STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

March 27, 2019

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

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

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

Re: Decision
Lead Sampling in Schools: Public Water System No. 3710020, 17-TC-03
Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017
City of San Diego, Claimant

Dear Ms. Li and Mr. Palmucci:

On March 22, 2019, the Commission on State Mandates adopted the Decision denying the Test Claim on the above-entitled matter.

Sincerely,

Heather Halsey
Executive Director

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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017 Filed on January 11, 2018 City of San Diego, Claimant	Case No.: 17-TC-03 *Lead Sampling in Schools: Public Water System No. 3710020* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted March 22, 2019*) (*Served March 27, 2019*)

DECISION

The Commission in State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on March 22, 2019. Raymond Palmucci and Tom Zeleny appeared on behalf of the City of San Diego (claimant). David Rice and Kurt Souza appeared on behalf of the State Water Resources Control Board (SWRCB). Chris Hill appeared on behalf of the Department of Finance (Finance).

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

The Commission adopted the Proposed Decision to deny the Test Claim by a vote of 6-1, as follows:

Member	**Vote**
Lee Adams, County Supervisor	Yes
Keely Bosler, Director of the Department of Finance, Chairperson	Yes
Mark Hariri, Representative of the State Treasurer	Yes
Jeannie Lee, Representative of the Director of the Office of Planning and Research	Yes
Sarah Olsen, Public Member	No
Carmen Ramirez, City Council Member	Yes
Yvette Stowers, Representative of the State Controller, Vice Chairperson	Yes

Summary of the Findings

This Test Claim alleges new state-mandated activities and costs arising from an amendment to the City of San Diego's (claimant's) public water system (PWS) permit adopted by the State Water Resources Control Board (SWRCB), Order No. 2017PA-SCHOOLS. The test claim order requires the claimant, as the operator of a "public water system"[1] that serves a number of K-12 schools, to perform lead sampling, upon request from a school it serves. A PWS may be a private company or a governmental entity.[2] Specifically, a PWS is defined as "a system for the provision *to the public* of water for human consumption" that has at least 15 service connections and serves at least 25 people per day for at least 60 days out of the year.[3] Under the order, upon request from a school, the PWS must take samples at one to five fixtures (e.g., drinking fountains or food preparation areas) on the school's property, process those results with a certified laboratory, maintain records of the requests and the results, and provide the results, and if necessary, information to the school regarding possible remediation or other solutions if lead is detected in the fixtures above 15 parts per billion (ppb).

The Commission finds that the Test Claim is timely filed.

The Commission further finds that the activities required by the order are new, as compared against prior state and federal law. However, the requirements of the test claim order do not impose a new program or higher level of service, within the meaning of article XIII B, section 6. The requirements are not uniquely imposed on local government, because the test claim order is one of over 1,100 PWS permits amended simultaneously with identical requirements, approximately 450 of which were issued to privately-owned and operated drinking water suppliers. Moreover, water service is not a *governmental* function of providing services to the public because providing water service is not required by state or federal law and is not a core function of government. The test claim order here relates to the provision of drinking water

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

[2] 42 United States Code, section 300f(4): "The term "public water system" means a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals." (Emphasis added.) Also, "the term "supplier of water" means any person who owns or operates a public water system." (42 United States Code, section 300f(5).) Further, "the term "person" means an individual, corporation, company, association, partnership, State, municipality, or Federal agency (and includes officers, employees, and agents of any corporation, company, association, State, municipality, or Federal agency)." (42 United States Code, section 300f(12).) California law is consistent: '"Public water system" means a system for the provision of water for human consumption through pipes or other constructed conveyances that has 15 or more service connections or regularly serves at least 25 individuals daily at least 60 days out of the year." (Health and Safety Code 116275(h).)

[3] Health and Safety Code section 116275(h).

through a PWS, which is fundamentally distinct from the essential and peculiarly governmental functions determined by the courts: providing water service for a fee – traditionally a proprietary function – to ratepayers is far different from a city or county providing police or fire protection, or school districts providing a free and appropriate public education, to all residents of the jurisdiction regardless of their ability to pay. For these reasons, the Commission finds that the test claim order does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution, and denies this Test Claim.

COMMISSION FINDINGS

I. Chronology

01/18/2017	Permit Amendment No. 2017PA-SCHOOLS for City of San Diego PWS 3710020 was adopted by SWRCB, Division of Drinking Water.[4]
01/11/2018	The claimant filed the Test Claim.[5]
04/13/2018	The Test Claim was deemed complete and issued for comment, along with a request that SWRCB provide a copy of its administrative record for the adoption of the permit amendment.
04/23/2018	SWRCB requested an extension of time to file comments and to provide its administrative record.
05/11/2018	The Department of Finance (Finance) requested an extension of time to comment.
06/11/2018	SWRCB requested a second extension of time to file comments and to provide its administrative record, and a postponement of the hearing.
06/25/2018	Finance requested a second extension of time to comment.
08/13/2018	SWRCB filed comments on the Test Claim and provided its administrative record.[6]
08/13/2018	Finance filed comments on the Test Claim.[7]
08/29/2018	The claimant requested an extension of time to file rebuttal comments.
10/18/2018	The claimant requested a second extension of time to file rebuttal comments.
11/09/2018	The claimant filed its rebuttal comments.[8]

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

[5] Exhibit A, Test Claim.

[6] Exhibit B, Administrative Record on Permit Amendment No. 2017PA-SCHOOLS; Exhibit C, SWRCB's Comments on the Test Claim.

[7] Exhibit D, Finance's Comments on the Test Claim.

[8] Exhibit E, Claimant's Rebuttal Comments.

12/21/2018	Commission staff issued the Draft Proposed Decision.[9]
01/11/2019	SWRCB filed comments on the Draft Proposed Decision.[10]
01/11/2019	The claimant filed comments on the Draft Proposed Decision.[11]

II. Background

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

A. Lead as an Environmental Health Risk

Lead is toxic and has "no known value to the human body."[12] 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."[13] 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.[14] 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.[15] Higher lead levels can cause severe neurological problems and ultimately death.[16]

Though a naturally occurring metal found all over the Earth, "[e]nvironmental levels of lead have increased more than 1,000-fold over the past three centuries as a result of human activity."[17] 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,

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[9] Exhibit F, Draft Proposed Decision.

[10] Exhibit G, SWRCB's Comments on the Draft Proposed Decision.

[11] Exhibit H, Claimant's Comments on the Draft Proposed Decision.

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

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

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

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

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

[17] Exhibit I, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, page 2.

batteries, and cosmetics.[18] 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.[19] 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."[20] 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.[21]

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.[22] 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.'"[23] 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."[24] 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."[25] Accordingly, the primary regulatory approach, as discussed below, is to require water systems to prioritize monitoring, and to implement and maintain corrosion control treatment to minimize toxic metals leaching into water supplies.

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[18] Exhibit I, National Institutes of Health, Lead Information Home Page, page 1.

[19] Exhibit I, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, page 4.

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

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

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

[23] Exhibit I, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, pages 3-4.

[24] Exhibit I, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, page 4.

[25] Exhibit I, Public Health Statement: Lead, Agency for Toxic Substances and Disease Registry, August 2007, page 4.

To potentially close some of the gaps in lead exposure prevention, the California Legislature in 1992 enacted the Lead-Safe Schools Protection Act,[26] 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.[27] The Act did not specifically require testing of drinking water, but only required the Department to assess risk factors, of which drinking water was one.

B. Prior Law on Drinking Water

1. Federal Law

In 1974 Congress passed the federal Safe Drinking Water Act (SDWA), authorizing U.S. EPA to set health-based standards for drinking water supplies, which U.S. EPA, the states, and drinking water systems work together to meet.[28] 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.[29] U.S. EPA states that there are over 170,000 public water systems providing drinking water to Americans, to which the Act applies.[30]

Under authority provided in the federal Act, U.S. EPA promulgated health-based standards for lead and copper in drinking water, known as the federal Lead and Copper Rule (LCR).[31] The federal action level "is exceeded if the concentration of lead in more than 10 percent of tap water samples collected during any monitoring period…is greater than 0.015 mg/L [15 ppb]."[32] The number of samples required depends on the size of the drinking water system, and any history of prior exceedances.[33] The primary mechanisms described in the LCR to control and minimize lead in drinking water are "optimal corrosion control treatment," which includes monitoring and adjusting the chemistry of drinking water supplies to prevent or minimize corrosion of lead or

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[26] Education Code section 32240 et seq.

[27] Education Code section 32242.

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

[29] 42 U.S.C. § 300f(4).

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

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

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

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

copper plumbing materials; source water treatment; replacement of lead service lines; and public education.[34] The LCR also includes monitoring and reporting requirements for public water systems.[35]

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

> (e) This chapter is intended to ensure that the water delivered by public water systems of this state shall at all times be pure, wholesome, and potable. This chapter provides the means to accomplish this objective.
>
> (f) It is the intent of the Legislature to improve laws governing drinking water quality, to improve upon the minimum requirements of the federal Safe Drinking Water Act Amendments of 1996, to establish primary drinking water standards that are at least as stringent as those established under the federal Safe Drinking Water Act, and to establish a program under this chapter that is more protective of public health than the minimum federal requirements.
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> (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.[37]

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.[38] SWRCB

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

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

[36] Health and Safety Code section 116270.

[37] Health and Safety Code section 116270.

[38] 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

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."[39]

The courts have called the California SDWA "a remedial act intended to protect the public from contamination of its drinking water."[40] Accordingly, the Act does not create affirmative rights, including rights to the delivery of water: the only mandatory duty on local government is to review on a monthly basis water quality monitoring data submitted to the local government by water suppliers within its jurisdiction in order to detect exceedances of water quality standards.[41] Nothing in the Act requires state or local government to assume responsibility to ensure that every resident of California receives water from a public water system, or to test or monitor the public water systems within its jurisdiction, or take corrective or enforcement actions when pollutants are detected. The focus of the Act is "to ensure that the water *delivered* by public water systems of this state shall at all times be pure, wholesome, and potable,"[42] and the monitoring and corrosion control requirements are aimed at the water systems themselves, whether publicly or privately owned.

The State has also adopted a Lead and Copper Rule, substantially similar to the federal rule, which requires all operators of drinking water systems to monitor and sample at a number of sample sites determined by the size of the system, primarily residential sample sites.[43] 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.[44] Approximately 500 schools within California are themselves permitted as a "public water system," because they have their own water supply,

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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].

[39] Health and Safety Code sections 116525, 116271(k) [Before July 1, 2014, the Department of Public Health issued such permits; however, Statutes 2014, chapter 35 transferred those duties to the SWRCB, effective July 1, 2014];"Public Water Systems" are defined in Health and Safety Code section 116275(h) and 42 U.S.C. § 300f(4).

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

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

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

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

[44] See, e.g., California Code of Regulations, title 22, section 64673 [Describing monitoring and corrosion control measures to be taken if an elevated lead level is detected].

such as a well.[45] Those entities also are required to test their taps for lead and copper under the LCR; however, most schools are served by community water systems that are not required to test for lead specifically at the school's taps.[46]

C. The Test Claim Permit Amendment

Both the federal and state law and regulations have long required drinking water systems to monitor a sample of their customers' water supplies for exceedances and to take corrective action as necessary. However, that monitoring has been mostly limited to residential service connections, as a proxy for the presence of lead within the greater drinking water system.[47]

In September 2015, the Legislature passed SB 334 as a potential solution to the gap in regulation, which would have, had it been enacted, required school districts with water sources or drinking water supplies that do not meet U.S. EPA standards to close access to those drinking water sources; provide alternative drinking water sources if the school did not have the minimum number of drinking fountains required by law; and provide access to free, fresh, and clean drinking water during meal times in the food service areas of the schools under its jurisdiction.[48] SB 334 was vetoed by then-Governor Brown, whose veto message expressed concern that the bill could create a very expensive reimbursable state mandate.[49] The veto message instead directed the SWRCB to examine the scope of the potential problem by incorporating water quality testing in schools as part of the state's LCR.[50]

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

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

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[45] Exhibit I, *Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*, California Water Boards, March 30, 3018, page 2.

[46] Exhibit I, *Frequently Asked Questions by Public Water Systems about Lead Testing of Drinking Water in California Schools*, California Water Boards, March 30, 3018, page 2.

