none of the exceptions identified in Government Code section 17556 apply.

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

The claimant alleges that it has incurred costs to comply with the test claim order, as follows:[316]

| **Test Claim Order** | **Actual Costs FY 2016-2017 (1/17/17-6/30/17)** | **Actual Costs FY 2017-2018 (7/1/17-3/29/18)** | **Estimated Costs FY 2017-2018 (3/30/18-6/30/18)** |
|---|---|---|---|
| Section 1 | $115,724.90 | $0 | $0 |
| Section 2 | $6,706.65 | $0 | $0 |
| Section 3(a) | $25,566.73 | $9,299.63 | $11,693.89 |
| Section 3(b) | $9,294.99 | $4,739.59 | $4,069.22 |
| Section 3(c) | $64,103.96 | $5,000.29 | $12,476.13 |
| Section 3(e) | $6,090.78 | $0 | $1,208.59 |
| Section 3(f) | $61,087.21 | $6,399.85 | $12,364.08 |
| Section 3(g) | $4,261.12 | $1,549.94 | $1,948.98 |
| Section 3(h) | $3,059.99 | $677.17 | $607.19 |
| Section 3(i) | $4,261.12 | $1,549.94 | $1,948.98 |
| Section 3(j) | $4,547.46 | $1,549.94 | $2,005.80 |
| Section 3(l) | $4,261.12 | $1,549.94 | $1,948.98 |
| Section 3(m) | $17,044.49 | $6,199.75 | $7,795.93 |
| Section 7 | $12,783.37 | $4,649.82 | $5,846.95 |
| Section 8 | $12,783.37 | $4,649.82 | $5,846.95 |
| **TOTALS** | **FY 2016-2017 $351,577.26** | **FY 2017-2018 (actual) $47,815.67** | **FY 2017-2018 (estimated) $69,761.67** |

As shown above, the claimant alleges incurred costs of $351,577.26 for fiscal year 2016-2017.[317] In support, the claimant cites to the declaration of Rex Ragucos, Supervising Management Analyst for the City of San Diego Public Utilities Department and to a cost analysis spreadsheet prepared by Mr. Ragucos.[318] Mr. Ragucos directly oversees the review of and budgetary requirements for implementation of the mandated activities in the test claim order.[319] His declaration contains a narrative of the cost

[316] Exhibit A, Test Claim, pages 18-51, 58.

[317] Exhibit A, Test Claim, page 58.

[318] Exhibit A, Test Claim, page 79 (Declaration of Rex Ragucos).

[319] Exhibit A, Test Claim, page 79 (Declaration of Rex Ragucos).

analysis he performed of expenses incurred under the test claim order as of March 2018, as well as projected expenses through the end of fiscal year 2017-2018.[320] The cost analysis is attached to the Test Claim as Exhibit 36.[321]

The record contains substantial evidence pursuant to Government Code section 17559 that the claimant's costs to comply with the mandated activities under the test claim order exceed $1,000.[322]

The claimant states that it anticipates total costs will potentially be higher than the estimated $69,761.67 during the last quarter of fiscal year 2017-2018 "because the legislature is planning to require all schools to receive this lead testing, whether voluntarily requested or not."[323] The claimant appears to be referencing AB 746, discussed above, which added Health and Safety Code section 116277 to require community water systems serving public school constructed before January 1, 2010 to test for lead in the schools' potable water system during the time period January 1, 2018 through July 1, 2019.[324] AB 746 is the not the subject of this test claim, nor was a test claim timely filed on AB 746. Therefore, whether AB 746 imposes a reimbursable state-mandated program on the claimant or any other local government agency is not before the Commission, and the Commission makes no findings regarding whether Health and Safety Code section 116277 (as added by Stats. 2017, ch. 746) imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6. As discussed above, beginning January 1, 2018, any lead testing conducted by the claimant on those public schools constructed or modernized before January 1, 2010, that did not request testing before January 1, 2018, is required by Health and Safety Code section 116227 (as added by Stats. 2017, ch. 746), and not by the test claim order.

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

As stated above, the test claim order imposes the following new requirement on the claimant: "Do not release the lead sampling data to the public for 60 days following receipt of the initial lead sampling results unless in compliance with a Public Records Act request for specific results."[325] This activity is limited to releasing the lead sampling data in compliance with preexisting obligations under the Public Records Act.

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[320] Exhibit A, Test Claim, page 79 (Declaration of Rex Ragucos).

[321] Exhibit A, Test Claim, pages 2767-2768.

[322] Government Code section 17564.

[323] Exhibit A, Test Claim, pages 58, 86 (Declaration of Rex Ragucos).

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

[325] Exhibit A, Test Claim, page 107 (test claim order). The claimant alleges it incurred reimbursable costs under Section 3(l) of the test claim order to prepare presentations

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

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

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

Article XIII B, section 6 of the California Constitution requires the state to reimburse local government if the Legislature or any state agency mandates local government to provide a new program or higher level of service.[326] 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."[327] "The purpose of section 6 is to prevent '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.'"[328] Thus, unless there is an exception to reimbursement that applies, the claimant cannot be forced to absorb the increased costs of the mandated new program or higher level of service.[329]

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

[326] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 754.

[327] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763; *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[328] *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[329] *County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 906, and *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1577-1578, both holding that "Reimbursement is required when the state freely chooses

Government Code section 17556(d) provides that the Commission shall not find costs mandated by the state if it finds that the "local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service."

The California Supreme Court upheld the constitutionality of Government Code section 17556(d) in *County of Fresno.* [330] The court, in holding that the term "costs" in article XIII B, section 6, excludes expenses recoverable from sources other than taxes, stated:

> Section 6 was included in article XIII B in recognition that article XIII A of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles I, supra,* 43 Cal.3d at p. 61.) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues. Thus, although its language broadly declares that the "state shall provide a subvention of funds to reimburse ... local government for the costs [of a state-mandated new] program or higher level of service," read in its textual and historical context section 6 of article XIII B requires subvention only when the costs in question can be recovered *solely from tax revenues.*[331]

Following the logic of *County of Fresno*, the Third District Court of Appeal held in *Connell v. Superior Court*, where the claimant has "authority, i.e., the right or power, to levy fees sufficient to cover the costs" of a state mandated program, reimbursement is not required, notwithstanding other factors that may make the exercise of that authority impractical or undesirable.[332] The parties dispute the applicability of Government Code section 17556(d).

The claimant, as a public or community water system, generally has the statutory authority to collect fees from its customers to provide water under the California Safe

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to impose on local agencies any peculiarly governmental cost which they were not previously required to absorb."

[330] *County of Fresno v. State of California* (1990) 53 Cal.3d. 482.

[331] *County of Fresno v. State of California* (1990) 53 Cal.3d. 482, 487.

