In the Supreme Court of the State of California

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,

Plaintiff and Appellant,

v.

STATE WATER RESOURCES CONTROL BOARD,

Defendant and Respondent.

Case No. S226753

First Appellate District, Division Two, Case No. A137680
San Francisco County Superior Court, Case No. CGC-11-516510
The Honorable Curtis E. A. Karnow, Judge

ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

The Porter-Cologne Water Quality Control Act requires anyone who discharges or proposes to discharge waste that could affect the quality of California's waters to obtain a permit and pay an annual permit fee. The fee helps pay for a comprehensive waste discharge permit program created by the act and administered by the State Water Resources Control Board. The act requires the Board to adopt a fee schedule each year to establish what all the dischargers must pay. The California Building Industry Association (CBIA) challenges the Board's fee schedule for fiscal year 2011-12 on statutory and constitutional grounds. CBIA's claims are without merit.

Consistent with the Water Code, the Board designed the 2011-12 fee schedule to generate only the amount of revenue specified in the budget act to help pay for the entire waste discharge permit program. The budget act required the fee schedule to generate more revenue than the year before, and the Board designed the fee schedule to comply with that requirement. There is no evidence that the fee schedule generated more actual revenue than was required.

The Board also designed the fee schedule to comply with Proposition 13's two-pronged test for a valid regulatory fee. As required by the first prong, the fee schedule was designed to generate only the total amount of revenue necessary to help pay for the entire waste discharge permit program. As required by the second prong, the fee was allocated by a reasonable method among all the regulated dischargers.

The Board's method of allocating the fee is based in part on the Board's own classification of waste dischargers into eight broad categories. The Water Code creates just one waste discharge permit program and does not authorize the Board to create other programs, but the Board classifies the dischargers into eight categories for its own administrative purposes.

Each year the Board designs the fee schedule so that projected payments by each category of discharger equals the Board's budgeted cost of regulating that same category of discharger. Since the Board's method of allocating the fee relies on projections and estimates, it does not always achieve perfect results. But perfection is not required, and the Board's method is reasonably designed to treat all the dischargers fairly.

CBIA contends that the Board should have adjusted the 2011-12 fee schedule to compensate one category of discharger—those associated with storm water—for earlier years in which storm water dischargers paid more than the Board projected. This would have increased the fees for other categories of dischargers and would not necessarily have benefited the same storm water dischargers who were responsible for the earlier years' payments. For those reasons, the Board reasonably decided not to deviate from its usual approach.

Proposition 26 does not affect the constitutionality of the fee schedule, because the fee is not a "tax" as defined in Proposition 26. Proposition 26 also applies only to a "change in state statute," and CBIA has not challenged any change in state statute. And where no statute is challenged, Proposition 26 does not affect the burden of proof, which traditionally falls on the party challenging the constitutionality of a fee.

Finally, CBIA argues that the Board did not adopt the fee schedule with a sufficient number of votes. But the fee schedule was approved by a majority of a quorum, consistent with the Water Code's requirements.

The decision of the Court of Appeal should therefore be affirmed.

LEGAL BACKGROUND

I. THE WASTE DISCHARGE PERMIT PROGRAM AND RELATED FEE SCHEDULE

Among the Board's responsibilities is to administer the Porter-Cologne Water Quality Control Act. (Wat. Code, § 13001; further statutory references are to the Water Code unless otherwise stated.) The act requires those who discharge waste or propose to discharge waste "that could affect the quality of the waters of the state" to file a "report of waste discharge" (i.e., a permit application) with one of the nine regional boards that implement the act in conjunction with the Board. (§ 13260, subds. (a)-(c).) Dischargers are exempt from filing a permit application only if they obtain a waiver or if they discharge only into a community sewer system. (§§ 13260, subd. (a)(1), 13269.) The regional boards must review each permit application and issue "waste discharge requirements" (i.e., a permit to discharge waste). (§ 13260, subd. (d); see also Attwater & Markle, *Overview of California Water Rights and Water Quality Law* (1988) 19 Pacific L.J. 957, 997.)

All those who file a permit application must pay an annual fee. (§ 13260, subd. (d)(1)(A).) As required by law, the fees are deposited into the Waste Discharge Permit Fund (the Fund) and are available to the Board upon appropriation by the Legislature to administer the program, as specified in the act. (§ 13260, subd. (d)(2)(A).) Fees must remain in the Fund until they are spent to administer the program. (*Ibid.*) Thus, fees cannot be used for purposes unrelated to the waste discharge permit program.

Each year the Board must adopt a fee schedule by emergency regulation to set the amount of the dischargers' payments that year. (§ 13260, subd. (f)(1).) The fee must generate revenue equal to a line item in the budget act that sets the amount the Board must spend from the Fund

for the entire waste discharge permit program. (§ 13260, subds. (d)(1)(B) & (f)(1); see, e.g., line item 3940-001-0193 in Joint Appendix [JA] 209.) That line item may be affected by the amount of any general fund subsidy to the waste discharge permit program, among other factors. (Compare line items 3940-001-0001 and 3940-001-0193 in JA 123-124 with the same line items in JA 208-209; see also JA 232-233, 325-326, 408-409 [discussing the impact of "General Fund shifts" in the 2011-12 fiscal year].)