[47] Exhibit C, SWRCB's Comments on the Test Claim, page 6 ["Together, the sampling sites provide an overall picture of lead levels in the water customers are consuming – the assumption being that the houses and other facilities near sampling sites will have similar plumbing characteristics and, therefore, similar amounts of lead in tap water"].

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

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

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

- Finalize a sampling plan and complete initial sampling within 90 days, or develop an alternative time schedule if necessary;
- Collect one to five samples from drinking fountains, cafeteria/food preparation areas, or reusable bottle filling stations;
- Collect samples on a Tuesday, Wednesday, Thursday, or Friday on a day when school is in session;
- Submit samples to an ELAP certified laboratory;
- Within two business days of a result that shows an exceedance of 15 parts per billion (ppb), notify the school of the sample result;
- If an initial sample shows an exceedance of 15 ppb:
    - Collect an additional sample within 10 business days, unless the sample site is removed from service by the school;
    - Collect a third sample within 10 business days if the resample is less than or equal to 15 ppb;
    - Collect at least one more sample at a site where the school has completed some corrective action;
- Ensure the water system receives the results of repeat samples no more than 10 business days after the date of collection;
- Do not release lead sampling data to the public for 60 days, unless in compliance with a Public Records Act request;
- Discuss the results with the school prior to releasing the results to the public.[51]

Finally, the order states that the water system may not use any lead samples collected under the order to satisfy federal or state LCR requirements; the water system must keep records of all schools requesting testing or lead-related assistance and provide those records to DDW upon request; and the water system's annual Consumer Confidence Report shall include a statement summarizing the number of schools requesting lead sampling.[52]

III. Positions of the Parties

A. City of San Diego

The claimant alleges that the test claim order required the claimant to perform lead testing, at no charge, on the property of all schools that receive water from the claimant's public water system, upon request.[53]

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

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

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

Specifically, the claimant alleges initial costs to develop a plan and begin responding to testing requests from schools;[54] as well as costs to compile a list of schools within the claimant's service area;[55] and costs and activities surrounding the actual response to testing requests.[56] The claimant further alleges for each sampling request received, it was required to:

(a) Prepare and send a response to the request;

(b) Submit a copy of the request to the state;

(c) Communicate with the school to schedule training meetings;

(d) Communicate school request status with the water system's management;

(e) Create and maintain a tracking spreadsheet; and

(f) Create sampling plans for each school (the claimant alleges 25 plans per week were required to be completed in order to meet the deadline in the order).[57]

The claimant also states that for each sampling request, and to complete each sampling plan, the claimant was required to collect one to five samples at each school from "regularly used drinking fountains, cafeteria/food preparation areas, or reusable bottle water filling stations selected according to the lead sampling plan…"[58] The claimant asserts that this sampling could only be done before the start of the school day, because the order required sampling after water had been sitting in plumbing and fixtures for at least six hours; and, the claimant asserts that sampling was only permitted to be conducted Tuesday through Friday, or on Saturdays in specific cases with approval from SWRCB.[59] The claimant states that 1,115 samples were taken and analyzed by the claimant in fiscal year 2017, excluding quality control samples.[60] The claimant further states that it developed a reporting template for tracking samples and the schools and fixtures from which they originated; and, based on the requirements of the order, the claimant consulted with schools after testing, aiding in the interpretation of results.[61] For school fixtures with lead sampling results over 15 ppb, schools had the option to resample, remediate, or remove the fixture. In cases where the school chose remediation, follow-up samples were taken and new reports provided to the school.[62]

[54] Exhibit A, Test Claim, page 21.

[55] Exhibit A, Test Claim, pages 22-23.

[56] Exhibit A, Test Claim, pages 26-27.

[57] Exhibit A, Test Claim, pages 28-30.

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

[59] Exhibit A, Test Claim, pages 31-32.

[60] Exhibit A, Test Claim, page 32.

[61] Exhibit A, Test Claim, page 32.

[62] Exhibit A, Test Claim, pages 32-33.

The claimant states that it used its own laboratory, which contains a mass spectrometer, to analyze the samples. The samples were analyzed independently, and not combined with other regulatory or special project samples, by a trained chemist.[63] The results of the sampling were required to be uploaded to DDW's database, which, the claimant asserts, required the claimant to develop a method to convert and upload the information all at once, rather than generate and upload 1,115 separate reports.[64]

The claimant further states that it was required to provide the results to the school representative, and in the case of an exceedance of 15 ppb, notify the school within two business days.[65] Also in the case of an exceedance, claimant states that it was required to collect and additional sample within 10 days, and a third sample within 10 days if the resample is less than or equal to 15 ppb.[66] An additional sample is also required after remediation.[67]

Though the order prohibits releasing the sampling results to the public for 60 days unless the water system releases the data in compliance with the Public Records Act, the claimant asserts that the Environmental Committee of the City Council also requested updates on the progress of lead testing on May 25, 2017 and June 20, 2017, for which the claimant prepared a presentation.[68] And, the order required the claimant to discuss lead sampling results with the school prior to release to the public, and to discuss results within 10 business days of receiving laboratory results.[69]

Finally, the claimant states that the order required the claimant to keep records of all requests from schools for lead sampling, and provide those records to DDW, upon request.[70]

The claimant asserts that no prior federal or state law requires the activities described, and that the claimant does not receive any dedicated state or federal funds, or any other non-local agency funds dedicated to this program.[71]

The claimant's rebuttal comments also assert that the test claim order imposes a new program or higher level of service. The claimant argues that the lead sampling requirements are a statewide policy or program;[72] which "furthers two governmental functions of providing services to the

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[63] Exhibit A, Test Claim, pages 36-37.

[64] Exhibit A, Test Claim, page 38.

[65] Exhibit A, Test Claim, pages 39-41.

[66] Exhibit A, Test Claim, page 42.

[67] Exhibit A, Test Claim, page 43.

[68] Exhibit A, Test Claim, pages 44-45.

[69] Exhibit A, Test Claim, page 46.

[70] Exhibit A, Test Claim, page 49.

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

[72] Exhibit E, Claimant's Rebuttal Comments, page 2.

public," namely providing water service, and ensuring a safe environment for school children;[73] and that the Permit Amendment "applies uniquely to the City as a local water agency."[74] The claimant also notes that the case law, beginning with *County of Los Angeles*, articulates and applies two alternative tests.[75] The California Supreme Court decision in *County of Los Angeles* states that:

> The concern which prompted the inclusion of section 6 in article XIIIB 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.[76]

The claimant argues: "This is precisely what the Permit Amendment is doing: creating a new lead testing program for schools and transferring the cost and administration of the program to the City."[77] The claimant states that it has "approximately 281,000 retail water connections," and the city council approves rates and charges for water service.[78] The claimant also argues that the City's charter "imposes a legal obligation and responsibility on the City to provide water service."[79] Accordingly, the claimant argues that providing water service is a function of the City's government. In addition, the claimant argues that the provision of water service is a governmental function "because it is predominantly provided by public agencies," and in particular, "[l]ead testing of drinking water at schools is a service to the public."[80] The claimant reasons, therefore that the test claim order is a new program eligible for reimbursement under *County of Los Angeles*.[81]

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

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[73] Exhibit E, Claimant's Rebuttal Comments, page 3.

[74] Exhibit E, Claimant's Rebuttal Comments, page 3.

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

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

[77] Exhibit E, Claimant's Rebuttal Comments, page 6.

[78] Exhibit E, Claimant's Rebuttal Comments, page 4.

[79] Exhibit E, Claimant's Rebuttal Comments, page 4.

[80] Exhibit E, Claimant's Rebuttal Comments, page 6.

[81] Exhibit E, Claimant's Rebuttal Comments, page 6.

function related to the safety of schools: "Schools are obligated to provide free drinking water to students, or to adopt a resolution explaining why fiscal constraints or health and safety concerns prevent it."[82] The claimant argues that the "history of the Permit Amendment demonstrates its purpose is to provide safe schools, a governmental function, while shifting financial responsibility to local water agencies."[83] The claimant references failed SB 334, vetoed in October 2015: "Instead of signing the bill, the Governor directed SWRCB to implement lead testing at schools through local water agencies as part of the Lead and Copper Rule."[84] The claimant argues that the reason SB 334 was vetoed was to avoid a reimbursable state mandate, but "[l]ead testing at schools does not lose its characterization as a 'governmental function of providing services to the public' under the Supreme Court's test, merely because the obligation is transferred from schools to water agencies."[85]

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

> The Permit Amendment applies specifically to the City. It does not apply generally to all residents and entities in the State. Even collectively considering all 1,100 permit amendments issued by SWRCB, they only apply to local water agencies with schools in their service areas, not to everyone in the State. The Permit Amendment does not require lead testing be performed for all state residents and entities either, only for schools. Collectively, the permit amendments apply uniquely to water agencies in the same way the Court found the requirement for fire protective gear applied uniquely to public and private fire protection agencies. The permit amendments do not need to exclusively apply to publicly-owned water agencies to satisfy the uniqueness element of the second test.
>
> Under the second test, examples of laws that apply generally to all residents and entities in the state include requirements to provide employees with unemployment insurance coverage, worker's compensation benefits, or to upgrade public buildings to comply with statewide elevator safety regulations. Subvention was denied in these cases because the requirements applied to everyone, not just to local government. Unlike these examples, though, the Permit Amendment only applies to the City. Those in the State who do not provide water service do not have to comply with the Permit Amendment.[86]

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

[83] Exhibit E, Claimant's Rebuttal Comments, page 7.

[84] Exhibit E, Claimant's Rebuttal Comments, page 7.

[85] Exhibit E, Claimant's Rebuttal Comments, page 7.

[86] Exhibit E, Claimant's Rebuttal Comments, page 8.

The claimant therefore concludes that the test claim order implements a state policy, and imposes unique requirements on the claimant that do not apply generally to all persons and entities in the state.[87]

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

> SWRCB argues that the City is ineligible for reimbursement because water service is not a function "peculiar" to government, and therefore not a governmental function. But the first test established by the California Supreme Court does not require that the function be "peculiar" to government, only that the program "carry out the governmental function of providing services to the public." The word "peculiar" is not in the test. The Supreme Court used the term "peculiar" only to distinguish programs that are forced on local government from laws that apply generally to all state residents and entities. The opinion of *Carmel Valley Fire Protection District v. State of California* cited by SWRCB, certainly found that "fire protection is a peculiarly governmental function" in satisfying the first test, despite the fact that private sector fire fighters provide the same service. The opinion does not say, however, that the first test can only be satisfied if the governmental function is peculiar to government, as SWRCB suggests.
>
> The first test only requires that the governmental function be that "of providing services to the public." SWRCB does not cite a published opinion where the government was providing a public service, but subvention was denied because the government function was not peculiar to government. Instead, instances where the first test was not satisfied involved situations where the new requirements did not increase the level of service provided to the public, such as requirements to provide employees with unemployment insurance coverage, worker's compensation benefits, or to upgrade public buildings to comply with statewide elevator safety regulations. These requirements only increased the government's incidental cost of providing existing public services rather than requiring new services or programs.[88]

The claimant also argues that SWRCB's reliance on "a 100-year-old line of cases on sovereign immunity" is inapplicable, and irrelevant. The claimant argues that more recently "Courts have determined '[t]he labels "governmental function" and "proprietary function" are of dubious value in terms of legal analysis in any context.'"[89] The claimant argues that Proposition 218 weakens the analogy to corporate or proprietary activities: "Water service provided by public

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[87] Exhibit E, Claimant's Rebuttal Comments, page 8.

[88] Exhibit E, Claimant's Rebuttal Comments, page 4.