[332] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Connell v. Superior Court* (1997) 59 Cal.App.4th 382; 401-402; *Paradise Irrigation District v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 195; *Department of Finance v. Commission on State Mandates* (2021) 59 Cal.App.5th 546, 564, citing to *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 401.

Drinking Water Act.[333] The claimant acknowledges that it has this general authority and imposes water service fees on water customers to comply with the Lead and Copper Rule, since the service of monitoring benefits all customers for water.

> The Lead and Copper Rule (LCR) is a United States federal regulation that requires San Diego Public Utilities to test for corrosivity of the City's water supply by analyzing samples from residential plumbing systems that contain copper and may contain lead. The LCR studies occur regularly every three years and are funded through rates charged by the Department. Since analyses required by the LCR are a normal part of the Public Utilities Department's scheduled responsibilities, and provide water quality information on a system-wide basis, no specific budget is earmarked for this activity. Instead, costs associated with LCR sampling and analyses have been included as part of the City's Public Utilities annual laboratory budget since the implementation of the regulation in the early 1990's. This service benefits all PUD customers for water, thus it is properly charged to all ratepayers.[334]

The claimant's water service fees are governed by chapter 6, article 7 of the San Diego Municipal Code, beginning with section 67.0501, which states that "[t]he water charge [for water and water service] begins when a service connection is installed and the meter is set."[335] The ordinances authorize the city to establish and adjust water rates by resolution as follows:

- The rates to be charged and collected for water supplied in any one month for Domestic, Commercial, and Industrial use within the City, and for all purposes for which no other rate for water supplied for use within the City is provided shall be established from time to time by a resolution of the City Council; provided, however, that prior to considering any change in the water service charge by resolution, a notice of the proposed change shall be posted by the City Clerk at least ten (10) days prior to consideration of such a resolution by the City Council. (San Diego Municipal Code § 67.0502.)[336]

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[333] Health and Safety Code section 116590(b) ("A public water system may collect a fee from its customers to recover the fees paid by the public water system pursuant to this chapter [California Safe Drinking Water Act].").

[334] Exhibit A, Test Claim, page 70 (Declaration of Doug Campbell, Senior Chemist of the Public Utilities Department, City of San Diego).

[335] Exhibit K (9), San Diego Municipal Code, Chapter 6, Article 7, Division 5 Water Rates and Charges, page 1.

[336] Exhibit K (9), San Diego Municipal Code, Chapter 6, Article 7, Division 5 Water Rates and Charges, page 1.

- The water rates established in the Article shall be adjusted as necessary by the City Manager to compensate proportionately for any increase in the cost of water and energy purchased by the City. Notice of such increases in water rates shall be given by the City Manager to the City Council by report and to the public by publication once in the City Official Newspaper on or before the thirtieth (30th) day prior to the effective date of such increases. (San Diego Municipal Code § 67.0508.)[337]

The water service fee is made up of several components, including a base fee and usage fee, the latter of which includes costs associated with complying with the Federal Safe Drinking Water Act, which includes the Lead and Copper Rule requirements.[338]

However, the claimant contends that Government Code section 17556(d) does not apply because the test claim order expressly provides that the claimant must conduct the lead sampling at no charge to the schools in its service area. In addition, pursuant to Propositions 218 and 26, it is unable to recoup the costs of the alleged mandate through fees for water service, because it cannot impose or increase fees on the schools in which it conducts lead testing, and it is legally proscribed from imposing or increasing fees on other water users.[339]

The claimant contends that the mandated activities at issue here are different than those provided under the Lead and Copper Rule: "Unlike the LCR that is examining corrosivity system-wide, the Lead in Schools amendment determines whether plumbing at a specific school site may be contaminating that facility's drinking water supply. This service directly benefits only the individual school tested and cannot be charged to all ratepayers."[340] The claimant also raises the following points:

- Lead testing at schools is not a property-related service that could properly be funded through water rates. A "property-related service" is defined as a public service having a direct relationship to property ownership (Cal. Const. art. XIII D, § 2(h)). Services provided due to the voluntary activities of property owners (here, the requests for lead testing by the schools) are not property-related services under Proposition 218.[341]

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[337] Exhibit K (9), San Diego Municipal Code, Chapter 6, Article 7, Division 5 Water Rates and Charges, page 3.

[338] See, e.g., Exhibit K (8) Resolution Number R-286720, adopted December 4, 1995, https://docs.sandiego.gov/council_reso_ordinance/rao1995/R-286720.pdf (accessed on January 12, 2023), pages 2-3.

[339] Exhibit A, Test Claim, page 54.

[340] Exhibit A, Test Claim, page 70 (Declaration of Doug Campbell, Senior Chemist of the Public Utilities Department, City of San Diego).

[341] Exhibit A, Test Claim, pages 54-55 (citing *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 427 and *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 841-84).

- The City's Public Utilities Department cannot absorb the cost of lead testing for schools without violating Proposition 218. "Testing for lead on school property, which is outside PUD's water distribution system, has no relationship to providing water service to other City customers."[342] Allowing water ratepayer funds to absorb the cost of lead testing would result in water service fees "exceed[ing] the proportional cost of the service attributable to the parcel" because all ratepayers would be contributing to the cost of a service provided only to parcels with schools.[343]
- Raising water rates to cover the mandated costs would violate the test claim order (by passing the costs on to the schools) and violate Proposition 218, which prohibits the claimant from charging customers for services that are not immediately available to them. The schools are the exclusive and direct recipients of lead testing and 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 water ratepayers under the test claim order, 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 the State Water Board says are direct benefits to all ratepayers, are collateral or incidental benefits.

  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.[344]

The State Water Board and the Department of Finance disagree with the claimant and argue there are no costs mandated by the state since Government Code section 17556(d) applies. The State Water Board contends – and Finance agrees – that Proposition 218 does not prevent the claimant from increasing water rates because lead testing confers a "direct benefit" to the water system as a whole and, by extension, each ratepayer. [345] Specifically, the State Water Board alleges that the mandated program "functionally extends" the Lead and Copper Rule and helps to maintain and possibly improve property values.[346]

> By requiring additional lead testing in schools, the Permit Amendment functionally extends the Lead and Copper rule by providing additional

[342] Exhibit A, Test Claim, page 54.

[343] Exhibit A, Test Claim, page 54.

[344] Exhibit D, Claimant's Rebuttal Comments, page 11.

[345] Exhibit B, State Water Board's Comments on the Test Claim, page 16; Exhibit C, Finance's Comments on the Test Claim, page 2.

[346] Exhibit B, State Water Board's Comments on the Test Claim, page 16.