II. RULES GOVERNING BOARD MEETINGS, HEARINGS, AND INVESTIGATIONS

The Board has five members who are appointed by the Governor. (§ 175, subd. (a).) The Board members must include an attorney, a civil engineer, and a professional engineer, and they must have particular areas of expertise relating to water supply, water rights, and water quality. (*Ibid.*) A quorum of three Board members is required "for the purpose of transacting any business of the board." (§ 181.)

The Board may delegate the conduct of any hearing or investigation to any one of its members, so long as "any final action of the board" is reserved for "a majority of all the members of the board, at a meeting duly called and held":

> The board may hold any hearings and conduct any investigations in any part of the state necessary to carry out the powers vested in it, and for such purposes has the powers conferred upon heads of departments of the state by Article 2 (commencing with Section 11180), Chapter 2, Part 1, Division 3, Title 2 of the Government Code.
>
> *Any hearing or investigation by the board may be conducted by any member upon authorization of the board*, and he shall have the powers granted to the board by this section, *but any final action of the board* shall be taken by a majority of all the members of the board, at a meeting duly called and held.

> All hearings held by the board or by any member thereof shall be open and public.

(§ 183, italics added.)

STATEMENT OF THE CASE

I. THE BOARD'S POLICIES IN CREATING THE FEE SCHEDULE

Although the budget act sets the total amount of revenue that the fee must generate each year, the Board otherwise has broad discretion in designing its fee schedules. (See § 13260, subds. (d)(1) & (f)(1) [requiring the Board to create an annual fee schedule but not specifying any particular method for allocating the fee among dischargers].)

The Water Code creates only one program governing waste dischargers, rather than separate programs for different classes of dischargers. (§ 13000 et seq.) For administrative purposes, the Board classifies the regulated dischargers into eight broad categories. The Board refers to these eight categories as "program areas" or "programs." (See, e.g., JA 232-238.) One of those program areas concerns discharges associated with storm water, which include, for example, discharges associated with construction activities, industrial activities, and municipal storm water sewer systems. (JA 199-201, 233-236, 245-246.) The record does not fully describe the other seven program areas, but the Board refers to them as the national pollutant discharge elimination system, waste discharge requirements, land disposal without tipping fee, land disposal with tipping fee, 401 certification, confined animal facilities, and irrigated lands. (JA 199-201, 233-236.) The program areas are not defined or listed anywhere within the governing statutes. (§ 13000 et seq.) Taken together, the eight program areas include all the dischargers that pay the waste discharge permit fee. (See JA 232-236.)

Each year the Board prepares an internal budget that plans a particular amount of spending from the Fund for each program area. (JA 232-233 [listing each program area's budgeted spending from the Fund].) Those amounts, taken together, equal the amount of that year's line item in the budget act for the entire waste discharge permit program. (JA 232-233 [comparing total anticipated spending of $101.4 million and total program budget of $100.7 million].)

For each program area, the Board designs the annual fee schedule to generate fee revenue equal to the Board's budgeted spending from the Fund for that particular program area. The Board first projects the amount of revenue that would be collected from dischargers in each program area if the existing fee schedule were extended for another year. (See, e.g., JA 232-233 [discussing "projected FY 2011-12 revenue based on the existing fee schedule" for each program area].) The Board then compares that projected revenue with the Board's budgeted spending from the Fund for that same program area. (JA 232-233 [see table 1, which lists the "FY 11-12 Budget" for each program area].) If the projected revenue for a program area is less than the Board's budgeted spending from the Fund for that program area, the Board adjusts the fee schedule to generate the needed revenue. (JA 233 [see table 1, which states the amount of additional fee revenue needed for each program area in the column labeled "Forecasted Revenue Increase FY 11-12" and also in the column labeled "Percent Increase"]; see also Joint Exhibits [JE] 159 [discussing the 2010-11 fiscal year].)

Each year's fee schedule necessarily relies on estimates and projections, because the Board cannot know precisely how much revenue the fee will generate during the year. For example, the Board cannot know in advance how many new permit applications dischargers will file each year or how many existing permits they will renew. The Board also cannot

know the amount of the fee that will result from each individual permit, because for most program areas that amount will depend on the nature of the discharge. (See, e.g., JA 435-436, 439-441.) And, as with any governmental charge, there will be varying levels of nonpayment from year to year within each program area. Consequently, the actual fee revenue received from dischargers within any given program area may differ from what the Board anticipated.

When the actual fee revenue received from a particular program area does differ from what the Board anticipated, the Board retains the same broad discretion as usual when designing the next year's fee schedule. (See § 13260, subds. (d)(1) & (f)(1) [not specifying any particular method for allocating the fee among dischargers].) For example, the Board may spend the unanticipated revenue for current needs in other program areas or keep the revenue in the Fund as a reserve for the benefit of all the program areas. (See § 13260, subd. (d)(2)(A) [requiring fees to be deposited in the Fund and used solely for the waste discharge permit program].) The Board is not required to segregate the fee revenue received from each individual program area and preserve it for that same program area. (See § 13260, subd. (d)(2)(A) [creating only one Fund].)