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

agencies no longer carries the indicia of a proprietary function or private enterprise due to Proposition 218 (discussed below), which eliminates profit from water service charges."[90]

And, the claimant argues that "SWRCB's reliance on the Service Duplication Law is confusing."[91] The claimant asserts that the Service Duplication Law, which was adopted in 1965, "recognizes that water service was transitioning from a private to a predominantly governmental function by providing compensation to private utilities for lost business."[92] The claimant maintains that "[n]ow, over 50 years later, that transition is substantially complete."[93]

Further, the claimant disputes the characterization by SWRCB and Finance that water service is largely a private enterprise. The claimant notes that even though SWRCB provides evidence that approximately 75 percent of drinking water systems are private entities, "the same tables show that 81% of the population served by drinking water systems statewide, or 33.8 million of 41.6 million people, receive their water service from public entities."[94] The claimant argues that "[s]uch a large percentage of the State population receiving water service from public entities is strong evidence that water service is a governmental function, more persuasive than the fact that small, privately owned water systems outnumber large, publicly owned systems."[95]

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.[96] The order expressly provides that the claimant must conduct the lead sampling at no charge to the schools in its service area. The claimant concludes on this basis, and pursuant to article XIII C of the California Constitution, which prohibits a fee or charge that exceeds the proportional cost of service attributable to a parcel, that the claimant is unable to recoup the costs of the alleged mandate through fees for water service, because it cannot impose or increase fees on the schools

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

[91] Exhibit E, Claimant's Rebuttal Comments, page 5.

[92] Exhibit E, Claimant's Rebuttal Comments, page 5.

[93] Exhibit E, Claimant's Rebuttal Comments, page 5.

[94] Exhibit E, Claimant's Rebuttal Comments, page 5 [citing Exhibit C, SWRCB's Comments on the Test Claim, Attachment 101, pp. 406-409].

[95] Exhibit E, Claimant's Rebuttal Comments, page 5.

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

in which it conducts lead testing, and it is legally proscribed from imposing or increasing fees on other water users.[97]

The claimant states in its rebuttal comments that the test claim order results in increased costs mandated by the state: "By mandating that the City perform lead testing for free, the Permit Amendment has ensnared the City in [a] constitutional web of fees and charges, where the only ways out are to spend local tax revenue or to seek reimbursement through this Commission."[98] The claimant argues that because the express language of the test claim order prohibits charging schools for the costs of sampling, "the cost of the new service is being absorbed by all City ratepayers."[99] The "constitutional web" the claimant is referring to is the substantive limitations on new fees or charges imposed by Proposition 218; article XIII D imposes a proportionality requirement, a prohibition on excessive fees, and a prohibition on new fees or charges for any service "unless that service is actually used by, or immediately available to, the owner of the property in question."[100] And although the "SWRCB believes that the Permit Amendment confers a direct benefit on all water ratepayers, not just the schools, in the form of increased property values and ensuring the City's water does not contain lead,"[101] the claimant argues that the benefits are not sufficiently direct:

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

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

[98] Exhibit E, Claimant's Rebuttal Comments, page 9.

[99] Exhibit E, Claimant's Rebuttal Comments, page 9.

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

[101] Exhibit E, Claimant's Rebuttal Comments, page 10.

> Second, even assuming there is a plausible connection between lead testing at schools and higher property values in the surrounding neighborhoods, higher property values do not benefit all water ratepayers. Water ratepayers are both homeowners and renters. While a homeowner may benefit from a higher resale value of a home, a tenant will not. Higher property values cannot justify charging all water ratepayers for a service they are not receiving.[102]

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.[103] Accordingly, the claimant argues that Proposition 26 controls:

> Proposition 26 further tightened the restrictions on local government revenue imposed by Propositions 13 and 218 by defining a tax as "any levy, charge, or exaction of any kind imposed by a local government, except the following:"
>
> > (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege.
> >
> > (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.
> >
> > (3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.
> >
> > (4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.
> >
> > (5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.
> >
> > (6) A charge imposed as a condition of property development.
> >
> > (7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.
>
> A fee or charge is a tax that must be approved by the voters unless the fee or charge meets one of these seven exceptions. [Citing to Cal. Const., art. XIII C, § 2.] The last of the seven exceptions is for property-related fees and charges under Proposition 218, but because lead testing performed under the Permit Amendment is not provided as an incident of property ownership (discussed above), the City

[102] Exhibit E, Claimant's Rebuttal Comments, page 11.

[103] Exhibit E, Claimant's Rebuttal Comments, page 12.

> cannot avail itself of that exception to raise water rates without voter approval. The third through sixth exceptions are inapplicable to a fee for lead testing because the City is not acting as a regulator in performing the service, the City is not charging the schools to enter City property, the City is not fining the schools for violating the law, and the City is not imposing a development fee, respectively. The first exception for "a specific benefit conferred or privilege granted directly to the payor" does not apply either, because the City is not issuing a school a permit or a license to engage in any activity.
>
> This leaves only the second exception, which would ordinarily give the City sufficient fee authority in situations like this: "[a] charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product." [Citing to Cal. Const., art. XIII C, § 1(e)(2).] The City is providing lead testing services on school property at the request of each school, for which the City could ordinarily charge each school an amount equivalent to the cost of providing the service. The problem is the Permit Amendment prohibits the City from charging the schools, even though the schools are receiving the government service. The school is not the "payor," so the second exception does not apply. Therefore, by default, the City's water ratepayers become the "payor" even though they are not requesting or receiving the service. Without any applicable exceptions, charging water ratepayers for lead testing provided to schools for free is a tax subject to voter approval under Proposition 26.[104]

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

In response to the Draft Proposed Decision, the claimant provides additional argument and evidence that the City's operation of a PWS is not discretionary, in large part due to its long history of doing so, and because of the substantial investment that would be lost and substantial bond liability that would immediately come due if the City elected to discontinue such service.[105] The claimant asserts that these facts constitute practical compulsion within the meaning of *Department of Finance v. Commission* (*Kern*).[106]

In addition, the claimant continues to assert that the test claim order imposes a new program or higher level of service, in that water service is an essential function of government, and that even if providing water service is not a governmental function and a public service, providing free lead testing in schools is a service to the public.[107]

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[104] Exhibit E, Claimant's Rebuttal Comments, pages 12-13.

[105] Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 8-11.

[106] (2003) 30 Cal.4th 727.

[107] Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 2-8.

B. Department of Finance

Finance argues that "[w]hile water service is a local governmental function in some jurisdictions, it is not a function unique to local governments."[108] Finance bases this conclusion on SWRCB's statement that 450 of the 1,100 "public water systems" affected by permit amendments identical to the test claim order are privately owned and operated.[109]

Finance also argues that "claimants do have fee authority undiminished by Propositions 218 or 26."[110] Finance states that "Proposition 26 specifically excludes assessments and property-related fees imposed in accordance with Proposition 218 from the definition of taxes."[111] 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)."[112] Finance further asserts that "as the State Board makes clear in its comments on this test claim, lead testing in K-12 schools provides a direct benefit to all water systems and each ratepayer, and the City may therefore set water rates sufficient to pay for the costs of compliance with the permit amendment."[113]

C. State Water Resources Control Board

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

Specifically, SWRCB argues that the claimant's operation of a PWS subject to the order "is not a function of service peculiar to government because public water systems are operated by both private and governmental entities."[114] And, SWRCB argues that the order "imposes no unique requirements on the City because the State Water Board imposed the exact same lead testing in school requirements on over 1,100 publicly and privately owned water systems."[115]

SWRCB acknowledges that the Safe Drinking Water Act, which SWRCB is responsible for implementing, makes it the policy of the state to reduce to the lowest level feasible all concentrations of toxic chemicals that may cause cancer, birth defects, or other chronic illness. And, SWRCB recognizes that it is the policy of the state to establish standards at least as

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[108] Exhibit D, Finance's Comments on the Test Claim, page 2.

[109] Exhibit D, Finance's Comments on the Test Claim, page 2.

[110] Exhibit D, Finance's Comments on the Test Claim, page 2.

[111] Exhibit D, Finance's Comments on the Test Claim, page 2.

[112] Exhibit D, Finance's Comments on the Test Claim, page 2.

[113] Exhibit D, Finance's Comments on the Test Claim, page 2.

[114] Exhibit C, SWRCB's Comments on the Test Claim, page 8.

[115] Exhibit C, SWRCB's Comments on the Test Claim, pages 8-9.

stringent as the federal Safe Drinking Water Act, and to protect public health and "establish a drinking water regulatory program that provides for the orderly and efficient delivery of safe drinking water throughout the state."[116]

However, in doing so, SWRCB argues that this order, one of 1,100 simultaneously adopted permit amendments, does not impose a state-mandated new program or higher level of service because the requirements of sampling for lead in K-12 schools apply to a variety of public and private entities, the only common characteristic of which is that the subject water systems are all PWSs that serve at least one K-12 school. SWRCB argues that the alleged mandate "relates to the City's provision of drinking water as a public water system."[117] SWRCB argues that the provision of drinking water, in this context, is not a service that is "peculiar to government," in the sense discussed in *County of Los Angeles v. State of California*.[118]

The term "public water system," SWRCB explains, does not mean only those drinking water systems that are publicly owned; instead, "[a] public water system is defined as a system that provides water for human consumption to at least 15 or more connections or that regularly serves 25 or more people daily."[119] And, SWRCB notes, "[o]f the 6,970 water systems currently operating in California, 5,314 are private entities and 1,656 are public entities."[120] More importantly, SWRCB argues that the courts have found that reimbursement is only required for "programs" that are essential and basic to government, "peculiar" to government, or "traditional" governmental services.[121] SWRCB argues that the provision of water, though sometimes a service provided by a governmental entity is not a traditional or essential service of government.

SWRCB argues that the rules developed by the courts are also consistent with a line of cases involving tort claims against local governments, prior to the adoption of the Government Claims Act. A threshold issue in each of those tort claims was whether sovereign immunity barred an action against the local government, and the courts distinguished cases in which sovereign immunity was available or not by characterizing the activity giving rise to the action as either "governmental" or "public," or more in the nature of "corporate" or "private."[122] SWRCB asserts that municipal activities providing utilities or other "facilities of urban life," are generally

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[116] Exhibit C, SWRCB's Comments on the Test Claim, page 4.

[117] Exhibit C, SWRCB's Comments on the Test Claim, page 10.

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

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

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

[121] Exhibit C, SWRCB's Comments on the Test Claim, pages 10-11.

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

considered more in the nature of "corporate" services, rather than "government" services.[123] SWRCB concludes "[a]lthough for the purposes of sovereign immunity, the distinction between the corporate and governmental functions of government is no longer relevant, this line of cases remains appropriate and persuasive authority for defining what constitutes a service peculiar to government."[124]

SWRCB also argues that this interpretation "is underscored by the Service Duplication Law, which requires a local government to compensate a private water supplier when the local government extends service into the service area of the private supplier.[125] SWRCB states that "[t]his statutory requirement for compensation…amounts to a legislative determination that water service is not a service that is or should be peculiar to local governments."[126]

SWRCB concludes on this issue that "simply put, the provision of drinking water is not a function or service which is peculiar to local government."[127] SWRCB states that "statewide, the overwhelming majority (over 75 percent) of drinking water systems are privately owned."[128] SWRCB asserts that no state or federal law requires a city or county to operate a drinking water system, and "[i]ndeed, many cities and counties do not provide potable water to their residents and, instead, rely on private companies to provide drinking water to city and county residents."[129] SWRCB argues that unlike the services at issue in *Carmel Valley* and *City of Sacramento*, "operating a public water system is not an 'essential,' 'basic,' 'classical' or 'traditional' governmental function."[130]

With respect to the alternative test, requirements "uniquely" imposed on local government, and not applicable generally to all residents or entities, SWRCB argues that the order must be considered in the context of the SWRCB's other permit amendments adopted simultaneously: "[w]hen viewed within this larger programmatic context, the Permit Amendment imposes no unique requirements on the City and is not a new program subject to subvention…"[131] SWRCB explains:

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

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

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

[126] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

[127] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

[128] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

[129] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

[130] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

[131] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

> [T]he City was one of more than 1,100 public water systems that received permit amendments substantially identical to the City's Permit Amendment. The State Water Board issued these permit amendments within a few days of each other. Collectively, these permit amendments, including the Permit Amendment at issue in this Test Claim, effectuate the statewide lead testing of drinking water in schools program. Of the over 1,100 public water systems that received the permit amendments, approximately 450 water systems are privately owned. Accordingly, the Permit Amendment, as part of the State Water Board's lead testing in schools program, imposed no unique requirements on the City that were not imposed on the privately owned water systems.[132]

SWRCB also notes that "[v]iewing each individual drinking water permit in a vacuum, and not relative to other similarly situated water systems, could result in a determination that each requirement was unique to that particular water system because the drinking water permit only applies to that entity."[133] SWRCB concludes that "[t]his cannot be the result the voters intended…"[134]

Finally, SWRCB argues that Proposition 218 does not prevent the claimant from imposing or increasing water rates to recoup the costs of the alleged mandate. SWRCB argues that the claimant interprets its authority post-Proposition 218 too narrowly. Broadly, Proposition 218 requires new or increased fees to be proportional to the benefit received or the burden imposed on the local government related to the governmental service at issue. However, SWRCB argues that the lead testing required under the Order confers a direct benefit on all water system users as a whole.[135] Additionally, SWRCB states that "[b]y requiring additional lead testing in schools, the Permit Amendment functionally extends the Lead and Copper rule by providing additional testing points which can inform the City about how the water chemistry in its distribution network may be impacting not only particular schools, but residences who obtain water from a common source or through a common delivery system."[136] SWRCB thus argues that "just as the testing of private residences under the Lead and Copper rule benefits the water system as a whole…the lead testing in K-12 schools provides a similar direct benefit to each ratepayer by providing additional testing inputs the City can use to optimize its water chemistry and quality…"[137]

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[132] Exhibit C, SWRCB's Comments on the Test Claim, page 14.