> testing points which can inform the City about how the water chemistry in its distribution network may be impacting not only particular schools, but residences who obtain water from a common source or through a common delivery system. And to the extent the City takes corrective action, for example by additional treatment to reduce corrosivity, all users, not just the schools, will benefit [] from the reduced threat of lead exposure. Therefore, just as the testing of private residences under the Lead and Copper rule benefits the water system as a whole, and by extension, each of the ratepayers, not just the owners of the residences being tested, the lead testing in K-12 schools provides similar direct benefit to each ratepayer by providing additional testing inputs the City can use to optimize its water chemistry and quality to reduce the amount of lead in [] all residences and businesses.
>
> Additionally, the lead testing in schools provides a direct benefit for each ratepayer by maintaining, and possibly, improving property values.[347]

The State Water Board further contends that the existing property-related fee can be increased since the fee is imposed as an incident of property ownership and any reliance on the *Richmond v. Shasta Community Services Dist.* case is misplaced.[348] In *Richmond*, the court held a fee or charge imposed on persons who apply for a *new water connection* is not a "fee or charge" within the meaning of article XIII D, section 6 because it is triggered by a voluntary action of the property owner to undertake development that triggers a need for a new connection.[349] The Supreme Court noted that it would be impossible to comply with article XIII D, section 6 (added by Proposition 218) 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.[350] The State Water Board asserts the "facts that drove the decision in *Richmond* are not present in this test claim. Any increased fee . . . 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 require nothing besides normal ownership and use of property.[351]

~~Finally~~ Further, the State Water Board contends that all of the substantive requirements of article XIII D, section 6(b) (added by Proposition 218) are satisfied, including the requirements in article XIII D, section 6(b)(3) and (b)(4), which the claimant specifically disputes.

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[347] Exhibit B, State Water Board's Comments on the Test Claim, page 16.

[348] Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision, page 4 (citing *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409).

[349] *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 424.

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

[351] Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision, pages 4-5.

Regarding subdivisions (b)(3) and (b)(4) of [article XIII D,] 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 Xlll D for compliance with the LCR. [Fn. omitted.]

Additionally, a private entity or local government cannot operate a public water system without a permit from the State Water Board. [Fn. omitted.] The permit is subject to revocation or penalties for failure to comply. [Fn. omitted.] 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.[352]

The State Water Board also argues that the test claim order cannot be interpreted as prohibiting the claimant from increasing its water rates on all rate payers, including the schools receiving the service, and therefore, the proportionality requirement in article XIII D, section 6(b)(3) is satisfied.[353]

Finally, the State Water Board contends that the fee would not be considered a tax under article XIII C (Proposition 26), since it would fall under the exception for "assessments and property-related fees imposed in accordance with the provisions of Article XIII D."[354]

As explained below, the Commission finds that Government Code section 17556(d) does not apply in this case and, therefore, the test claim order imposes costs mandated by the state on the claimant.

*i. Pursuant to the plain language of the test claim order and other State Water Board documents, the claimant does not have the authority to impose fees on schools requesting lead testing to cover the increased costs to comply with the new state-mandated activities.*

Based on the plain language of the test claim order and other State Water Board documents issued at the time the test claim order was adopted, the City does not have the authority to impose fees on the schools requesting lead testing to pay for the new state-mandated requirements. The test claim order states the following:

5. The water system is responsible for the following costs:
   a. Laboratory fees for all lead samples and reporting of the results to DDW and the school, and all laboratory coordination and instruction.
   b. All water system staff time dedicated to the tasks required by the provisions in this permit amendment.[355]

The State Water Board's "Frequently Asked Questions" document explains that the community water system that serves the school is responsible for all costs associated with collecting, analyzing, and reporting the results as follows:

**6. Who pays for lead testing of drinking water in California schools?**

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[352] Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision, pages 5-6.

[353] Exhibit M, State Water Board's Comments on the Proposed Decision, pages 2-5, 7-8.

[354] Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision, page 6.

[355] Exhibit A, Test Claim, page 107 (test claim order).

> The community water system that serves the school is responsible for all costs associated with collecting, analyzing, and reporting drinking water samples for lead testing at up to five locations at each school, and is required to meet with the authorized school representative to develop a sampling plan and review the sampling results. The community water system will *not* pay for any maintenance or corrections needed at the school if elevated lead levels are found in the drinking water, but is required to conduct repeat sampling at the school to confirm elevated lead levels and the effectiveness of any corrective action taken by the school.[356]

The State Water Board urges the Commission to interpret this language as prohibiting the claimant from charging the schools receiving service a *separate* fee for all costs of the service — but *not* prohibiting the claimant from increasing existing water rates on all customers, including the schools receiving the service (which would amount to roughly 50 cents per customer).[357] The State Water Board argues that the test claim order does not address "exactly how and with what fees and process the water system should pay for the costs."[358] In addition, the State Water Board's guidance and Frequently Asked Questions documents do not address the question of what fees or other revenues the community water system may use to cover the costs.[359] Thus, there is no prohibition in the test claim order from charging schools the same rates as other customers for the increased costs. The State Water Board also submits a declaration from its deputy director, who worked on the language of the test claim order, stating that it was never the intent to exempt a school receiving lead testing from paying all normal rates, including any incremental charge associated with costs of complying with the Permit Amendment requirements.[360]

~~Thus, the~~ For the reasons below, the Commission finds that increasing the existing water fees imposed on the schools requesting lead testing or imposing a separate fee on those schools violates the test claim order and the claimant has no authority to impose fees on these schools within the meaning of Government Code section 17556(d).

Under the rules of statutory construction, the courts have explained that the primary task is to determine the Legislature's intent, or in this case the State Water Board's intent when adopting the test claim order.[361] The first step in the process is to examine

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[356] Exhibit A, Test Claim, page 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*).

[357] Exhibit M, State Water Board's Comments on the Proposed Decision, page 2.

[358] Exhibit M, State Water Board's Comments on the Proposed Decision, page 3.

[359] Exhibit M, State Water Board's Comments on the Proposed Decision, page 3.

[360] Exhibit M, State Water Board's Comments on the Proposed Decision, page 8 (Declaration of Darrin Polhemus).

[361] *McHugh v. Protective Life Insurance Co.* (2021) 12 Cal.5th 213, 227.

the plain language, "which is the best indicator of legislative intent."[362] When interpreting a statute or executive order, courts generally give words their usual and ordinary meaning. If there is no ambiguity in the language, "we presume the lawmakers meant what they said, and we apply the term or phrase in accordance with that meaning. . . If, however, the statutory terms are ambiguous, then we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history."[363] Reports of legislative committees and analysts are useful indicators of legislative intent, but material showing the motive or understanding of the bill's author or other interested persons is generally not considered.[364] In addition, the courts have held that an administrative agency's interpretation of a statute that it routinely enforces is entitled to great weight. Ultimately, however, statutory construction is a matter of law and administrative interpretations "must be rejected where contrary to statutory intent."[365]

Here, the plain language of the test claim order states that the claimant is responsible for the costs of staff time under the order, and for "***all"*** laboratory and reporting costs.[366] There is no language in the test claim order indicating that the schools would have to pay for this service or pay a portion of the costs of this service. The courts have held that "[i]f the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute)."[367]

However, in light of the interpretation by the State Water Board that this language does not prohibit the claimant from increasing fees on all rate payers including the schools receiving the service, and assuming there may be ambiguity in the plain language of the test claim order, the extrinsic evidence still supports the interpretation that the claimant has no authority to shift the costs of the mandated program to the schools receiving the mandated service. The following documents issued by the State Water Board at the time the test claim order was adopted state the following:

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[362] *Joannou v. City of Rancho Palos Verdes* (2013) 219 Cal.App.4th 746, 752; *McHugh v. Protective Life Insurance Co.* (2021) 12 Cal.5th 213, 227.