II. THE BOARD'S FEE SCHEDULES BEFORE FISCAL YEAR 2011-12

Over the long term, total fee revenue from the waste discharge permit program has closely corresponded to total spending from the Fund. From fiscal year 2004-05 through fiscal year 2010-11, the Board's fee schedules generated total fee revenue of $470 million, as compared to $481 million in total Fund spending, a difference of 2.3 percent. (JA 221.)

The Board's revenue projections have been less accurate for the storm water program area. During fiscal years 2004-05 through 2006-07, for example, an active construction industry caused actual fee revenue from the

storm water program area to exceed the Board's projections, so that actual fee revenue exceeded actual spending from the Fund for the storm water program area by an average of $4.9 million per year during those years. (JA 220, 331, 413.) The excess revenue contributed to a reserve balance in the entire Fund during those same fiscal years. (JA 0236, 0239.)

With the economic downturn that occurred after fiscal year 2006-07, fee revenue from the storm water program area declined. (JE 159.) Even with a 19 percent fee increase for storm water dischargers in 2008-09, the total revenue from the storm water program area stayed relatively flat in 2008-09 and 2009-10, and in 2010-11 it dropped to its lowest level in seven years. (JA 220; JE 73, 84.) And during fiscal years 2006-07 through 2010-11, the reserve balance in the Fund steadily dropped, to a forecasted amount of less than $6 million at the start of fiscal year 2011-12. (JA 239.) This balance represents a reserve of less than 6 percent of anticipated spending from the Fund.

The inherent volatility of the revenue from the storm water program area is evident from the difference of nearly $3 million in revenue for that program area between 2004-05 and 2006-07, during a time when the fee schedule for storm water dischargers did not change. (JA 220; JE 5, 9, 21, 46, 73.)

III. THE CHALLENGED FEE SCHEDULE

When the Board designed the fee schedule for fiscal year 2011-12, the entire waste discharge permit program faced a projected shortfall of more than $27.6 million. (JA 232.) The primary reason for the shortfall was a "fund shift." The 2011-12 budget act reduced the general fund subsidy for the waste discharge permit program by approximately $20 million and increased the Board's authority to spend revenue from the Fund by a similar amount. (Compare line items 3940-001-0001 and 3940-001-0193

in JA 208-209 with the same line items in JA 123-124; see also JA 232-233, 325-326, 408-409 [discussing fund shifts]; see also, Stats. 2011, ch. 2, § 28 [amending § 13260, subd. (d)(1)(C), to expand the scope of regulatory costs recoverable from the Fund].) Another reason for the shortfall was that in the year before, the Legislature had temporarily reduced the Board's projected spending for the waste discharge permit program by $7.2 million (primarily from temporary reductions in staff costs), and the Legislature reinstated that spending in 2011-12. (JE 179; JA 325-326.)

The Board had several stakeholder meetings and workshops to explain its projected budget and revenue for all eight program areas. (JA 142, 150, 161, 197.) The full Board then held a public meeting to consider adopting the fee schedule for the 2011-12 fiscal year. (JA 228-229.)

The staff report for the Board's meeting analyzed a number of different options for allocating the fee increase among the dischargers. (JA 232-238.) Board staff recommended that the fee be allocated by the Board's traditional approach, so that the projected fee revenue from each program area would equal the projected spending from the Fund for that program area. (JA 233, 238.) Based on that approach, staff proposed a 34.9 percent fee increase in fees charged to storm water dischargers for fiscal year 2011-12. (JA 233.) Fee increases were also proposed for the other seven program areas, ranging from 23.8 percent to 354.7 percent. (JA 233.)

During the Board meeting, staff explained the reasons for the fee increase and discussed options for allocating the increase among the dischargers, and the Board received public comment. (JA 325-433.) After considering all this information, the Board adopted by emergency regulation the fee schedule that CBIA challenges here. (JA 434.)

One option the Board considered was to limit the increase in fees for storm water dischargers to compensate for earlier years in which fees from

those dischargers exceeded projections. (JA 236-237, 330-331.) That option would have caused further increases in fees charged to all the other program areas by a total of $2.9 million. (JA 237.) Board staff recommended against that option, primarily because those who had paid fees in earlier years were not necessarily the same dischargers who would benefit. (JA 238, 332.)

At the time of the vote, two of the Board's five seats were vacant. (JA 434 [noting that no Board members were absent].) The Board adopted the fee schedule with two affirmative votes, one abstention, and no votes in opposition. (JA 434.)

IV. CBIA'S LAWSUIT CHALLENGING THE FEE SCHEDULE

CBIA challenged the Board's fee schedule for the 2011-12 fiscal year by filing a complaint for declaratory and injunctive relief and petition for writ of mandate. CBIA did not challenge any statute or any of the Board's fee schedules for other years. (JA 5, 21-22.)

CBIA's complaint alleged that for several years before the 2011-12 fiscal year, fees collected for the storm water program area exceeded the reasonable costs of that program area. (JA 5, 6, 10, 12-15.) CBIA also asserted that the fees collected from storm water dischargers in 2011-12 "would continue to generate revenues substantially in excess of the costs of the Board's storm water regulatory program." (JA 5, 12-15) CBIA asserted that the fees therefore exceeded the amount permitted under section 13260 and were inconsistent with cases such as *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421 (*Farm Bureau*) and *Sinclair Paint Co. v. Board of Equalization* (1997) 15 Cal.4th 866 (*Sinclair Paint*). (JA 6, 10, 12-15.) Relying on section 183, CBIA's complaint also asserted that the fee schedule was

improperly adopted without a majority vote of "all members" of the Board. (JA 16.)