[133] Exhibit C, SWRCB's Comments on the Test Claim, page 14.

[134] Exhibit C, SWRCB's Comments on the Test Claim, page 14.

[135] Exhibit C, SWRCB's Comments on the Test Claim, page 15.

[136] Exhibit C, SWRCB's Comments on the Test Claim, page 16.

[137] Exhibit C, SWRCB's Comments on the Test Claim, page 16.

In addition, SWRCB argues that lead testing in schools will help to maintain and possibly improve property values; and that school facilities are often used for community meetings and generally provide a benefit to the entire community.[138]

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

In response to the Draft Proposed Decision, SWRCB states that it agrees that the permit amendment does not impose a reimbursable new program or higher level of service.[139] In addition, SWRCB asserts that if the Commission determines that the permit amendment constitutes a new program or higher level of service, "there are alternative grounds to find that the City has sufficient fee authority to comply with the Permit Amendment."[140]

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."[141] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[142]

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.[143]
2. The mandated activity either:
   a. Carries out the governmental function of providing a service to the public; or

[138] Exhibit C, SWRCB's Comments on the Test Claim, page 16.

[139] Exhibit G, SWRCB's Comments on the Draft Proposed Decision, page 1.

[140] Exhibit G, SWRCB's Comments on the Draft Proposed Decision, page 1.

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

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

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

b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[144]

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.[145]

4. The mandated activity results in the local agency or school district incurring increased costs mandated by the state within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[146]

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.[147] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[148] 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."[149]

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

Government Code section 17551(c) states that test claims "shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later."[150]

[144] *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).

[145] *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.

[146] *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.

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

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

[149] *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].

[150] Government Code section 17551(c).

The effective date of the order is January 18, 2017.[151] The claimant filed the Test Claim on January 11, 2018, less than 12 months after the effective date of the order.[152] Therefore, the Test Claim is timely filed.

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

This Test Claim alleges new state-mandated activities and costs arising from an amendment to the claimant's public water system permit adopted by SWRCB, Order No. 2017PA-SCHOOLS for the City of San Diego PWS No. 3710020, which requires the claimant, as the operator of a "public water system" that serves a number of K-12 schools, to perform lead sampling upon request of a school. A PWS may be a private company or a governmental entity and is defined as "a system for the provision to the public of water for human consumption" that has at least 15 service connections and serves at least 25 people per day for at least 60 days out of the year.[153] Under the order, upon request, the PWS must take samples to perform lead sampling, at one to five fixtures (e.g., drinking fountains or food preparation areas) on the school's property, process those results at a certified laboratory, maintain records of the requests and the results, and provide the results, and if necessary, information to the school regarding possible remediation or other solutions if lead is detected in the fixtures above 15 parts per billion (ppb).

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

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

The plain language of the test claim order requires the claimant, as a PWS, to:

- Submit to SWRCB's Division of Drinking Water a comprehensive list of the names and addresses of all K-12 schools served water through a utility meter [by the claimant];[154]
- If a school representative requests lead sampling assistance in writing:
    - Respond in writing within 60 days and schedule a meeting with school officials to develop a sampling plan;[155]

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

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

[153] 42 United States Code, section 300f(4).

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

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

- Finalize a sampling plan and complete initial sampling within 90 days [or an alternative time schedule approved by DDW];[156]
- 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;[157]
- 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;[158]
- Ensure samples are collected by an adequately trained water system representative;[159]
- Submit the samples to an ELAP certified laboratory for analysis;[160]
- Require the laboratory to submit the data electronically to DDW;[161]
- Provide a copy of the results to the school representative;[162]
- Within two business days of a result that shows an exceedance of 15 ppb, notify the school of the sample result;[163]

- If an initial sample shows an exceedance of 15 ppb:

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

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

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

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

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

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

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

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

    - Collect an additional sample within 10 days if the sample site remains in service;[164]
    - Collect a third sample within 10 business days after notification that a resample result is less than or equal to 15 ppb;[165]
    - 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;[166]
- Ensure that the water system receives the results of repeat lead samples from the laboratory in no more than 10 business days;[167]
- 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;[168]
- 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;[169]
- 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;[170]
    - The water system is not responsible for the costs of any corrective action or maintenance;[171]

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

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

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

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

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

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

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

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

- Keep records of all requests for lead related assistance and provide the records to DDW, upon request;[172]
- Include in the annual Consumer Confidence Report a statement summarizing the number of schools requesting lead sampling.[173]

Both the claimant and SWRCB agree that these requirements are new, as compared against prior law.[174]

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

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

State mandate reimbursement is not required for any and all costs that might be incurred by local government incident to a change in law. Mandate reimbursement is required only when all elements of article XIII B, section 6 are met: the statute or executive order must impose a state mandated program, must provide "new program or higher level of service," and must result in increased costs mandated by the state.[175] If any of these elements is not satisfied, then reimbursement is not required and the test claim must be denied.

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

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

[174] See Exhibit A, Test Claim, pages 16-17 ["The City's existing Permit and its prior amendments do not require [the claimant] to perform lead testing at K-12 schools."]; Exhibit C, SWRCB's Comments on the Test Claim, pages 5-7 [Explaining that under prior federal and state regulations community water systems, such as operated by the claimant, were required to monitor and sample for lead throughout their systems, but mostly by sampling private residences.].

[175] California Constitution, article XIII B, section 6; *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81 and 109; Government Code sections 17514, 17556.

The Draft Proposed Decision relied on the *City of Merced* and *Department of Finance (Kern High School Dist., and POBRA)* cases,[176] to find that local government is not mandated by state or federal law to provide drinking water through operation of a PWS and, thus, is not mandated by the state to comply with the test claim order.[177] The analysis turned largely on the absence of any requirement in the California Constitution for local government to own or operate a PWS, and the express authority for private and public entities to do so.[178] The Draft Proposed Decision also noted that there was no evidence in the record that the claimant is practically compelled and would suffer "certain and severe penalties" or other draconian measures if the claimant decided to no longer provide water services to its residents or operate as a PWS.[179]

In its response to the Draft Proposed Decision, the claimant has provided additional argument and evidence that the City is practically compelled to continue providing water service as a PWS, both because of the long history of doing so, and because of the substantial bond liability it has incurred, which would immediately come due if it ceased operation of the PWS.[180] Specifically, the claimant asserts that it incorporated its municipal water "agency" on July 21, 1901, when the voters approved the issuance of bonds to purchase the distribution system from a private water company.[181] Subsequent "bonds and other financing secured over the years to maintain the water system in good working order," totaling approximately $890 million as of November 2018, would immediately come due if the claimant sought to discontinue service.[182] For these reasons, the claimant argues that it is practically compelled to continue to operate as a PWS.

The Commission, does not need to resolve the state-mandate issue to determine this case because, as explained below, the Commission finds that test claim order does not constitute a new program or higher level of service and, thus, reimbursement under article XIII B, section 6 is not required.

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[176] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777; *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727; *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355.

[177] Exhibit F, Draft Proposed Decision, pages 49-55.

[178] See Exhibit F, Draft Proposed Decision, pages 49-50 [citing California Constitution, article XI, section 9; *Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 274].

[179] Exhibit F, Draft Proposed Decision, page 55. See also, *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727, 753-754. *Department of Finance v. Commission on State Mandates* (*POBRA*) (2009) 170 Cal.App.4th 1355, 1368.

[180] Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 8-11; 56-59 [Declaration of Raymond C. Palmucci, Deputy City Attorney designated to review and approve information pertaining to the City's Water Fund].

[181] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 9 [The claimant also points out that its six largest customers are federal, state, and local agencies, including the City itself, and that these agencies could not function if the City elected to discontinue water service].

[182] Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 10-11; 112 [Financial Statement regarding Subordinated Water Revenue Bonds, Series 2018A].

a. The courts have defined a "new program or higher level of service" as a "program that carries out the governmental function of providing services to the public or laws, which, to implement a state policy, impose unique requirements on local government."

The California Supreme Court explained in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, that a new program or higher level of service means a program that carries out of the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local government and do not apply generally to all residents and entities in the state," as follows:

> Looking at the language of section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs." But the term "program" itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term – *programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state*.[183]

The Court further held that "the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions *peculiar to government*, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities."[184] The law at issue in the *County of Los Angeles* case addressed increased worker's compensation benefits for government employees, and the Court concluded that:

> …section 6 has no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in worker's compensation benefits that employees of private individuals or organizations receive. Workers' compensation is *not* a program administered by local agencies to *provide service to the public*.[185]

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

> Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers. In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services

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

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

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

> incidental to administration of the program. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. [Citation omitted.] Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.[186]

In *City of Sacramento*, the Court considered whether a state law extending mandatory unemployment insurance coverage to include local government employees imposed a reimbursable state mandate.[187] The Court followed *County of Los Angeles*, holding that "[b]y requiring local governments to provide unemployment compensation protection to their own employees, the state has not compelled provision of new or increased 'service to the public' at the local level…[nor] imposed a state policy 'uniquely' on local governments."[188] Rather, the Court observed that most employers were already required to provide unemployment protection to their employers, and "[e]xtension of this requirement to local governments, together with the state government and nonprofit corporations, merely makes the local agencies 'indistinguishable in this respect from private employers.'"[189]

A few other examples are instructive. In *Carmel Valley*, the claimants sought reimbursement from the state for protective clothing and equipment required by regulation, and the State argued that private sector firefighters were also subject to the regulations, and thus the regulations were not unique to government.[190] The court rejected that argument, finding that "police and fire protection are two of the most essential and basic functions of local government."[191] And since there was no evidence on that point in the trial court, the court held "we have no difficulty in concluding as a matter of judicial notice that the overwhelming number of fire fighters discharge a classic governmental function."[192] Thus, the court found that the regulations requiring local agencies to provide protective clothing and equipment to firefighters carried out the

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

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

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

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

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

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

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

governmental function of providing services to the public. The court also found that the requirements were uniquely imposed on government because:

> The executive orders manifest a state policy to provide updated equipment to all fire fighters. Indeed, compliance with the executive orders is compulsory. The requirements imposed on local governments are also unique because fire fighting is overwhelmingly engaged in by local agencies. Finally, the orders do not generally apply to all residents and entities in the State but only to those involved in fire fighting.[193]

Later, in *County of Los Angeles II*, counties sought reimbursement for elevator fire and earthquake safety regulations that applied to all elevators, not just those that were publicly owned.[194] The court found that the regulations were plainly not unique to government.[195] The court also found that the regulations did not carry out the governmental function of providing a service to the public, despite declarations by the county that without those elevators, "no peculiarly governmental functions and no purposes mandated on County by State law could be performed in those County buildings . . . ."[196] The court held that the regulations did not constitute an increased or higher level of service, because "[t]he regulations at issue do not mandate elevator service; they simply establish safety measures."[197] The court continued:

> In determining whether these regulations are a program, the critical question is whether the mandated program carries out the governmental function of providing services to the public, not whether the elevators can be used to obtain these services. Providing elevators equipped with fire and earthquake safety features simply is not "a governmental function of providing services to the public." [FN 5 This case is therefore unlike *Lucia Mar, supra*, 44 Cal.3d 830, in which the court found the education of handicapped children to be a governmental function (44 Cal.3d at p. 835) and *Carmel Valley, supra*, where the court reached a similar conclusion regarding fire protection services. (190 Cal.App.3d at p. 537.)[198]

As analyzed herein, the test claim order does not impose unique requirements on local government and does not impose a program that carries out the governmental function of providing services to the public.