[363] *Almond Alliance of California v. California Fish and Game Commission* (2022) 79 Cal.App.5th 337, 353.

[364] *Joannou v. City of Rancho Palos Verdes* (2013) 219 Cal.App.4th 746, 759; *McHugh v. Protective Life Insurance Co.* (2021) 12 Cal.5th 213, 241 (Courts will review the author's statements when the statements are part of committee materials and are relayed not as personal views, but as part of the Legislature's consideration of the bill.).

[365] *Skidgel v. California Unemployment Insurance Appeals Bd.* (2021) 12 Cal.5th 1, 10-11.

[366] Exhibit A, Test Claim, page 107 (test claim order).

[367] *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.

- On January 17, 2017 (the day before the effective date of test claim order),[368] the State Water Board issued a media release entitled "California Water Systems to Provide Lead Testing for Schools."[369] The media release contains the following statements:

  "In an effort to further safeguard California's water quality, K-12 schools in the state can receive ***free*** testing for lead under a new initiative announced today by the State Water Resources Control Board."[370]

  "The community water systems are responsible for the costs associated with collecting drinking water samples, analyzing them and reporting results through this new program."[371]

  "The Board's new requirement ensures schools that want lead testing can receive it for ***free***. The Board consulted with water systems and schools in developing the requirement."[372]

- The State Water Board's "Frequently Asked Questions" document explains that the community water system that serves the school is responsible for ***all*** costs associated with collecting, analyzing, and reporting the results.[373]

Thus, these documents support the interpretation that the lead testing services provided to schools by the claimant would be paid for by the claimant and although the State Water Board now contends that the intent of the test claim order was not to exempt a school receiving lead testing from paying all normal rates, including any incremental charge associated with the costs of complying with the test claim order, the plain language of the order and documents issued by the State Water Board state the opposite; that the service would be free.[374]

Accordingly, the Commission finds that increasing the existing water fees imposed on the schools requesting lead testing or imposing a separate fee on those schools violates the test claim order and the claimant has no authority to impose fees on these schools within the meaning of Government Code section 17556(d).

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[368] Exhibit A, Test Claim, page 108 (test claim order).

[369] Exhibit A, Test Claim, page 115 (State Water Board's Media Release).

[370] Exhibit A, Test Claim, page 115 (State Water Board's Media Release), emphasis added.

[371] Exhibit A, Test Claim, page 116 (State Water Board's Media Release).

[372] Exhibit A, Test Claim, page 116 (State Water Board's Media Release), emphasis added.

[373] Exhibit A, Test Claim, page 119 (*Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*), emphasis added.

[374] Exhibit M, State Water Board's Comments on the Proposed Decision, page 8.

*ii. The claimant does not have the authority to impose fees on the remaining customers pursuant to Government Code section 17556(d) to cover the increased costs of the new state-mandated activities since such a fee would violate article XIII D, section 6(b)(3) of the California Constitution (Proposition 218).*

Thus, the issue is whether the claimant has the authority (the right or power) pursuant to the exception to reimbursement in Government Code section 17556(d), to levy fees sufficient to cover the costs of the mandated activities on the remaining water customers, including residential customers, given the requirements imposed by Propositions 218 and 26 (adding and amending articles XIII C and XIII D to the California Constitution), which restrict the ability of state and local governments to impose taxes and fees.[375] As the courts have determined, the Commission is required to liberally construe these constitutional amendments in a manner that effectuates the voters' purpose in adopting the law:

> The appropriate way of examining the text of Proposition 218 has already been spelled out by the Supreme Court in Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority (2008) 44 Cal.4th 431, 448 [unofficial cite omitted]: "We ' " 'must enforce the provisions of our Constitution and "may not lightly disregard or blink at ... a clear constitutional mandate." ' " ' [Citation.] In so doing, we are obligated to construe constitutional amendments in a manner that effectuates the voters' purpose in adopting the law. [Citation.] [¶] Proposition 218 specifically states that '[t]he provisions of this act shall be *liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.*' (Ballot Pamp., [Gen. Elec. (Nov. 5, 1996)] text of Prop. 218, § 5, p. 109; see Historical Notes, [2A West's Ann. Const. (2008 supp.) foll. *Cal. Const., art. XIII C.*], at p. 85.) Also, as discussed above, the ballot materials explained to the voters that Proposition 218 was designed to 'constrain local governments' ability to impose assessments; place extensive requirements on local governments charging assessments; shift the burden of demonstrating assessments' legality to local government; *make it easier for taxpayers to win lawsuits; and limit the methods by which local governments exact revenue from taxpayers without their consent.*' " [Citation omitted.][376]

Article XIII D of the California Constitution, which was added in 1996 by Proposition 218, defines "fees" associated with property ownership in article XIII D, section 2(e), as follows:

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[375] *Coziahr v. Otay Water Dist.* (2024) 103 Cal.App.5th 785, 794, 795; *City of Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191, 1200.

[376] *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493. 1505, emphasis in original.

> (e) "Fee" or "charge" means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an *incident of property ownership*, including a user fee or charge for a property related service.[377]

Article XIII D, section 2(h), further defines a "property-related service" as "a public service having a *direct relationship* to property ownership."[378]

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

> *Except for fees or charges for sewer, water, and refuse collection services*, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area.[379]

"Thus, article XIII D expressly exempts water service charges from the voter-approval requirement that it imposes on all other fees and charges."[380] Nonetheless, water service fees are still subject to the procedural requirements imposed by article XIII D, section 6(a), including the voter protest provisions.[381] And a water service fee must satisfy the five substantive requirements of article XIII D, section 6(b), which provides as follows:

> A fee or charge shall not be extended, imposed, or increased by any agency unless it meets *all* of the following requirements:

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[377] California Constitution, article XIII D, section 2(e), emphasis added.

[378] California Constitution, article XIII D, section 2(h), emphasis added. In addition, section 2(g) of article XIIID defines "property ownership" to include tenancies if the tenant is directly liable for the payment of the fee.

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

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

[381] *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal. 4th 205, 215 ("Because article XIII D does not include similar express exemptions from the other requirements that it imposes on property-related fee[s] and charges, the implication is strong that fees for water, sewer, and refuse collection services are subject to those other requirements"); *Paradise Irrigation Dist. v. Commission on State Mandates* (2019) 33 Cal.App.5th 174, 194-196, holding that requirements imposed on water districts to conserve water and achieve water conservation goals did not impose costs mandated by the state since the districts had fee authority as a matter of law, subject only to the voter protest provisions of article XIII D, section 6(a).