The Legislature has deemed the fee schedule to be an emergency regulation, so the Board was not required to maintain a rulemaking file. (§ 13260, subd. (f)(1); Gov. Code, §§ 11346.1, subd. (a)(1), & 11347.3.) However, the parties stipulated to the contents of an administrative record. (JA 32-33, 131-537.) The parties also lodged a set of joint exhibits relating to earlier fee schedules. (JA 126-130.)

After a hearing on the merits, the trial court rejected each of CBIA's arguments and entered an order denying the writ (JA 551), an order denying reconsideration (JA 629), and judgment in favor of the Board (JA 632). CBIA filed a notice of appeal.

Like the trial court, the majority of the Court of Appeal held that section 13260 requires only that the total fees collected from all waste dischargers must equal the cost of the entire waste discharge program, and not that fees for each particular program area must equal the cost of that program area. (Slip opn., pp. 14-18; JA 552-553.) The majority also agreed with the trial court that CBIA had failed in its constitutional challenge to the fee. (Slip opn., pp. 20-24; JA 554-555.) The majority reasoned that projected revenue for the entire waste discharge program closely corresponded to anticipated spending, and CBIA did not offer evidence that the Board's method of allocating the fee among program areas was unfair or unreasonable. (Slip opn., pp. 20-24.) The court noted that CBIA had not cited either Proposition 13 or Proposition 26, but had relied only on cases applying Proposition 13. (Slip opn., p. 18, fn. 9.) It further held that Proposition 26, which modified Proposition 13 in 2010, did not apply. (*Ibid.*)

The majority also rejected CBIA's interpretation of section 183. The majority concluded that although section 183 states that "any final action"

of the Board "shall be taken by a majority of all the members of the Board," the plain meaning of "any final action," in the context of section 183, is limited to "all final actions following a hearing or investigation by one Board member." (Slip opn., p. 8.) Thus, "the express language of section 183 indicates that it applies *only* to situations in which the Board has delegated authority to one member to conduct a hearing or meeting." (*Id.* at p. 9.) The majority found no need to resort to legislative history but also found that the legislative history did not support CBIA's interpretation of the section. (*Id.* at pp. 10, 13.)

In his dissenting opinion, Justice Richman concluded from the legislative history that "[w]here 'final action' was concerned, section 183 was meant to trump" the rule implied by section 181 that the Board could take action with affirmative votes from a majority of a quorum. (Dis. opn., pp. 14-15.) The dissent also questioned the logic and wisdom of allowing the Board to adopt a fee schedule with only two affirmative votes. (*Id.* at pp. 19-20.) The dissent found it unnecessary to address CBIA's other contentions. (*Id.* at p. 21, fn. 12.)

STANDARD OF REVIEW

Interpreting statutes is a question of law subject to de novo review. (*In re Tobacco Cases* (2009) 46 Cal.4th 298, 311.) However, "[a]n agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts," particularly where the agency's interpretation is longstanding. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7, 13.)

Whether a measure constitutes a "tax" or a "fee" under article XIII A of the California Constitution is ultimately a question of law that the court decides on an independent review of the record. (*Farm Bureau, supra*, 51 Cal.4th at pp. 436-438.) However, the courts "use the arbitrary and

capricious standard to review quasi-legislative decisions resulting from an agency's exercise of its statutorily delegated policymaking discretion." (*American Coatings Assn., Inc. v. South Coast Air Quality Dist.* (2012) 54 Cal.4th 446, 461; accord, *Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 415.) This deferential standard applies even when a regulation is being challenged on constitutional grounds. (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 279, fn. 13; *California Bldg. Industry Ass'n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120, 133-135 [concluding that the plaintiff's criticisms of a regulatory fee were in most instances merely a "difference in expert opinion"].)

In this case, the Legislature has expressly delegated responsibility for designing a fee schedule to the Board. (§ 13260, subd. (f)(1).) The fee schedule was an emergency regulation and was not subject to review by the Office of Administrative Law. (§ 13260, subds. (f)(1) & (f)(2).) The Board based the fee schedule on careful consideration of the fiscal needs of each program area and concern for fairness to the fee payers. (JA 325-333.) While reasonable minds may differ about what fee schedule might be best, the court's role is only to determine whether the fee schedule satisfied relevant legal requirements and was reasonably supported by the information that was before the Board.

ARGUMENT

I. THE BOARD'S FEE SCHEDULE COMPLIED WITH WATER CODE SECTION 13260

A. The Board's Fee Schedule Balanced Projected Fee Revenue with the Total Budgeted Cost of the Waste Discharge Permit Program

The Board's fee schedule for fiscal year 2011-12 complied with section 13260, because the total projected fee revenue was equal to the total

spending from the Fund that the budget act prescribed to help pay for the Board's administration of the entire waste discharge permit program. (§ 13260, subd. (f)(1).) The fee schedule was designed to generate $100.7 million in fee revenue. (JA 239.) Together with $602,000 in other revenue, the projected fee revenue closely corresponded to the prescribed spending of $101.4 million from the Fund. (JA 239.) CBIA does not dispute that the total projected revenue from the 2011-12 fee schedule was equal to the total prescribed program spending from the Fund. There is also no evidence that the actual revenue generated from the fee schedule exceeded the prescribed amount of spending.