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

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

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

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

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

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

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

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

> The Permit Amendment applies specifically to the City. It does not apply generally to all residents and entities in the State. Even collectively considering all 1,100 permit amendments issued by SWRCB, they only apply to local water agencies with schools in their service areas, not to everyone in the State. The Permit Amendment does not require lead testing be performed for all state residents and entities either, only for schools. Collectively, the permit amendments apply uniquely to water agencies in the same way the Court found the requirement for fire protective gear applied uniquely to public and private fire protection agencies. The permit amendments do not need to exclusively apply to publicly-owned water agencies to satisfy the uniqueness element of the second test.
>
> Under the second test, examples of laws that apply generally to all residents and entities in the state include requirements to provide employees with unemployment insurance coverage, worker's compensation benefits, or to upgrade public buildings to comply with statewide elevator safety regulations. Subvention was denied in these cases because the requirements applied to everyone, not just to local government. Unlike these examples, though, the Permit Amendment only applies to the City. Those in the State who do not provide water service do not have to comply with the Permit Amendment.
>
> The Permit Amendment satisfies all the elements of the second test. The Permit Amendment is implementing a State policy of providing safe drinking water to school students. The policy is implemented by obligating local water agencies to test for lead on school property. The obligation to test for lead does not apply generally to all residents and entities in the State, but uniquely to local water agencies. Therefore, the Permit Amendment is a new program eligible for reimbursement under the second test established by the Supreme Court.[199]

In response to the Draft Proposed Decision, the claimant continues to argue that "[t]he Permit Amendments do not generally apply to all residents and entities in the State, but only to those providing water service to schools, in the same manner that the requirements in Carmel Valley only applied to firefighting services."[200]

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

First, it is correct that the test claim order pled is uniquely addressed to *a* local government entity (the City of San Diego, in its capacity as the operator of a PWS in this instance). However, it is but one of 1,128 permit amendments adopted near-simultaneously, more than a third of which

[199] Exhibit E, Claimant's Rebuttal Comments, page 8.

[200] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 8.

were issued to privately owned PWS's, with the same requirements to perform lead sampling upon request of a school within the service area. As instructed by the courts interpreting article XIII B, section 6 of the California Constitution, this test claim order cannot be considered in isolation; it must be construed in context with other similar permits issued by SWRCB to PWSs.[201] The test claim statute in *City of Sacramento* expressly extended unemployment insurance to public sector employees without altering the law applicable to private sector employees.[202] The California Supreme Court, however, considered the statute in context and held that the statute did not impose requirements unique to local government and, thus, did not impose a new program or higher level of service: "Extension of this requirement to local governments, together with the state government and nonprofit corporations, merely makes the local agencies 'indistinguishable in this respect from private employers.'"[203] The Court also observed that it would "have an anomalous result" if the State could "avoid subvention under *County of Los Angeles* standards by imposing new obligations on the public and private sectors at the same time," while "if it chose to proceed by stages, extending such obligations first to private entities, and only later to local governments, it would have to pay."[204] Similarly, the test claim statute in *City of Richmond v. Commission on State Mandates* eliminated a statutory exemption from providing workers' compensation death benefits to local safety members, which put local government employers on the same footing as all other nonexempt employers, requiring that they provide the workers' compensation death benefit.[205] The court found that the statute did not impose a new program or higher level of service, even though the statute itself, considered in isolation, affected only local government.[206] Accordingly, here, the Commission must consider the permit amendment in context, and although the permit amendment pled in this test claim is directed to only one local government, it is one of many permits issued to PWS' and is therefore not *uniquely* imposed on the claimant.

The claimant, however, asserts that "[t]he obligation to test for lead does not apply generally to all residents and entities in the State, but uniquely to local water agencies,"[207] and therefore the test claim order is eligible for reimbursement under article XIII B, section 6. The claimant's statement is factually incorrect, and misuses and misapplies the words "generally" and "uniquely." The factual error inherent in the claimant's argument is that lead testing

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

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

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

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

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

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

[207] Exhibit E, Claimant's Rebuttal Comments, page 8.

requirements do not apply only to "local water agencies," a phrase which implies a group of *local government* entities,. The permit amendments issued apply "to *each public water system* that serves drinking water to at least one or more of grades [K-12]"[208] which is significantly more broad than "local water agencies" and includes both governmental and privately owed systems. Similarly, the SWRCB media release accompanying the permit amendments stated "[t]he Board is requiring *all community water systems* to test school drinking water upon request by the school's officials."[209]

As noted above, the term "public water system" does not mean a water system owned or operated by a governmental entity; California's SDWA defines a PWS as "a system for the provision to the public of water for human consumption" that has at least 15 service connections and serves at least 25 people per day for at least 60 days out of the year.[210] In addition, the Act defines several other water systems that might deliver drinking water and would be regulated under the Act, including, but not limited to, a "community water system," defined as a public water system that serves yearlong residents; and a "state small water system," defined as a system that serves at least five but not more than 14 service connections and does not regularly serve at least 25 persons for more than 60 days out of the year.[211] The record indicates that permit amendments were issued to privately owned PWS's including mutual water companies organized under the Corporations Code;[212] and investor-owned utilities regulated under the Public Utilities Code.[213] Describing such entities as "local water agencies," or implying that the

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[208] Exhibit E, Claimant's Rebuttal Comments, page 21 [Permit Amendment No. 2017PA-SCHOOLS].

[209] Exhibit E, Claimant's Rebuttal Comments, page 34 [SWRCB Media Release, Jan. 17, 2017].

[210] Health and Safety Code 116275(h).

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

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

[213] See, Exhibit I, List of Regulated Water and Sewer Utilities, California Public Utilities Commission, August 17, 2018. See, e.g., Exhibit C, SWRCB's Comments on the Test Claim, Permit Amendments issued to investor-owned utilities regulated by PUC: pages 1265 [Bakman Water Co.]; 1292 [Bass Lake Water Co.]; 1455 [Big Basin Water Co.]; 1862-1939 [California Water Service Company: King City, Las Lomas, Oak Hills, Salinas Hills, Salinas, Stockton]; 1940 [California American Water, Coronado]; 2105 [California Water Service, Bear Gulch]; 2133-2177 [California Water Service: East Los Angeles, Hermosa/Redondo; Palos Verdes]; 2193-2220 [California Water Service: Westlake, Los Altos Suburban]; 2240 [California Water Service, South San Francisco]; 2380-2414 [Cal-Water Service Co.: Chico, Hamilton City, Marysville, Oroville, Willows]; 2508 [Canada Woods Water Co.]; 2661 [Cazadero Water Co.];

requirements of the test claim order apply only to "local water agencies" is misleading and factually inaccurate.

Moreover, as indicated above, the provision of water through a public water system, to a school or any other customer, is not an activity or service unique to government, and therefore additional requirements or costs imposed on that service are also not unique. Article XI, section 9 of the California Constitution provides that a municipal corporation, or a private person or corporation, may be established to operate public works to furnish water.[214] This provision was adopted by voter initiative to make clear that cities or other local entities had authority to organize to provide such services, which had previously been provided primarily by private entities.[215] SWRCB provides evidence that there are 6,970 water systems of various types currently operating in California, 5,314 of which (approximately 76 percent) are privately owned and operated, and 1,656 of which are public entities.[216]

More importantly, the claimant's assertion that the lead sampling requirements of the test claim order "do not apply generally to all residents and entities in the State, but uniquely to local water

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5956 [CWS Bakersfield]; 6034 [CWS Selma]; 6060-6098 [CWS: Visalia, Dixon, Livermore]; 6194-6214 [Del Oro Water Co.: Magalia, Paradise Pines, Stirling Bluffs]; 6481 [East Pasadena Water Co.]; 6541 [Easton Estates Water Co.]; 6725 [Erskine Creek Water Co.]; 7077 [Fruitridge Vista Water Co.]; 7192 [Golden State Water Co., Clearlake]; 7315 [Golden State Water Co., Wrightwood]; 7395 [Great Oaks Water Co.]; 7408 [Green Acres Mobile Home Estates]; 7880 [Havasu Water Co.]; 8078 [Hillview Water Co., Oakhurst/Sierra Lakes]; 8524 [Kenwood Village Water Co.]; 8866 [Lake Alpine Water Co.]; 9021 [Las Flores Water Co.]; 9270 Little Bear Water Co.]; 9426 Lukins Brothers Water Co.]; 9768 [Mesa Crest Water Co.]; 10082 [Mountain Mesa Water Co.]; 10217 Nacimiento Water Co.]; 10871 Penngrove Water Co.]; 10925 [Pierpoint Springs Water Co.]; 11066 [Point Arena Water Works]; 11478 [Rio Plaza Water Co.]; 11542 [Rolling Green Utilities]; 11803-11845 [San Gabriel Valley Water Co., El Monte, Montebello, Fontana]; 11915 [San Jose Water Co.]; 12959 [Southern California Edison Co., Santa Catalina]; 12975 [Spreckels Water Co.]; 13163-13213 [Suburban Water Systems, Covina, Glendora, La Mirada]; 14361 [Warring Water Service, Inc.]; 14411 [Weimar Water Co.]; 14426 [West San Martin Water Works, Inc.]; 14649 [Yerba Buena Water Co.].

[214] California Constitution, article XI, section 9(a-b).

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

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

agencies,"[217] misconstrues the test.[218] The Court in *County of Los Angeles* reasoned that the "drafters and the electorate" that shaped and adopted article XIII B, section 6, intended to require mandate reimbursement for "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local government and do not apply generally to all residents and entities in the state."[219] The claimant's underlying argument is that because the test claim order applies only to PWSs, and not to "all residents and entities in the State," it should be considered "uniquely" imposed on local government.[220] This reasoning misinterprets and misapplies the words "generally" and "uniquely," which the Court used to illustrate the difference between a law that results indirectly, or incidentally, in costs to local government; and a law that specifically and directly imposes new "unique" requirements on local government.[221]

First, *general* does not mean *universal*: "The rule need not, however, apply universally; a rule applies generally so long as it declares *how a certain class of cases will be decided*."[222] Accordingly, the idea that a law would "apply generally to all residents and entities in the State" should not be taken to mean that a law must apply broadly to *all* persons and entities without limitation or caveat; laws may apply to a *class* of persons or entities, or to a defined set of *circumstances*, and still be considered to apply *generally*.[223] The permit amendment applies to the claimant because the claimant operates a PWS, which has K-12 schools within its service area.[224] These are the circumstances and class of entities upon which SWRCB *generally* imposed the lead testing requirements, and those circumstances are shared by a number of privately owned entities, in addition to governmental entities.

Moreover, a law that applies to a class of persons or entities whose members are both governmental and private cannot be said to apply *uniquely* to government, as the claimant asserts. Rather, the requirements of the test claim order are applicable to all PWS's that serve at

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[217] Exhibit E, Claimant's Rebuttal Comments, pages 8-9; Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 7-8.

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

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

[220] Exhibit E, Claimant's Rebuttal Comments, pages 8-9; Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 7-8.