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership *shall not exceed the proportional cost of the service attributable to the parcel*.

(4) No fee or charge may be imposed for a service *unless that service is actually used by, or immediately available to, the owner of the property in question*. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners.[382]

The claimant contends that the services provided under the test claim order are due to the voluntary requests for lead testing by the schools and, thus, the services are not property-related services under Proposition 218 and a fee would not be incident to property ownership pursuant to article XIII D, section 2(e) and (h).[383]

The California Supreme Court has held that domestic water delivery through a pipeline is a "property-related service" within the meaning of article XIII D,[384] and therefore a fee imposed for that service is a property-related fee subject to the restrictions of article XIII D.[385] In addition, the Proposition 218 Omnibus Implementation Act, enacted specifically to construe Proposition 218, defines "water" as "any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water."[386] Thus, the entity who produces, stores, supplies, treats, or distributes water necessarily provides water service.[387]

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

[383] Exhibit A, Test Claim, pages 54-55 (citing *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409, 427 and *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 841-84).

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

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

[386] Government Code section 53750(m).

[387] *Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 595 (disapproved on other grounds by *City of Buenaventura v. United Water Conservation Dist.* (2017) 3 Cal.5th 1191).

But this determination does not apply to any domestic water delivery system-related service without limitation. As the Court explained in *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, "[a] water service fee is a fee or charge under article XIII D if, but only if, it is imposed 'upon a person as an incident of property ownership.'"[388]

As explained earlier, *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. The Supreme Court held that a fee for making a new connection to the water system is not imposed "as an incident of property ownership" and therefore not subject to the restrictions that article XIII D imposes on property assessments and property related fees because the fee imposed on the owner results "from the owner's *voluntary decision* to apply for the connection."[389]

> Thus, we agree that water service fees, being fees for property-related services, may be fees or charges within the meaning of article XIII D. But we do not agree that all water service charges are necessarily subject to the restrictions that article XIII D imposes on fees and charges. Rather, we conclude that a water service fee is a fee or charge under article XIII D if, but only if, it is imposed "upon a person as an incident of property ownership." (Art. XIII D, § 2, subd. (e).) A fee for ongoing water service through an existing connection is imposed "as an incident of property ownership" because it requires nothing other than normal ownership and use of property. But a fee for making a new connection to the system is not imposed "as an incident of property ownership" because it results from the owner's voluntary decision to apply for the connection.
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> Any doubt on this point is removed by considering the requirements that article XIII D imposes on property-related fees and charges. As with assessments, article XIII D requires local government agencies to identify the parcels affected by a property-related fee or charge. Specifically, it requires the agency to identify "[t]he parcels upon which a fee or charge is proposed for imposition." (Art. XIII D, § 6, subd. (a)(1).) As we have explained, *it is impossible for the District to comply with such a requirement for connection charges, because the District cannot determine in advance which property owners will apply for water service connection*. As with assessments, this impossibility of compliance strongly suggests that connection fees for new users are not subject to article XIII D's restrictions on property-related fees.[390]

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

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

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

Similarly, if a property owner incurs a fee as a result of a voluntary decision regarding the property's business use, rather than mere ownership or activities intertwined with property ownership, the fee imposed on that property owner is not imposed as an incident of property ownership.[391] In *Apartment Association of Los Angeles County, Inc.*, the Supreme Court determined whether a city ordinance imposing an inspection fee on private landlords violates article XIII D, section 6, as added by Proposition 218.[392] The Court determined that the fee was not imposed as an incident of property ownership and did not violate article XIII D, section 6, because the fee was imposed on business owners who choose to engage in the residential rental business and not in their capacity as landowners.

> . . . a levy may not be imposed on a property owner as such—i.e., in its capacity as property owner—unless it meets constitutional prerequisites. In this case, however, the fee is imposed on landlords not in their capacity as landowners, but in their capacity as business owners. The exaction at issue here is more in the nature of a fee for a business license than a charge against property. It is imposed only on those landowners who choose to engage in the residential rental business, and only while they are operating the business.[393]

"In other words, taxes, assessments, fees, and charges are subject to the constitutional strictures when they burden landowners *as landowners.* The ordinance does not do so: it imposes a fee on its subjects by virtue of their ownership of a business—i.e., because they are landlords."[394]

The Draft Proposed Decision issued in March 2023 agreed with the claimant's argument that a fee was triggered by a voluntary decision of the schools and, thus, was not a property-related fee under article XIII D.[395] Upon further review, however, the Commission finds that an increase in the existing fees for ongoing water service under the test claim order would satisfy the requirements of a property-related fee within the meaning of article XIII D, section 2.

The test claim order amended the claimant's *existing* domestic water supply permit as directed by then-Governor Brown in his veto message on AB 334 for the State Water Board to incorporate water quality testing in schools as part of the state's Lead and Copper Rule, and compliance with the test claim order is a requirement for the claimant

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[391] *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830.

[392] *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 833.

[393] *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 839-840.

[394] *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 841.

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

to *continue* providing water to its customers.[396] Health and Safety Code section 116525(a) provides: "No person shall operate a public water system unless he or she first submits an application to the department and receives a permit as provided in this chapter." And the Sacramento County Superior Court found "[b]ecause the City operates its water system under a permit from the Board, it would not be able to continue to do so if its permit was suspended or revoked."[397] In addition, the mandate is to test for lead in the schools already connected to the water distribution system. The test claim order applies to the "schools that are served water through a utility meter by July 1, 2017" and request testing.[398] The Frequently Asked Questions document issued by the State Water Board explains that "[i]f your water system does not serve potable water to at least one K-12 school listed in the California School Directory, the permit amendment does not apply to your water system and no further action is necessary."[399] Thus, the claimant's assertion that "testing for lead on school property . . . is outside PUD's water distribution system"[400] is not supported by the test claim order or the record. Furthermore, the claimant already imposes a property-related fee for water service on property owners after a connection to the system is made, which covers the costs associated with complying with the Federal Safe Drinking Water Act, including the Lead and Copper Rule requirements.[401] Thus, the situation here is unlike *Richmond*, because the fee is associated with water service after the connection to the water system is made and the property owners have been identified, and is not related to voluntary requests for new connections.

In addition, the facts here are not like those in the *Apartment Assn.* case, where the city tried to impose an inspection fee on landowners who chose to conduct residential rental

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[396] Exhibit K (1), Administrative Record on Permit Amendment No. 2017PA-SCHOOLS, page 145 (Governor's Veto Message); see also, Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision, pages 5-6 ("The permit is subject to revocation or penalties for failure to comply. . . . 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.").