B. Section 13260 Does Not Require Fee Revenue from Each Program Area to Equal the Board's Spending for Each Program Area

CBIA contends that it is not enough for total projected fee revenue to equal the total budgeted spending for the entire waste discharge permit program, because, CBIA asserts, section 13260 also requires fees collected from storm water dischargers to equal the Board's cost of regulating those same storm water dischargers. (CBIA's brief, pp. 30-32.) The statute does not support that view. By its terms, section 13260 only requires the Board to collect a fee from "all persons" discharging or proposing to discharge waste that could affect the quality of the waters of the state. (§ 13260, subd. (d)(1)(A).) The section only requires the *total* revenue from that fee to equal the total amount necessary to recover the Board's costs relating to *all* waste discharges:

> The *total amount of annual fees collected pursuant to this section* shall equal that amount necessary to recover costs incurred in connection with the issuance, administration, reviewing, monitoring, and enforcement of waste discharge requirements and waivers of waste discharge requirements.

(§ 13260, subd. (d)(1)(B), italics added; see also § 13260, subd. (e)(2)(A) [requiring all fees collected pursuant to § 13260 to be deposited in the Fund and used "solely for the purposes of carrying out this division"].)

Subdivision (f)(1) of section 13260 confirms that the Legislature intended only to require fees for the entire waste discharge permit program to equal spending for the entire program. Subdivision (f)(1) states that the "total revenue collected each year through annual fees shall be set at an amount equal to the revenue levels set forth in the Budget Act for this activity." The "total revenue collected" necessarily includes all the fees supporting the waste discharge program, because the budget act only makes one appropriation from the Fund for the entire program. (JA 123-124 [line item 3940-001-0193]; JA 209-210 [same line item].) The budget act does not make separate appropriations for each program area.

Further, while section 13260 recognizes that there are different kinds of dischargers—for example, it specifically mentions certain types of storm water dischargers (§ 13260, subd. (d)(2)(B)), confined animal facilities (§ 13260, subd. (d)(1)(D)), and the national pollutant discharge elimination system (§ 13260, subd. (d)(2)(B)(i))—the section only creates one waste discharge permit program. It does not even mention five of the eight categories of dischargers defined by the Board's program areas. And the section imposes only a limited set of requirements concerning fees from storm water dischargers, providing that fees collected from some (but not all) storm water dischargers must be separately accounted for in the Fund and prescribing how some (but not all) of those funds must be used. (§ 13260, subd. (d)(2)(B) [imposing requirements that do not apply, for example, to fees paid by municipal storm water dischargers or storm water dischargers that are subject to individual national pollutant discharge elimination system permits].) If the Legislature intended section 13260 to limit the fees paid by storm water dischargers to the amount necessary to

help pay the Board's cost of regulating only those same storm water dischargers, the Legislature would have done so with language as specific as that contained in subdivision (d)(1)(B), which limits the total fees for the entire waste discharge permit program. The Legislature did not impose separate limits on fees associated with any of the eight program areas.

C. Section 13260 Does Not Require the Board to Adjust Its Fee Schedules to Compensate for Earlier Imbalances Within Particular Program Areas

CBIA argues that the 2011-12 fee schedule did not comply with section 13260 because it failed to compensate storm water dischargers for earlier years in which fees paid by storm water dischargers exceeded the Board's projections. (CBIA's brief, pp. 8, 14, 31.) But CBIA mistakenly relies on subdivision (f)(1) of section 13260, which refers only to "the revenue levels set forth in the Budget Act":

> The state board shall automatically adjust the annual fees each fiscal year to conform with *the revenue levels set forth in the Budget Act* for this activity. If the state board determines that the revenue collected during the preceding year was greater than, or less than, *the revenue levels set forth in the Budget Act*, the state board may further adjust the annual fees to compensate for the over and under collection of revenue.

(§ 13260, subd. (f)(1), italics added.) Since there are no revenue levels set forth in the budget act for individual program areas, this provision only concerns the balance between the *total* fees collected and the amount necessary to help pay for the *entire* waste discharge permit program. Section 13260 does not require the Board to make adjustments within particular program areas.

Even if that provision could somehow be construed to apply to individual program areas, the provision states only that the Board "may" adjust the annual fees. (§ 13260, subd. (f)(1).) It does not require the Board to do so.

II. THE BOARD'S FEE SCHEDULE DOES NOT VIOLATE PROPOSITION 13

A. Regulatory Fees Are Consistent with Proposition 13 if They Do Not Exceed the Reasonable Costs of the Regulatory Activity and Are Reasonably Allocated Among the Regulated Parties

CBIA never states whether its constitutional claim is based on Proposition 13, Proposition 26, or both. (See CBIA's brief, pp. 1-6, 20-24, 28-29, 32-34; JA 14-15; slip opn., p. 18, fn. 9.) But the relevant part of Proposition 26 only applies to a "change in state statute." (Cal. Const., art. XIII A, § 3, subd. (a).) Since CBIA does not challenge any change in state statute, Proposition 26 does not apply. (See part III.B. below.) This argument will therefore focus on Proposition 13.