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

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

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

[224] See Exhibit E, Claimant's Rebuttal Comments, page 34 [SWRCB Media Release, January 17, 2017].

least one K-12 school, and there is evidence in the record, absent in *Carmel Valley*,[225] that there are a substantial number of PWS's affected by the policy that are privately owned, as noted above. Thus, the requirements are not *unique* to government at all; rather, they apply to the claimant and similarly-situated local agencies by virtue of their decision to own or operate a PWS, but they also apply to PWSs that are *not* local government agencies: approximately 450 privately owned PWSs are subject to the same requirements.[226]

The claimant notes that in *City of Sacramento*,[227] *County of Los Angeles*,[228] and *County of Los Angeles II*,[229] "[s]ubvention was denied in these cases because the requirements applied to everyone, not just to local government."[230] And in its comments on the Draft Proposed Decision, the claimant insists that the permit amendments are analogous to "the requirements in *Carmel Valley* [that] only applied to firefighting agencies."[231] Again, this misconstrues the meaning of "generally" and "uniquely" and the effect of the test articulated by the courts: in each case the requirements applied based on a given set of limitations or circumstances. In *City of Sacramento* and *County of Los Angeles*, the requirements applied to the class of *employers*, which included both public and private entities.[232] In *County of Los Angeles II* the requirements applied to the owners or operators of both public and private buildings containing elevators.[233] Thus, the assertion that the test claim statutes in those cases applied to "everyone" is simply not accurate. In *Carmel Valley*, which the claimant asserts is controlling, the requirements applied only to firefighting organizations, but the court found those requirements *unique to government* because "fire fighting is overwhelmingly engaged in by local agencies."[234] In this case, however, the evidence in the record shows that that class includes a substantial population of private entities.[235]

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

[226] Exhibit C, SWRCB's Comments on the Test Claim, page 6.

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

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

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

[230] Exhibit E, Claimant's Rebuttal Comments, page 8.

[231] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 8.

[232] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

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

[234] *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 538.

[235] See Exhibit C, SWRCB's Comments on the Test Claim, pages 819 and following [Permit Amendments 2017PA-SCHOOLS, issued to all subject PWS's].

Therefore, this Test Claim is distinguishable from *Carmel Valley*, in which the court noted that it did not have evidence in the record of the existence or prevalence of private fire-fighting teams or private fire personnel, but accepted it as a matter of judicial notice that the overwhelming majority of fire fighters discharge a governmental service.[236] Here, the evidence shows that the test claim order is one permit of more than 1,100 issued to drinking water suppliers that serve at least one K-12 school, a substantial number of which are non-governmental entities.

This Test Claim most closely resembles *County of Los Angeles II*.[237] In that case, earthquake safety regulations applied to the owners or operators of buildings containing elevators, and affected the local government only insofar as the County operated buildings that contained working elevators.[238] Here, the test claim order affects the claimant *only because* the claimant provides drinking water through a PWS to K-12 schools within its service area, and those schools have requested testing, but it also affects a substantial number of private entities that meet the same criteria.

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

c. <u>The test claim order does not impose a program that carries out a governmental function of providing a service to the public within the meaning of article XIII B, section 6.</u>

The alternative test articulated by the Court to determine if a statute or executive order imposes a new program or higher level of service is whether the requirements of the statute or executive order constitute a "program[] that carr[ies] out the governmental function of providing services to the public."

The claimant asserts that the test claim order imposes a new program or higher level of service because *County of Los Angeles* and the cases following only require that a governmental function be a function of providing services to the public, not that the function at issue must be "peculiar" to government.[239] The claimant argues, based on a number of authorities cited that employ some variation of the phrase "governmental function," that anything a local government does pursuant to legal authority is a government function.[240] In comments on the Draft Proposed Decision, the claimant argues that the Draft Proposed Decision relies too heavily on the prevalence of privately owned PWS's, and ignores both United States Supreme Court and California Supreme Court authorities that describe water service as a governmental function.[241] The claimant states the following:

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

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

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

[239] Exhibit E, Claimant's Rebuttal Comments, page 4.

[240] Exhibit E, Claimant's Rebuttal Comments, page 5.

[241] Exhibit H, Claimant's Comments on the Draft Proposed Decision, pages 2-4.

> The Draft Proposed Decision determines the Permit Amendment does not impose unique requirements on local government because private companies received similar orders, and then concludes water service is not a peculiarly governmental function because private companies also provide water service. In other words, the fact that private companies provide water service defeats both tests. What this analysis fails to recognize is that private companies can perform governmental functions without turning the function into a proprietary one. For example, operating prisons is a governmental function even though both public entities and private companies perform the service. [Citation omitted.] Trash collection is also a governmental function even though public agencies and private firms both provide the service. [Citation omitted.] Governmental functions are not limited to functions performed *exclusively* by government. [Citation omitted.][242]

The claimant further asserts that even if providing water service through a PWS is not a governmental function, testing for lead in schools is a governmental function. The claimant alternatively argues that the "program" at issue is not providing water, but ensuring safe schools, which the courts have found to be a program within the meaning of article XIII B, section 6.[243]

In this case, the Commission finds that the provision of drinking water through the operation of a PWS is not an essential or peculiarly government function. Thus, the activities required of all PWSs to test for the presence of lead at drinking fountains and in food preparation areas at the request of any K-12 school in their service area does not impose a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution. The Commission further finds that the examples and analogies raised by both the claimant and SWRCB do not support an interpretion of "governmental function" that is more broad than relevant mandate case authorities suggest. And finally, the Commission finds that ensuring safe schools is the purview of schools, and not of a PWS.

i. A "governmental function" within the meaning of article XIII B, section 6 is limited to activities peculiar and essential to local governments such as providing police and fire protection, and public education.

The Court in *County of Los Angeles* elaborated upon its two part test for a "program" subject to article XIII B, section 6, referencing the ballot arguments that declared that section 6 "[w]ill not allow the state government to force programs on local governments without the state paying for them." The Court explained that "the phrase 'to force programs on local governments' confirms that the intent underlying section 6 was to require reimbursement to local agencies for the *costs involved in carrying out functions peculiar to government*, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities."[244] On that basis, the Court reasoned that workers compensation was not a local governmental

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[242] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 2.

[243] Exhibit E, Claimant's Rebuttal Comments, page 6 [citing *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 879].

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

program at all, both because it is not administered by local government (it is administered by the State), and because, following enactment of the test claim statute, private and public employers have the same obligations under the law.[245]

In the years since, the courts have applied and interpreted this test to *confirm* the existence of a *governmental* program within the meaning of article XIII B, section 6 to include the following: protective clothing and equipment for firefighters;[246] education of "handicapped" children;[247] reducing racial or ethnic segregation in public schools;[248] providing due process in expulsion proceedings in public schools;[249] and providing due process in disciplinary proceedings for peace officers employed by cities and counties.[250] In *Carmel Valley*, addressing fire protective clothing and equipment, the court observed that the underlying government service at issue is a "peculiarly governmental function," and that police and fire protection are "two of the most essential and basic functions of local government."[251] The same was echoed in *POBRA*, relative to the due process procedures for city and county peace officer disciplinary proceedings.[252] *Lucia Mar*, *Long Beach*, and *San Diego Unified* all addressed alleged reimbursable mandates in the realm of education,[253] for which the governmental duty of a school district is clearly expressed in the California Constitution,[254] and for which the court in *Long Beach* expressly recognized that education is a "peculiarly governmental function," notwithstanding the existence of private schools.[255]

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

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

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

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

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

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

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

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

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

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

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

At the same time the courts have *rejected* mandate reimbursement in the following cases, finding that they did *not* involve a governmental function of providing a service to the public (and also were not uniquely imposed on local government): fire and earthquake safety features for elevators in buildings open to the public;[256] elimination of a government and nonprofit employer exemption from contributing to unemployment insurance;[257] awarding attorneys' fees against a local government under Code of Civil Procedure section 1021.5;[258] and the elimination of an exemption for local governments employing public safety workers from requirements to pay workers' compensation death benefits.[259] The cases disapproving reimbursement therefore involved either costs and activities related to local governments' capacity as an employer;[260] or generally-applicable laws that impacted local government by virtue of some other circumstance not relating to any identifiable *governmental* service (i.e., the award of attorneys' fees for litigants successful against local govenrment, and the applicability of elevator safety regulations in public buildings).[261]

Unlike *Carmel Valley*, *Lucia Mar*, *Long Beach*, *San Diego Unified*, and *POBRA*, the test claim order in this case does not involve an essential and *peculiarly governmental* function identified by the courts of this State.[262] The test claim order here relates to the provision of drinking water through a PWS, which is fundamentally distinct from the other examples discussed above: providing water service for a fee to ratepayers/customers, is far different from providing police or fire protection, or free and appropriate public education, to all residents of the jurisdiction regardless of their ability to pay, which are core, mandatory governmental functions, according to the case law discussed above. Water service, on the other hand, is not a mandatory duty of local government and can be, and often is, provided by a private entity. As noted in the Background, there is no legal requirement for local agencies to be involved in providing water, and historically the authority of local agencies to do so was in question. Article XI, section 9(a) of the California Constitution provides that a municipal corporation *may* be established to operate public works to furnish light, water, power, heat, transportation, or means of

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

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

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

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

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

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

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

communication.[263] However, section 9(b) provides that *private persons or corporations* may also establish and operate works for those same purposes "upon conditions and under regulations that the city may prescribe…"[264] The courts have interpreted article XI, section 9 to provide *authority* to provide public utilities, but not a *duty*.[265]

Accordingly, SWRCB provides evidence that there are 6,970 water systems currently operating in California, 5,314 of which are privately owned and operated, and 1,656 of which are public entities.[266] And, as many as two million Californians "are served either by the estimated 250,000 to 600,000 private domestic wells, or by water systems serving fewer than 15 service connections.[267] Thus, the provision of drinking water through a PWS is not only not necessary in all cases and in all parts of the State, it is also an activity and function that, where necessary or expedient, can be fulfilled by a private person or corporation.[268] It bears repeating that the term "public water system" does not mean a water system owned or operated by a governmental entity; a "public water system" is defined only by the number of connections,[269] and is distinguished from a "community water system," a "noncommunity water system," a "nontransient noncommunity water system," a "state small water system," and a "transient noncommunity water system," by the size of each system.[270] Neither the California SDWA, nor the federal LCR, defines these entities any differently whether owned and operated by a public entity or by a private person or corporation.

The claimant challenges SWRCB's evidence that approximately 75 percent of water systems throughout the state, or 5,314 of 6,970, are privately owned or operated. The claimant states that while it "has no means to verify the accuracy of this data," the same data provided by SWRCB "demonstrate that public agencies serve 81% of people in the State who have drinking water service."[271] The claimant argues that the number of people statewide receiving drinking water from a publicly owned utility "is strong evidence that water service is a governmental function,

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

[264] California Constitution, article XI, section 9(b).

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

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

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

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

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

[270] Health and Safety Code section 116275(h-k; n-o).

[271] Exhibit E, Claimant's Rebuttal Comments, page 5.

more persuasive than the fact that small, privately owned water systems outnumber large, publicly owned systems."[272]

However, the relative number of *persons* served by privately or publicly owned water systems is not persuasive evidence that water service is a governmental function; the majority of persons served by publicly owned water systems is merely a function of the size and capacity of the publicly owned systems, and presumably also a more dense and urbanized ratepayer/customer base.[273] In addition, as many as two million California residents still rely on private domestic wells or water systems with fewer than 15 service connections for their drinking water, rather than a PWS.[274] The specific requirements of this test claim order apply beyond local government entities; the requirements apply to any and every PWS that decides to supply water and serves at least one K-12 school. Subtantial evidence has been presented that as many as one-third of affected entities are privately held or operated.[275]

Thus, the Commission finds that the case law interpreting the *new program or higher level of service* requirement of article XIII B, section 6 does not support a finding that the provision of drinking water through the operation of a PWS is an essential or peculiarly governmental function.

The cases discussed above make findings on what activities of local government are or are not "governmental functions," within the meaning of article XIII B, section 6, but do not necessarily provide further guidance or definition to be applied in other circumstances. Accordingly, the dearth of case authority directly *defining* the concept of a "governmental function" specifically within the meaning of article XIII B, section 6 has led both the claimant and SWRCB to borrow from and analogize to other concepts in the law, and specifically has led the claimant to search for examples of courts using some variation of the phrase "governmental function," and to argue that those cases are binding on the Commission as statements of mandates law. As the analysis herein demonstrates, SWRCB's analogies and reasoning support the above findings, and are consistent with prior mandates cases, while the claimant's examples and analogies are not sufficient to support a finding that provision of drinking water through a PWS is a core and essential function of government, similar to police and fire protection, and education.

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[272] Exhibit E, Claimant's Rebuttal Comments, page 5.

[273] Exhibit C, SWRCB's Comments on the Test Claim, page 2.