[397] Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056), page 9 ("Because the City operates its water system under a permit from the Board, it would not be able to continue to do so if its permit was suspended or revoked. (See Health & Saf. Code, § 116525, subd. (a).) . . . No city could reasonably ignore such an obligation [imposed by the test claim order] and roll the dice on whether 1.3 million residents will have their water service disrupted.").

[398] Exhibit A, Test Claim, page 105 (Test claim order).

[399] Exhibit A, Test Claim, page 118.

[400] Exhibit A, Test Claim, page 54.

[401] See, Exhibit K (8), Resolution Number R-286720, adopted December 4, 1995, https://docs.sandiego.gov/council_reso_ordinance/rao1995/R-286720.pdf (accessed on January 12, 2023), pages 2-3.

businesses and thus, the court held the fee was triggered by the property owners' business decisions rather than as an incident to property ownership. Although a school has a choice to request lead testing under the test claim order, its request is not based on a business decision of the school. The dual purpose of the test claim order is to "further safeguard California's water quality" generally and to "ensure we are continuing to protect our most vulnerable populations."[402] As indicated above, the schools that request service cannot be charged for these activities. And the mandated activities are not triggered by a voluntary decision of the other property owners. Thus, the *Richmond* and *Apartment Assn*. cases are distinguishable and do not apply here. The requirements mandated by the test claim order are conditions imposed by the state for the claimant to continue providing water service to its existing customers, are incident to property ownership, and fee would be considered a property-related fee under article XIII D, section 2.[403]

Moreover, a fee imposed on the claimant's remaining customers would satisfy article XIII D, section 6(b)(4), which requires: "No fee or charge may be imposed for a service *unless that service is actually used by, or immediately available to, the owner of the property in question*." Continued water service provided by the claimant is immediately available and is used by the claimant's customers.[404] As the Sacramento County Superior Court found,

> [T]he City will incur costs to comply with the new lead testing requirement, and it has no reasonable alternative to continuing its water service operations in compliance with its permit. Simply ceasing water service is not a reasonable alternative given the critical importance of water service.[405]

~~In addition, the claimant's declarant states that in all instances where remediation was performed at the schools that had lead exceedances, follow-up sampling showed the source of the lead was removed and no problems to the city's water system were~~

[402] Exhibit A, Test Claim, page 115 (Media Release); see also, pages 104-105 (test claim order, paragraphs 4-6).

[403] *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 216; *Wolstoncroft v. County of Yolo* (2021) 68 Cal.App.5th 327, 344.

[404] See, for example, *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493, 1516, where the court held as follows: "Water service fees to fund the costs of capital-intensive operations to produce more or new water, such as the recycling plant at issue in this case, do not contravene article XIII, section 6, subdivision (b)(4) of the Constitution. While that provision precludes fees for a service not immediately available, both recycled water and traditional potable water are part of the same service — water service. And water service most assuredly is immediately available to City Water's customers now."

[405] Exhibit K (3), *City of San Diego v. Commission on State Mandates*, Judgment (Oct. 31, 2024, Case No. 24WM000056), pages 12-13.

~~identified.~~[406] Thus, the service provided under the test claim order benefits all water users connected to the water system.

However, there remains an issue with respect to article XIII D, section 6(b)(3), which requires that "[t]he amount of a fee or charge imposed upon any parcel or person as an incident of property ownership *shall not exceed the proportional cost of the service attributable to the parcel*" since, pursuant to the test claim order, the claimants do not have the authority to impose fees on the schools requesting the lead testing service.[407] The courts have addressed the proportionality requirement in the following three cases.

In *City of Palmdale v. Palmdale Water District*, the city challenged increased tiered water rates imposed by the water district, which "dramatically" imposed higher rates on parcels owned by irrigation users (including the city), as violating article XIII D, section 6(b)(3), alleging that the district's increased rates exceeded the proportional cost of the service attributable to parcels owned by irrigation users and that the district intentionally tried to recoup most of its costs from a relatively few irrigation users to keep costs to the vast majority of district's customers proportionately low.[408] The Second District Court of Appeal agreed with the city, finding that "a review of the tier structure alone establishes that irrigation customers such as the city are charged disproportionate rates reaching tier 5 ($5.03/unit) rates at 130 percent of their budgeted allocation as compared to other users who do not reach such high rates until they exceed 175 percent (SFR/MFR) [single-family residence or multi-family residence] or 190 percent (commercial) without any showing by [the district] of a corresponding disparity in the cost of providing water to these customers at such levels."[409]

*Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* also involved tiered water rates.[410] Using four budgets of consumption levels, the city allocated its total costs in such a way that the anticipated revenues from all four tiers would equal its total costs and, thus, taken as a whole, the city would be revenue neutral and not make a profit on its pricing structure. The city, however, "did not try to calculate the incremental cost of providing water at the level of use represented by each tier, and in fact, . . . admitted it effectively used revenues from the top tiers to *subsidize* below-cost rates for the bottom tier."[411] The court held the city's fee violates the constitutional requirement that fees "not exceed the proportional cost of the service attributable to the parcel":

> If the phrase "proportional cost of the service attributable to *the* parcel"

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~~406 Exhibit G, Claimant's Comments on the 2018 Draft Proposed Decision, pages 60-61.~~

407 Exhibit A, Test Claim, page 107 (test claim order).

408 *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 934.

409 *City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 937.

410 *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493.

411 *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493, 1499, emphasis added.

> (italics added) is to mean anything, it has to be that article XIII D, section 6, subdivision (b)(3) assumes that there really *is* an ascertainable cost of the service that can be attributed to a specific—hence that little word "the"—parcel. Otherwise, the cost of service language would be meaningless. Why use the phrase "cost of the service to the parcel" if a local agency doesn't actually have to ascertain a cost of service to that particular parcel?
>
> The presence of subdivision (b)(1) of section 6, article XIII D, just a few lines above subdivision (b)(3), confirms our conclusion. Constitutional provisions, particularly when enacted in the same measure, should be construed together and read as a whole. (*Bighorn, supra,* 39 Cal.4th at p. 228 . . .) The "proportional cost of the service" language from subdivision (b)(3) is part of a general subdivision (b), and there is an additional reference to costs in subdivision (b)(1). Subdivision (b)(1) provides that the total revenue from fees "shall not exceed the funds required to provide *the property* related service." (Italics added.)
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> It seems to us that to comply with the Constitution, City Water had to do more than merely balance its total costs of service with its total revenues—that's already covered in subdivision (b)(1). To comply with subdivision (b)(3), City Water also had to correlate its tiered prices with the actual cost of providing water at those tiered levels. Since City Water didn't try to calculate the actual costs of service for the various tiers, the trial court's ruling on tiered pricing must be upheld simply on the basis of the constitutional text.[412]

The court further explained that water rates that exceed the cost of service operate as a tax, which have to be approved by the voters. However, tiered rates imposed without a vote of the electorate "must be based on the cost of service for the incremental level of usage, not predetermined budgets."[413]

The most recent case is *Coziahr v. Otay Water District*, which involved a challenge by a class of single-family residential customers to tiered water rates that charged these customers a higher price for water units at each increasing tier based on rates of consumption, but moved commercial and irrigation customers to uniform rates without price increases based on volume.[414] Following a lengthy analysis of the water districts' rate studies, expert opinions, and arguments that the rates were based on conservation and peak usage of residential customers, the court relied on *Palmdale* and *Capistrano*

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[412] *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493, 1505-1506.