The relevant part of Proposition 13 required approval by a two-thirds majority of the Legislature for "any changes in State taxes enacted for the purpose of increasing revenues. . . ." (Former Cal. Const., art. XIII A, § 3, added by initiative, Primary Elec. (June 6, 1978), commonly known as Prop. 13; amended by initiative, Gen. Elec. (November 2, 2010), commonly known as Prop. 26.) The measure was intended to restrict the state from attempting to make up for lost property tax revenue by increasing other taxes or creating new ones. (*Amador Valley Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231.)

A regulatory fee is not a tax and is therefore not subject to Proposition 13's two-thirds requirement. (*Farm Bureau, supra*, 51 Cal.4th at p. 428.) A regulatory fee is "charged to cover the reasonable cost of a service or program connected to a particular [regulatory] activity." (*California Bldg. Industry Ass'n v. San Joaquin Valley Air Pollution Control Dist., supra*, 178 Cal.App.4th at p. 131; cf. *Sinclair Paint, supra*, 15 Cal.4th at p. 874 [noting that different categories of fees may overlap].) Regulatory fees help advance the purposes of Proposition 13, because a

reasonable way to achieve effective tax relief is to shift the costs of a regulatory program from the taxpayers to the regulated parties. (*Sinclair Paint*, at p. 878, quoting *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1148.)

The constitutionality of a regulatory fee depends on a two-pronged test concerning "(1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity." (*Sinclair Paint, supra*, 15 Cal.4th at p. 878, quoting *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist., supra*, 203 Cal.App.3d at p. 1146; accord, *Farm Bureau, supra*, 51 Cal.4th at p. 437.)

Under the first prong, a fee must not exceed the reasonable cost of the regulatory activity, with the resulting surplus being used for general revenue. (*Farm Bureau, supra*, 51 Cal.4th at p. 438.) Under the second prong, the fee must be allocated among the regulated parties by a reasonable method. (*Sinclair Paint, supra*, 15 Cal.4th at p. 878; see *Farm Bureau*, at p. 440.) The 2011-12 fee schedule satisfies both prongs.

B. The Total Projected Revenue from the Waste Discharge Permit Fee in 2011-12 Was Not Excessive

1. The Board designed the fee schedule to generate only the amount of revenue specified in the budget act

The Board designed its 2011-12 fee schedule to generate only the amount of revenue required by that year's budget act to help pay for the waste discharge permit program. (JA 232-233.) There is no evidence that the actual fee revenue exceeded the Board's projections. Even if that occurred, any surplus would remain in the Fund until being spent for the

waste discharge permit program; it could not be used for general revenue. (§ 13260, subd. (d)(2)(A).)

CBIA argues that fees under the 2011-12 fee schedule were excessive because the Board discussed a $27 million increase in total program "expenditures" without any increase in program activities. (CBIA's brief, pp. 11-13.) CBIA's argument overlooks that the Board used the term "expenditures" to include only the Board's spending from the Fund. The budget act dictated that the Board would increase its spending from the Fund to offset cuts in the program's general fund subsidy. (JA 232-233, 325-326, 408-409 [discussing the impact of "general fund shifts"]; compare line items 3940-001-0001 and 3940-001-0193 in JA 208-219 with the same line items in JA 123-124.) If one considers both expenditures from the Fund and the program's general fund subsidy, total spending for the program did not change. (JA 232-233, 326.)

CBIA further contends that if program activities remained constant, the increased fees were "for the purpose of increasing revenues," contrary to the language of Proposition 13. (CBIA's brief, p. 33.) By definition, however, regulatory fees generate revenue necessary to pay for a regulatory program. (*California Bldg. Industry Ass'n v. San Joaquin Valley Air Pollution Control Dist.*, *supra*, 178 Cal.App.4th at p. 131.) The relevant question is not whether the fee was intended to increase revenues, but whether the fee was intended to generate more revenue than necessary to help pay for the waste discharge permit program. (See *Farm Bureau*, *supra*, 51 Cal.4th at p. 438 ["What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used for general revenue collection"].) Because there is no evidence that the fee schedule for 2011-12 was designed to generate more revenue than necessary to pay for the waste discharge permit program, CBIA's argument fails.

2. The so-called "storm water fee" does not require separate constitutional analysis

As with its argument regarding section 13260, CBIA rests its constitutional challenge largely on the premise that storm water dischargers are regulated by their own distinct program and pay their own distinct fee. (See, e.g., CBIA's brief, p. 29.) For the same reasons discussed in part I.B. above, that premise is wrong. The Board creates only one annual fee schedule under section 13260, and all eight categories of waste dischargers are regulated by the same permit program.

The rule is that a regulatory fee must not exceed the estimated costs of the relevant "regulatory activity." (*Sinclair Paint*, *supra*, 15 Cal.4th at p. 878; accord, *Farm Bureau*, *supra*, 51 Cal.4th at p. 438 [the fee must "not exceed the reasonable cost of providing services necessary to regulate the activity for which the fee is charged," with the excess used for "unrelated revenue purposes"].) The Board's regulatory activity under section 13260 includes all eight program areas, because all of the program areas are components of the Board's broad duty to regulate parties who discharge waste that could affect the quality of California's waters. (See § 13260, subd. (a) [identifying those who are required to file reports of waste discharge].)