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

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

SWCRB asserts that a "line of cases decided prior to California's adoption of the Government Claims Act, and which involved tort claims for damages against local governments," is consistent with and reinforces the distinction between "governmental" functions or programs that may be the subject of mandate reimbursement, and those functions that are not "governmental" and are not subject to mandate reimbursement. Specifically, SWRCB asserts that local entities act in either a "governmental" or "public" capacity, or a "corporate" or "private" capacity, and that the same distinction used to determine whether sovereign immunity attached to a particular action is consistent with, and provides an analogy to, the concept of a governmental function or "program" in the mandates context.[276]

The "proprietary" versus "governmental" distinction traces back to the common law jurisprudence on the scope of sovereign immunity, prior to the adoption of the Government Claims Act. In order to resolve questions of government liability the courts were forced to draw a distinction between activities that are *governmental* in nature, and thus entitled to immunity, and those that are more "corporate" or "proprietary" and not so entitled.[277] The Court described a local government providing water, light, heat, or power as "not acting in its governmental capacity as a sovereign, but…in a proprietary capacity."[278] The Court later explained that it was "now a generally accepted proposition that," when a local government "undertakes to supply…utilities and facilities of urban life…it is, in fact, *engaging in business* upon municipal capital and for municipal purposes."[279]

The claimant argues, to the contrary, that essentially any service that a local government has authority to provide, or any activity that local government may engage in under its police power, is a local government function, and that the distinction between governmental and "proprietary" or "corporate" activity is no longer a useful determinant: "Water service provided by public agencies no longer carries the indicia of a proprietary function or private enterprise due to Proposition 218…, which eliminates profit from water service charges."[280] The claimant cites *Pacific Telephone & Telegraph Company v. Redevelopment Agency of the City of Redlands*, where the court held that "[t]he labels 'governmental function' and 'proprietary function' are of

[276] Exhibit C, SWRCB's Comments on the Test Claim, page 12.

[277] Exhibit C, SWRCB's Comments on the Test Claim, page 12.

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

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

[280] Exhibit E, Claimant's Rebuttal Comments, page 5.

dubious value in terms of legal analysis in any context."[281] The court went on to say that the distinction, developed for and applied in government tort claims, was "manifestly unsatisfactory" and "operated both 'illogically' and 'inequitably.'"[282] In *Northeast Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County*, also cited by the claimant, the court stated broadly that anything local government is authorized to do "constitutes a function of government, and when a municipality acts pursuant to granted authority it acts as government and not as a private entrepreneur."[283]

The Commission disagrees that Proposition 218 has any bearing on whether water service is a "governmental" function. The claimant argues that the existence of Proposition 218 demonstrates that utility services such as water are "governmental," not "proprietary" functions, because a local government engaging in utility services does not have the ability to set its rates at a level that will maintain profitability. The claimant assumes, without analysis or evidence, that a private utility would be able to do so. However, the comparison is poor: a private utility entity is required by law to charge only rates that are just and reasonable, subject to the regulation and control of the Public Utilities Commission.[284] Thus, the limitations of Proposition 218 applicable to a publicly owned PWS, even to the extent they may be more stringent than the limitations applicable to a privately owned utility, do not alter the fundamental nature of the service or function being provided – in this case a function that the city is not required by law to perform– to provide water service.[285]

More importantly, while the cases cited by the claimant discount the value of the distinction between *governmental* and *proprietary* or *corporate* functions,[286] they do so on grounds other than the nature of the service provided, and therefore are not persuasive. In both cases cited, the court is weighing the rights of a utility to maintain its service lines along or under a public

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

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

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

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

[285] See California Constitution, article XI, section 9.

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

roadway, against the power of a public agency to force relocation of those service lines at the utility's expense.[287] This makes the applicability of the cited language to the mandates context suspect, at best. And, in each case, the claimant has selectively quoted language that undermines the *governmental* versus *proprietary* distinction, despite contrary language in the same opinion.[288] In addition, *neither* court finds the distinction to be dispositive of the issues in any event, and therefore the quoted language is dicta.[289]

In *Pacific Telephone and Telegraph Co.*, the company sought compensation from the City and the Redevelopment Agency for expenses resulting from the abandonment of a street that carried its service lines, which in turn necessitated relocation of the lines, under two theories including that "the city and the agency were acting in a proprietary capacity."[290] But the court held that "'[a] utility's right to compensation should depend, not on whether municipal activity is 'governmental' or 'proprietary,' but on whether compensation has been required by the Legislature [such as under the Community Redevelopment Law], or whether there has been a constitutionally compensable taking or damaging of a valuable property right."[291] The court also noted, in declining to consider *City of Los Angeles v. Los Angeles Gas & Electric Corp*.[292] and

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

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

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

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

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

[292] 251 U.S. 32.

Postal-Tel.Co. v. San Francisco,[293] both of which addressed utilities compelled to relocate service lines to accommodate another utility, that "[u]nder traditional tests," utility businesses carried on by a municipality "*were uniformly treated as being proprietary in nature*."[294]

Northeast Sacramento County Sanitation Dist. addressed a dispute between a county water district and a county sanitation district, wherein the sanitation district constructed sewers in and under the same roads where water lines had already been laid, which required relocation of the water mains. Each asserted a "governmental" status granting them sovereign immunity against the other's merely "proprietary" interest: the sanitation district argued that it stood in the shoes of the County because the County Board of Supervisors also served as its Board of Directors; while the water district, the court observed, not only held a "favorable position in the area of eminent domain," but also had been given certain rights and privileges under the Water Code usually held by municipalities.[295] However, the court found that the language that the claimant cites, that "whatever local government is authorized to do constitutes a function of government…"[296] is, in context, an observation that between a water district and a sanitation district, "no statute gives a sanitation district superior rights over a water district *in the matter of relocation*."[297] The court concluded that "each district when performing the identical type of function – the laying of pipe lines in a public street – should pay its own way," and therefore since the water district's lines were first in time and the expansion benefited only the rate payers of the sanitation district, the sanitation district must pay for the necessary relocation.[298]

And, in 1967, the year after *Northeast Sacramento*, the Fourth District Court of Appeal decided *Glenbrook Development Co*.[299] As discussed above, the court in *Glenbrook Development Co.* found that cities have no legal duty to provide water to their citizens, and reiterated and again

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[293] 53 Cal.App. 188.

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

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

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

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

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

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

endorsed the view that "service of water by a city is a proprietary function."[300] Therefore, even though the case law on the "governmental" versus "proprietary" distinction is not directly on point with regard to state mandates, the weight of authority supports the finding above that providing water service is not a governmental function, unlike police or fire protection, or public education, which the courts have acknowledged are overwhelmingly governmental in nature.

In response to the Draft Proposed Decision, the claimant cites additional authority that it suggests supports a broad interpretation of "governmental function" as including water service. Specifically, the claimant cites *Brush v. Commissioner of Internal Revenue*,[301] and *City of San Diego v. Cuyamaca Water Company*.[302] In *Brush*, the United States Supreme Court was called upon to determine whether the City of New York's publicly owned water system was subject to federal taxes. The claimant cites a passage in which the Court observes that the City has made a determination its interests are best served by providing for its own water supply:

> We conclude that the acquisition and distribution of a supply of water for the needs of the modern city involve the exercise of essential governmental functions, and this conclusion is fortified by a consideration of the public uses to which the water is put. Without such a supply, public schools, public sewers so necessary to preserve health, fire departments, street sprinkling and cleaning, public buildings, parks, playgrounds, and public baths could not exist… It may be, as it is suggested, that private corporations would be able and willing to undertake to provide a supply of water for all purposes; but if the state and city of New York be of opinion, as they evidently are, that the service should not be intrusted [sic] to private hands, but should be rendered by the city itself as an appropriate means of discharging its duty to protect the health, safety, and lives of its inhabitants, we do not doubt that it may do so in the exercise of its essential governmental functions.[303]

In *City of San Diego v. Cuyamaca Water Company*,[304]the Court sought to resolve a dispute over the priority of water rights in the San Diego River, as between the City and upstream riparian users. From *City of San Diego*, the claimant relies on the following:

> It should at the outset be understood and stated that the pueblo rights, and hence the rights of its successor, the city of San Diego, to whatever of the waters of the San Diego river were from time to time required for the needs of the pueblo and of the city and of the inhabitants of each, were rights which were essentially 'governmental' in character, as much so in fact as were the rights of the ancient

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

[301] (1936) 300 U.S. 352.

[302] (1930) 209 Cal. 105.

[303] *Brush v. Commissioner of Internal Revenue* (1936) 300 U.S. 352, 370-371.

[304] (1930) 209 Cal. 105.

> pueblo and modern city to the public squares or streets, and that the term 'proprietary,' as employed with reference to certain commercialized uses made by municipalities and other public bodies, of water, light, and power, for example, has no application to the fundamental rights of the plaintiff herein to its ownership of its foregoing classes of property dedicated and devoted to public uses.[305]

Neither of these authorities is directly on point, and neither makes any express finding regarding the nature of water service as a municipal undertaking. *Brush* employs the phrase "essential governmental functions," but the analysis and findings turn on the City's exercise of its local authority, and ultimately the question to be resolved is only whether the municipal water system should be exempt from federal taxation: "The answer depends upon whether the water system of the city was created and is conducted in the *exercise of the city's governmental functions*."[306] The Court acknowledges that private corporations may be willing and able to provide water to the city, and that in the City's history, private entities had indeed done so.[307] But, the Court concludes, "if the state and city of New York be of opinion, as they evidently are, that [water] service should not be intrusted to private hands…*we do not doubt that it may do so in the exercise of its essential governmental functions*."[308]

City of San Diego, likewise, does not make any findings on the nature of the City's activities in providing water to its citizens; rather, the case seeks to resolve an issue of *priority of water rights*.[309] The Court finds that the City is the successor in priority of its water rights to the *pueblo* of San Diego, a political entity that predates the State of California itself.[310] The Court states that these rights "were essentially 'governmental' in character," and compares the water rights to the City's claim over the "public squares or streets."[311] Nevertheless, the Court finds that it is irrelevant to the question of that priority whether the City's use and distribution of those waters is considered a "proprietary" function, rather than a governmental one.[312] This is not a finding that the City's municipal utilities are engaged in a "governmental" service or function within the meaning of article XIII B, section 6, rather it is a finding that the successor government, City of San Diego, was successor to the water rights of the preceeding government, Pueblo of San Diego.[313]

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[305] *City of San Diego v. Cuyamaca Water Company*, (1930) 209 Cal. 105, 130.

[306] *Brush v. Commissioner of Internal Revenue* (1936) 300 U.S. 352, 360.

[307] *Brush v. Commissioner of Internal Revenue* (1936) 300 U.S. 352, 360; 371.

[308] *Brush v. Commissioner of Internal Revenue* (1936) 300 U.S. 352, 371.

[309] *City of San Diego v. Cuyamaca Water Company*, (1930) 209 Cal. 105, 131 ["[T]he subject matter of the action is the establishment of the priority of right…"].

[310] *City of San Diego v. Cuyamaca Water Company*, (1930) 209 Cal. 105, 130-131.

[311] *City of San Diego v. Cuyamaca Water Company*, (1930) 209 Cal. 105, 130.

[312] *City of San Diego v. Cuyamaca Water Company*, (1930) 209 Cal. 105, 131.

[313] *City of San Diego v. Cuyamaca Water Company*, (1930) 209 Cal. 105, 130-131.

Next, the claimant compares providing water service to "operating prisons" and "trash collection," both of which it asserts are considered governmental functions that may be performed by private entities.[314] The claimant cites to case law describing those services as governmental in nature, but those authorities are no more on point than the cases discussed above: the courts use some variation of the phrase "governmental function," but there is nothing so unique and powerful about that phrase that it expands the scope of activities previously found to be essential and peculiarly governmental in nature for purposes of article XIII B, section 6.[315] The two cases cited that address garbage collection are cumulative to the reasoning already discussed with respect to water service: the courts acknowledge that trash collection is *within the police power* of municipalities, but also that such services may be provided by private entities under contract with the municipality, or in private contract with a group of residents.[316] Similarly, of the two cases addressing the operation of prisons, neither turns on the nature of operating a prison as a governmental function. *Pennsylvania Dept. of Corrections v. Yeskey* (1998) holds only that the Americans with Disabilities Act applies to the Department as a state entity,[317] while *Richardson v. McKnight* holds that employees of a private prison do not enjoy the qualified immunity from suit under federal civil rights statutes enjoyed by their publicly employed counterparts,[318] despite discharging what the claimant characterizes as a governmental function.[319] The Court in fact says that when deciding questions of immunity a "purely functional" test "bristles with difficulty, particularly since, in many areas, government and

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[314] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 2.