[413] *Capistrano Taxpayers Assoc., Inc. v. City of Capistrano* (2015) 235 Cal.App.4th 1493, 1515.

[414] *Coziahr v. Otay Water District* (2024) 103 Cal.App.5th 785, 791-792.

and found the water district did not comply with article XIII D, section 6(b)(3),[415] and emphasized the following main points:

- "The limitation at issue here, Section 6(b)(3), states the 'amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.' This 'requirement ensures that the aggregate fee collected on *all* parcels is *distributed among those parcels in proportion to the cost of service for each parcel*.'"[416]
- The proportionality requirement under article XIII D, section 6(b)(3) demands something more than the reasonable basis standard under article XIII A (for regulatory fees). "To satisfy Section 6(b)(3), then, it is not enough for a water agency to show it uses a reasonable allocation method. Rather, an agency must show that the method produces rates that are proportional to costs."[417]
- The water district had to substantiate the analysis with data that meaningfully captured the cost of service to the parcel for the district's single-family residences. "Proportional cost means 'there really *is* an ascertainable cost of service that can be attributed to a specific … parcel.'"[418]

Here, the cost of the overall service of providing water is higher because of the additional and new required activities mandated by the state. These activities are performed *in addition* to the prior requirements imposed by the Lead and Copper Rule. As indicated in the test claim order, the claimant may not use any lead samples collected under the order to satisfy federal or state Lead and Copper Rule requirements.[419] The State Water Board nevertheless asserts that the benefits of the test claim order are similar to those under the Lead and Copper Rule, where the claimant tests individual residential homes and uses those test results to optimize corrosion control for the larger system.[420] The difference, however, is that under the Lead and Copper Rule, *all* customers share in the costs of lead testing. Here, the claimant is prohibited by the test claim order from passing those increased costs on to the schools receiving the lead testing. Thus, passing the increased costs on to the remaining customers, making the costs of service to their parcels higher than the cost of

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[415] *Coziahr v. Otay Water District* (2024*)* 103 Cal.App.5th 785, 808-819.

[416] *Coziahr v. Otay Water District* (2024*)* 103 Cal.App.5th 785, 795, emphasis added.

[417] *Coziahr v. Otay Water District* (2024*)* 103 Cal.App.5th 785, 801.

[418] *Coziahr v. Otay Water District* (2024*)* 103 Cal.App.5th 785, 803, emphasis in original.

[419] Exhibit A, Test Claim, page 108 (test claim order, "The water system may not use any lead samples collected as part of these special school samples to satisfy federal or state Lead and Copper Rule requirements").

[420] Exhibit J, State Water Board's Comments on the 2023 Draft Proposed Decision, pages 5-6.

service to the schools receiving the additional lead testing, is no different than a water district recouping costs from irrigation users to keep costs to the remaining customers proportionately low (as in *City of Palmdale*) or using revenues from the top tiers to subsidize below-cost rates for the bottom tier (*Capistrano*), all of which violate article XIII D, section 6(b)(3). As *Coziahr* reiterated, the requirement in section 6(b)(3) "ensures that the aggregate fee collected on *all* parcels is *distributed among those parcels in proportion to the cost of service for each parcel*."[421]

Finally, this case is distinguishable from the stormwater fee analysis performed by the Third District Court of Appeal in *Department of Finance v. Commission on State Mandates*, where the court held that unless there is a showing that a fee cannot meet the substantive requirements of article XIII D, section 6(b) as a matter of law or undisputed fact, then the finding that a fee would meet the substantive requirements is implicit in the determination that permittees have the right or power to levy a fee. Here, as a matter of law, a property-related fee cannot be imposed on school districts under the test claim order and cannot be imposed on the remaining property owners without violating article XIII D, section 6(b)(3).[422]

Accordingly, based on the facts in this case, the Commission finds that the claimant cannot impose a fee on the remaining water customers without violating article XIII D, section 6(b)(3).

*iii. Any fee imposed by the claimant on the remaining customers would not fall under any exception in article XIII C of the California Constitution (Proposition 26) and, thus, the fee would be considered a tax requiring voter approval.*

In 2010, the voters adopted Proposition 26, which sought to broaden the definition of "tax." Thus, under article XIII C, section 1(e) of the California Constitution, "any levy, charge, or exaction of any kind imposed by a local government," is a "tax," and therefore

[421] *Coziahr v. Otay Water District* (2024*)* 103 Cal.App.5th 785, 795, emphasis added.

[422] *Department of Finance v. Commission on State Mandates* (2022) 85 Cal.App.5th 535, 584-585.

requires voter approval under article XIII C,[423] unless one of the following seven exceptions applies:[424]

> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor *that is not provided to those not charged*, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
>
> (2) A charge imposed for a specific government service or product provided directly to the payor *that is not provided to those not charged*, and which does not exceed the reasonable costs to the local government of providing the service or product.
>
> (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
>
> (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
>
> (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
>
> (6) A charge imposed as a condition of property development.
>
> (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D [Proposition 218].[425]

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

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

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

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

The claimant asserts that the test claim order prohibits it from exercising its fee authority on schools, and none of the seven exceptions under Proposition 26 apply.[426]

> The last of the seven exceptions is for property-related fees and charges under Proposition 218, but because lead testing performed under the Permit Amendment is not provided as an incident of property ownership (discussed above), the City cannot avail itself of that exception to raise water rates without voter approval. The third through sixth exceptions are inapplicable to a fee for lead testing because the City is not acting as a regulator in performing the service, the City is not charging the schools to enter City property, the City is not fining the schools for violating the law, and the City is not imposing a development fee, respectively. The first exception for "a specific benefit conferred or privilege granted directly to the payor" does not apply either, because the City is not issuing a school a permit or a license to engage in any activity.[427]

The claimant further states that the second exception (a "charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product") might ordinarily apply but for the fact that here, the permit order prohibits the claimant from charging the schools receiving the lead testing services. "The school is not the 'payor,' so the second exception does not apply. Therefore, by default, the City's water ratepayers become the 'payor' even though they are not requesting or receiving the service."[428]

Finance, however, argues that the claimant has fee authority under Proposition 26 to impose a property-related fee.[429] Similarly, while not specifically addressing Proposition 26, the State Water Board takes the position that the claimant has the authority to pay for the program costs by raising water rates, which it characterizes as a property-related service.[430]

The Commission finds that exceptions (1) through (7) do not apply here. Exceptions (1) and (2) (charges for benefits conferred and privileges granted, services and products provided) do not apply. The test claim order expressly provides that the claimant must conduct lead sampling at *no charge* to the schools in its service area. Because the claimant is required to provide lead sampling to "those not charged," exceptions (1) and (2) do not apply.