The program areas are administrative classifications that the Board has discretion to modify whenever the Board adopts a new fee schedule. (See § 13260, subds. (d)(1) & (f)(1) [requiring the Board to create an annual fee schedule but not specifying any particular method for allocating the fee among dischargers].) The Board could decide, for example, to absorb all storm water dischargers into other program areas. The Board could also revise the factors used to calculate the fee that each storm water discharger must pay, or it could create some entirely new approach for designing fee schedules that does not consider program areas at all. It

would be illogical to define a program's "regulatory activity" based on such discretionary administrative classifications. As the trial court correctly observed, Proposition 13 does not require "slicing and dicing the fees" based on how the Board chooses to classify the dischargers for administrative purposes. (JA 553.)

The correct approach for identifying a program's regulatory activity is illustrated by *Farm Bureau, supra*, 51 Cal.4th 421, which concerned a fee imposed to help pay for the Board's regulation of water rights permits and licenses. (*Id.* at pp. 429-432.) One of the issues was whether Proposition 13 required the Board to charge the fee not only to permit and license holders, but also to those who held other kinds of water rights. (*Farm Bureau*, at pp. 440-442.) In addressing that issue, the court did not treat the different kinds of water rights as multiple programs or "regulatory activities." The court focused instead on whether the total amount of the fee was reasonably allocated among all the regulated parties. (*Ibid.*)

Also instructive is *Collier v. City and County of San Francisco* (2007) 151 Cal.App.4th 1326. In that case, the court found it constitutionally permissible for revenue from a local building permit fee to be shared among the local building department, fire department, and planning department, each of which participated in regulating the construction industry. (*Id.* at pp. 1340-1344.) Just as revenue from a regulatory fee may be shared by multiple departments serving a common regulatory objective, so too may revenue from a regulatory fee be shared by multiple program areas within a comprehensive regulatory program. The existence of separate departments or separate program areas does not mean that there are distinct regulatory activities for purposes of Proposition 13.

CBIA's misplaced efforts to change the constitutional analysis by characterizing the storm water program area as a distinct permit program are without merit.

C. The Fee Is Reasonably Allocated Among the Regulated Parties

1. The 2011-12 fee schedule reasonably allocated that year's fee based on anticipated revenues and budgeted spending for each program area

CBIA's arguments assume that the Board's method of allocating the fee was unconstitutional unless the fees actually paid by storm water dischargers did not exceed the actual cost of regulating storm water dischargers. That assumption is wrong. The issue is whether the fee schedule allocated the waste discharge permit fee by a reasonable method. (*Farm Bureau, supra*, 51 Cal.4th at p. 437.) That issue requires a qualitative assessment of how the Board allocated the fee among *all eight* program areas.

The 2011-12 fee schedule allocated the waste discharge permit fee reasonably. For each of the eight program areas, the Board designed the fee schedule so that projected fee revenue equaled that year's budgeted spending from the Fund. (JA 232-233; 412-413 [discussing the Board's goal of having revenue from each program area match each program area's budget].) For the storm water program area, for example, the sum of the Board's "base revenue forecast" and "forecasted revenue increase" was about $26.6 million, equal to the Board's $26.6 million in budgeted spending from the Fund for the storm water program area that year. (JA 233.)

Since each year's fee schedule relies on projections and estimates, the actual fee revenue received from dischargers within each program area might differ from what the Board anticipates. Those circumstances are not enough to render the Board's method unreasonable. (See *California Bldg. Industry Ass'n v. San Joaquin Valley Air Pollution Control Dist.*, *supra*, 178 Cal.App.4th at p. 135 ["The calculation need not be exact, just

reasonable"]; *California Assn. of Professional Scientists v. Department of Fish & Game* (2000) 79 Cal.App.4th 935, 954 (*Professional Scientists*) [rejecting any asserted need for an "appellate audit" of an agency's accounting systems].)

CBIA erroneously asserts that the Court of Appeal granted the Board "unfettered discretion" to allocate the fee in any manner whatsoever, without regard to the regulatory burdens imposed by each class of fee payers. (CBIA's brief, p. 32.) But the court merely adhered to the principle that "a regulatory fee, to survive as a fee, does not require a precise cost-fee ratio." (*Professional Scientists*, *supra*, 79 Cal.App.4th at p. 950.) Fees must bear "a fair or reasonable relationship" to the fee payers' "burdens on or benefits from the regulatory activity." (*Farm Bureau*, *supra*, 51 Cal.4th at p. 437.) However, "[r]egulatory fees, unlike other types of user fees, often are not easily correlated to a specific, ascertainable cost." (*Professional Scientists*, at p. 950; accord, *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363, 368.) Consequently, "[a]n inherent component of reasonableness in this context is flexibility." (*Equilon Enterprises v. State Bd. of Equalization* (2010) 189 Cal.App.4th 865, 883, quoting *Professional Scientists*, at p. 950.) "The record need only demonstrate a *reasonable* relationship, not an exact relationship, between the fees to be charged and the *estimated* cost of the program." (*California Bldg. Industry Ass'n v. San Joaquin Valley Air Pollution Control Dist.*, *supra*, 178 Cal.App.4th at p. 135.)