[315] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 2 [citing *Richardson v. McKnight* (1997) 521 U.S. 399; *Pennsylvania Dept. of Corrections v. Yeskey* (1998) 524 U.S. 206; *Davis v. City of Santa Ana* (1952) 108 Cal.App.2d 669; *Glass v. City of Fresno* (1936) 17 Cal.App.2d 555].

[316] *Davis v. City of Santa Ana* (1952) 108 Cal.App.2d 669, 676-677 ["The collection and disposal of garbage and trash by the city constitutes a valid exercise of police power and a governmental function which the city may exercise in all reasonable ways to guard the public health. It may elect to collect and dispose of the garbage itself or it may grant exclusive collection and disposal privileges to one or more persons by contract, or it may permit private collectors to make private contracts with private citizens. The gathering of garbage and trash is considered to be a matter which public agencies are authorized to pursue by the best means in their possession to protect the public health."]; *Glass v. City of Fresno* (1936) 17 Cal.App.2d 555, 558 ["[C]ollection and disposal of garbage are matters so intimately connected with the preservation of public health that the regulation thereof is the proper exercise of police power, and it would naturally follow as a corollary thereto that [the city] would have the right to dispose of garbage itself, and it has been so held."].

[317] *Pennsylvania Dept. of Corrections v. Yeskey* (1998) 524 U.S. 206, 209.

[318] *Richardson v. McKnight* (1997) 521 U.S. 399, 412 ["[W]e must conclude that private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a § 1983 case."].

[319] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 2.

private industry may engage in fundamentally similar activities, ranging from electricity production, to waste disposal, to even mail delivery."[320] In other words, both of the cases cited turn on the nature of the entity and how the law applies to that entity, rather than the nature of the function being performed by the entity. Here, there is no argument that the City is not a governmental entity; the issue is whether the test claim order applies because the claimant is engaged in a governmental function.

The claimant also compares lead testing on school property to "the governmental function of building inspections on private property, where the City inspects private facilities that it neither owns nor operates, to confirm compliance with pre-established standards."[321] This analogy is not convincing, not least because building inspections are *exclusively* within the power of government, unlike the provision of utilities, which the above analysis establishes can be conducted by private entities.

Finally, the claimant argues that a finding that water service is a proprietary and not a governmental function categorically excludes municipal water agencies from state mandate reimbursement, and "[i]f there was legislative intent to make proprietary functions or municipal water service categorically ineligible for reimbursement, it would be found in the statutes that created this very Commission."[322] Setting aside for the moment the claimant's unfounded supposition that a categorical exclusion, if intended, would be expressly stated in Government Code section 17500 et seq., nothing in the above analysis categorically excludes municipal agencies from mandate reimbursement. This decision finds only that the requirements of the permit amendment are not reimbursable because they apply to the claimant as a result of its operation as a PWS, and as a result the requirements are neither uniquely imposed on local government, nor a "governmental function" within the meaning of article XIII B, section 6. Indeed, the above analysis makes no findings on any other program or statutory requirement that might be alleged to impose a mandate on the claimant based on its *existence* as a governmental entity.

Thus, the cases distinguishing between proprietary and governmental functions support the finding that the test claim order does not impose a governmental function of providing a service to the public within the meaning of article XIII B, section 6, and the cases and examples cited by the claimant are not relevant to the issue here.

In addition, the "Service Duplication Law," relied on by the SWRCB, supports (but is not essential to) the finding that the test claim order does not impose a governmental function of providing a service to the public within the meaning of article XIII B, section 6. The parties dispute the import of the Public Utilities Code provision known as the "Service Duplication Law," which requires a local government to compensate a privately owned drinking water

[320] *Richardson v. McKnight* (1997) 521 U.S. 399, 409.

[321] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 5.

[322] Exhibit H, Claimant's Comments on the Draft Proposed Decision, page 6.

supplier if the local entity extends service into the service area of the private supplier.[323] SWRCB argues that this compensation requirement "amounts to a legislative determination that water service is not a service that is or should be peculiar to local governments."[324] The claimant argues instead that "[i]f anything, the Service Duplication Law recognizes that water service was transitioning from a private to a predominantly governmental function by providing compensation to private utilities for lost business."[325] The claimant asserts that "[n]ow, over 50 years later, that transition is substantially complete."[326]

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

> The Legislature recognizes the substantial obligation undertaken by a privately owned public utility which is franchised under the Constitution or by a certificate of public convenience and necessity to provide water service in that the utility must provide facilities to meet the present and prospective needs of those in its service area who may request service. At the same time, the rates that may be charged for water service by a regulated utility are fixed by the Public Utilities Commission at levels which assume that the facilities so installed will remain used and useful in the operation of the utility for a period of time measured by the physical life of such facilities.
>
> The Legislature finds and declares that the potential loss of value of such facilities which may result from the construction and operation by a political subdivision of similar or duplicating facilities in the service area of such a private utility often deters such private utility from obtaining a certificate or extending its facilities to provide in many areas a water supply essential to the health and safety of the citizens thereof.
>
> The Legislature further finds and declares that it is necessary for the public health, safety, and welfare that privately owned public utilities regulated by the state be compensated for damages that they may suffer by reason of political subdivisions extending their facilities into the service areas of such privately owned public utilities.[327]

Sections 1503 and 1504 contain the operative provisions. In section 1503, the Legislature "finds and declares that whenever a political subdivision constructs facilities to provide or extend water service, or provides or extends such service, to any service area of a private utility with the same type of service, such an act constitutes a taking of the property of the private utility for a public

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

[324] Exhibit C, SWRCB's Comments on the Test Claim, page 13.

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

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

[327] Public Utilities Code section 1501.

purpose to the extent that the private utility is injured by reason of any of its property employed in providing water service being made inoperative, reduced in value or rendered useless…"[328] Section 1504 requires the "political subdivision" to compensate for the taking: "Just compensation for the property so taken for public purposes shall be as may be mutually agreed by the political subdivision and the private utility or as ascertained and fixed by a court…"[329] Section 1504 further provides that if the compensation required is equal to the just compensation value of all the property of the private utility, the political subdivision may provide for the acquisition of all such property (i.e., condemn the property in eminent domain).[330]

As the Legislative intent language in section 1501 states, the Legislature "recognize[d] the substantial obligation undertaken by a privately owned public utility…" including facilities and equipment, and that the Public Utilities Commission limits the rates that may be charged by such utilities "at levels which assume that the facilities so installed will remain used and useful…" for the life of the equipment or facilities.[331] In addition, the Legislature recognized that "the potential loss of value of such facilities…often deters such private utility from…extending its facilities to provide in many areas a water supply essential to the health and safety of the citizens thereof."[332]

The intent language shows that the purpose of the Service Duplication Law was to provide a remedy to protect the investment of privately owned utilities providing water service, and to mitigate the chilling effect of local government potentially encroaching upon a private water supplier's service area and customers. And, while sections 1503 and 1504 of the Public Utilities Code may have become necessary due to a pattern of municipalities extending duplicative service in certain areas and thus undermining the value of privately owned facilities or equipment, there is no indication that the Legislature intended to convert the provision of water service to a governmental function, as the claimant seems to imply. And indeed the acknowledgement of a deterrent effect and the statutory requirement of compensation suggests that the Legislature believed that private utility companies serving water in areas of the State would continue to be necessary into the future, and for that reason their investments should be protected, lest private entities choose not to offer such services in the first instance. The courts have observed that this is especially important with respect to water utilities.[333] Without the Service Duplication Law, infringement on the service area of a private water utility, and the

[328] Public Utilities Code section 1503.

[329] Public Utilities Code section 1504.

[330] Public Utilities Code section 1504.

[331] Public Utilities Code section 1501.

[332] Public Utilities Code section 1501.

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

potential loss of business, might not be compensable at all, unless the facilities and equipment were fully acquired by eminent domain.[334] The Service Duplication Law, in short, is a Legislative innovation designed to protect the viability of private water utilities, in recognition of their long term necessity to provide water in certain areas of the State.

Accordingly, the "Service Duplication Law," supports (but is not essential to) the finding that the test claim order does not impose a *governmental* function of providing a service to the public within the meaning of article XIII B, section 6.

ii. The test claim order does not impose a governmental function to ensure safe schools on PWSs, as asserted by the claimant; that governmental function remains with the schools who contact the PWS for lead testing.

Finally, the claimant argues that the "program" at issue in this Test Claim is not providing water through a PWS at all; rather "[t]he lead testing program in the Permit Amendment carries out a…governmental function of ensuring safe schools."[335] The claimant asserts that the history of the test claim order, including failed SB 334 and the associated veto message, "demonstrates [the order's] purpose is to provide safe schools, a governmental function, while shifting financial responsibility to local water agencies."[336] The claimant argues that "[h]ad SB 334 become law and schools had to test water for lead to confirm their students had safe, clean drinking water, the schools would have been performing a governmental function subject to reimbursement from the state."[337] The claimant concludes that the required testing "does not lose its characterization as a 'governmental function of providing services to the public' under the Supreme Court's test, merely because the obligation is transferred from schools to water agencies."[338]

The Commission disagrees. As noted in the Background, SB 334 proposed to amend the "Lead-Safe Schools Protection Act" in the Education Code to require school districts with water sources or drinking water supplies that do not meet U.S. EPA standards to close access to those drinking water sources, provide alternative drinking water sources if the school did not have the minimum number of drinking fountains required by law, and to provide access to free, fresh, and clean drinking water during meal times in the food service areas of the schools under its jurisdiction.[339] Then Governor Brown vetoed SB 334, believing that it would impose a reimbursable mandate of "uncertain but possibly very large magnitude."[340]

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

[335] Exhibit E, Claimant's Rebuttal Comments, page 6.

[336] Exhibit E, Claimant's Rebuttal Comments, page 7.

[337] Exhibit E, Claimant's Rebuttal Comments, page 7.

[338] Exhibit E, Claimant's Rebuttal Comments, page 7.

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

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

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

> A special relationship is formed between a school district and its students resulting in the imposition of an affirmative duty on the school district to take all reasonable steps to protect its students. This affirmative duty arises, in part, based on the compulsory nature of education. (*Rodriguez v. Inglewood Unified School Dist.* (1986) 186 Cal.App.3d 707, 714-715; … see also Cal.Const., art. 1, § 28, subd. (c) [students have inalienable right to attend safe, secure, and peaceful campuses]; Ed. Code, § 48200 [children between 6 and 18 years subject to compulsory full-time education].) "The right of all students to a school environment fit for learning cannot be questioned. Attendance is mandatory and the aim of all schools is to teach. Teaching and learning cannot take place without the physical and mental well-being of the students. The school premises, in short, must be safe and welcoming." (*In re William G.* (1985) 40 Cal.3d 550, 563 …)[341]

In addition, existing law requires school districts to furnish and repair school property and to "keep the schoolhouses in repair during the time school is taught therein . . . ."[342]

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

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

V. Conclusion

Based on the foregoing analysis, the Commission denies this Test Claim and finds that the test claim order does not impose a new program or higher level of service and, thus, does not constitute a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

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

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

[342] Education Code sections 17565 and 17593.

STATE *of* CALIFORNIA
COMMISSION ON STATE MANDATES

RE: **Decision**

Lead Sampling in Schools: Public Water System No. 370020, 17-TC-03
Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017
City of San Diego, Claimant

On March 22, 2019, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

Dated: March 27, 2019

Heather Halsey, Executive Director

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 27, 2019, I served the:

- **Decision adopted March 22, 2019**
- **Claimant's PowerPoint Presentation Presented at the Commission Hearing on March 22, 2019 filed March 21, 2019**

  Lead Sampling in Schools: Public Water System No. 3710020, 17-TC-03
  Permit Amendment No. 2017PA-SCHOOLS, City of San Diego Public Water System No. 3710020, effective January 18, 2017
  City of San Diego, Claimant

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 27, 2019 at Sacramento, California.

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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 3/25/19

Claim Number: 17-TC-03

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

Claimant: City of San Diego

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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

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