Nor does exception (3) (reasonable regulatory costs) apply. Conducting lead sampling of drinking water at schools is not a "reasonable regulatory cost[] to a local government

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[426] Exhibit D, Claimant's Rebuttal Comments, pages 12-13.

[427] Exhibit D, Claimant's Rebuttal Comments, page 13.

[428] Exhibit D, Claimant's Rebuttal Comments, page 13.

[429] Exhibit C, Finance's Comments on the Test Claim, page 2.

[430] Exhibit B, State Water Board's Comments on the Test Claim, pages 15-16.

for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof."[431] The claimant is not acting in a regulatory capacity in performing the mandated activities. Even characterizing the mandated activities as investigations or inspections, the activities are not carried out for a regulatory purpose. The claimant is not ensuring the school is complying with applicable laws regarding lead limits in school drinking water and expressly does not have any enforcement authority or responsibility under the test claim order if a lead level exceedance is detected. The testing is only done at the request of the school and if there is a violation, the test claim order requires the school, not the claimant, to remediate.[432] Thus, the claimant is performing a service (respond to a request, collect and test samples, provide the school with the results, and discuss the results with the school), not regulating school water quality.

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

Exception (7), "assessments and property-related fees imposed in accordance with the provisions of Article XIII D," is also inapplicable because, as discussed above, the claimant does not have the authority to impose a fee on the schools requesting service and cannot impose a fee on the remaining water customers without violating article XIII D, section 6(b)(3).

Thus, any fee imposed by the claimant on the remaining customers would not fall under any exception in article XIII C of the California Constitution (Proposition 26) and the fee would be considered a tax. Article XIII B, section 6 was specifically designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues.[433]

Therefore, because the test claim statute prohibits the claimant from imposing a fee for the service upon the schools, and because the claimant cannot impose a fee under Proposition 218 in accordance with the provisions of article XIII D, section 6(b)(3), or under Proposition 26 in accordance with the provisions of article XIII C (because it does not meet any of the exceptions to the definition of a tax), the claimant does not have fee authority sufficient to cover the costs of the mandated program pursuant to Government Code section 17556(d).

In addition, no law or facts in the record support a finding that any of the other exceptions specified in Government Code section 17556 apply to this claim.

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

[432] Exhibit A, Test Claim, page 108.

[433] *County of Fresno v. State of California* (1990) 53 Cal.3d. 482, 487.

Accordingly, the Commission finds that the test claim order results in increased costs mandated by the state within the meaning of Government Code sections 17514 and 17556.

## V. Conclusion

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

1. Submit to the State Water Board's Division of Drinking Water a comprehensive list of the names and addresses of all K-12 schools served water through a utility meter [by the claimant] by July 1, 2017;[434]

2. If an authorized school representative of a private K-12 school or a public K-12 school in the claimant's service area requests lead sampling assistance in writing by November 1, 2019:[435]

    a. Respond in writing within 60 days and schedule a meeting with school officials to develop a sampling plan;[436]

    b. Finalize a sampling plan and complete initial sampling within 90 days [or an alternative time schedule approved by DDW];[437]

    c. Collect one to five samples at each school, from regularly used drinking fountains, cafeteria or food preparation areas, or reusable bottle filling stations, selected according to the sampling plan, and using the sampling guidance provided in Appendix A;[438]

    d. Collect lead samples during the school year, on a Tuesday, Wednesday, Thursday, or Friday on a day that school is in session and has been in session for at least one day prior to the day of sampling;[439]

    e. Ensure samples are collected by an adequately trained water system representative;[440]

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[434] Exhibit A, Test Claim, page 105 (test claim order).

[435] Exhibit A, Test Claim, page 105 (test claim order).

[436] Exhibit A, Test Claim, page 106 (test claim order).

[437] Exhibit A, Test Claim, page 106 (test claim order).

[438] Exhibit A, Test Claim, page 106 (test claim order).

[439] Exhibit A, Test Claim, page 106 (test claim order).

[440] Exhibit A, Test Claim, page 106 (test claim order).

f. Submit the samples to an ELAP certified laboratory for analysis;[441]

g. Require the laboratory to submit the data electronically to DDW;[442]

h. Provide a copy of the results to the school representative;[443]

i. Within two business days of a result that shows an exceedance of 15 ppb, notify the school of the sample result;[444]

j. If an initial sample shows an exceedance of 15 ppb:

- Collect an additional sample within 10 days if the sample site remains in service;[445]
- Collect a third sample within 10 business days after notification that a resample result is less than or equal to 15 ppb;[446]
- 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;[447]

k. Ensure that the water system receives the results of repeat lead samples from the laboratory in no more than 10 business days;[448]

l. Discuss the lead sample results with the school prior to releasing the sample results to the public, and within 10 days of receiving the results from the laboratory;[449]

m. Communicate with the school after lead sampling and assist the school with the interpretation of laboratory results and provide information regarding potential corrective actions if the results confirm lead levels above 15 ppb.[450] ***The water***

[441] Exhibit A, Test Claim, page 106 (test claim order).

[442] Exhibit A, Test Claim, page 106 (test claim order).

[443] Exhibit A, Test Claim, page 106 (test claim order).

[444] Exhibit A, Test Claim, page 106 (test claim order).

[445] Exhibit A, Test Claim, page 106 (test claim order).

[446] Exhibit A, Test Claim, page 106 (test claim order).

[447] Exhibit A, Test Claim, page 107 (test claim order).

[448] Exhibit A, Test Claim, page 107 (test claim order).

[449] Exhibit A, Test Claim, page 107 (test claim order).

[450] Exhibit A, Test Claim, page 108 (test claim order).

***system is not responsible for the costs of any corrective action or maintenance***;[451]

n. Keep records of all requests for lead related assistance and provide the records to DDW, upon request;[452]

o. Include in the annual Consumer Confidence Report a statement summarizing the number of schools requesting lead sampling.[453]

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

[451] Exhibit A, Test Claim, page 108 (test claim order).

[452] Exhibit A, Test Claim, page 108 (test claim order).

[453] Exhibit A, Test Claim, page 108 (test claim order).

# DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

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

On March 20, 2025, I served the:

- **Current Mailing List dated March 20, 2025**
- **Revised Proposed Decision issued March 20, 2025**

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

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 20, 2025 at Sacramento, California.

Jill Magee

Jill Magee
Commission on State Mandates
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# COMMISSION ON STATE MANDATES

## Mailing List

**Last Updated:** 3/20/25

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

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

**Claimant:** City of San Diego

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

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

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