Applying that flexible standard, courts have upheld the following fees, among others, against challenges based on Proposition 13:

- Fees that support a rent control hearing process, imposed as a flat fee per apartment unit (*Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 374-375);

- Fees that support the state's childhood lead poisoning prevention program, based on manufacturers' "market share" responsibility for lead in the environment (*Equilon Enterprises v. State Bd. of Equalization*, *supra*, 189 Cal.App.4th at pp. 883-886);
- Fees that support a portion of the state's environmental review obligations, imposed as a flat fee (*Professional Scientists*, *supra*, 79 Cal.App.4th 935, 943-955);
- Fees that support the delivery of water, based on a tiered rate structure designed to discourage excessive water consumption (*Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 193);
- Fees that support the operation of a landfill, based on a determination that "different types of land use produced different types and amounts of refuse" (*Kern County Farm Bureau v. County of Kern* (1973) 19 Cal.App.4th 1416, 1419); and
- Fees that support the indirect costs of an air pollution control district, based on fee payers' levels of emissions (*San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.*, *supra*, 203 Cal.App.3d at pp. 1147-1148).

Citing *Farm Bureau*, *supra*, 51 Cal.4th 421, CBIA asserts that the court should require "detailed findings" to determine whether the Board charged storm water dischargers too much. (CBIA's brief, pp. 11-15, 20-23, 27-29.) But the need for additional findings in *Farm Bureau* was specific to the issues presented. *Farm Bureau* concerned a group of fee payers who argued that 40 percent of water rights holders were "charged for the entire cost of operations that benefit all rights holders and the public at large." (*Farm Bureau*, at p. 440.) The Board responded that those other water rights holders were only responsible for about 5 percent of the program's regulatory costs. (*Id.* at p. 441.) The court remanded for further findings on that issue. (*Id.* at p. 442.)

Here, in contrast, CBIA does not allege that the Board regulates any dischargers outside the eight program areas. For each program area, the Board's estimated spending is established by the Board's budget for the 2011-12 fiscal year, and the Board designed the fee schedule to generate only the revenue necessary to support the budgeted spending within each program area. (JA 232-233, 412-413.) Those facts are sufficient to show that the fee was allocated by a reasonable method. (See *Farm Bureau*, at p. 438 [the amount of a regulatory fee may properly be based on the Legislature's "sound judgment" and "probabilities according to the best honest viewpoint of honest officials"].) And contrary to CBIA's assertions, *Farm Bureau* is consistent with the principle that any reasonable method of allocating a fee will suffice. (*Id.* at p. 442 [an agency "should be accorded some flexibility in calculating the amount and distribution of a regulatory fee"]; *id.* at p. 442, fn. 26 [leaving open the possibility that, on remand, the Board might defend the fee on a different basis].)

CBIA also relies on *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, but *Capistrano* concerned a different kind of fee and a different constitutional requirement. The plaintiffs in *Capistrano* argued that a city's water rate structure violated Proposition 218, which provides that fees imposed by local governments "as an incident of property ownership" cannot exceed "the proportional cost of services attributable to the parcel." (*Capistrano*, at p. 1504, quoting Cal. Const., art. XIII D, § 6, subd. (b)(3).) Based on Proposition 218, the court held that the rate structure was not supported by sufficient evidence. (*Capistrano*, at p. 1506.) Proposition 218 does not apply here, because the waste discharge permit fee was not imposed by a local government or "as an incident of property ownership." And unlike Proposition 218, Proposition 13 does not limit fees to the "proportional cost of services" attributable to individual fee payers. The question of

proportionality under Proposition 13 is instead "measured collectively, considering all rate payors." (*Farm Bureau, supra*, 51 Cal.4th at p. 438.)

Since the Board's fee schedule was designed to generate revenue within each program area equal to the budgeted spending from the Fund within each program area, the Board's method of allocating the fee was reasonable, consistent with Proposition 13.

2. Proposition 13 did not require the Board to adjust the 2011-12 fee schedule to compensate for earlier imbalances within particular program areas

In some past fiscal years, primarily fiscal years 2004-05 through 2006-07, actual fees from storm water dischargers exceeded the Board's projections, so the storm water program area, viewed in isolation, produced a surplus. (JA 220.) But there is no evidence that storm water fees were ever set unreasonably, either in those past fiscal years or in 2011-12.

When actual fee revenues for one or more of the program areas either exceed or fall short of the Board's projections, the Board must weigh competing policies to determine how to respond. With the 2011-12 fee schedule, the Board considered whether to limit the increase in fees to storm water dischargers to compensate for earlier years in which fees paid by those dischargers exceeded projections. (JA 236-237, 330-331.) Doing so would have required other dischargers to pay more. (JA 236-237.) Staff recommended against making that adjustment, primarily because the dischargers who would benefit were not necessarily the same ones who had made the earlier payments. (JA 238, 331.) The law allows the Board sufficient flexibility to resolve such competing policy interests without judicial interference. (See *Collier v. City and County of San Francisco*, *supra*, 151 Cal.App.4th at p. 1345 [city could permissibly retain unused fee revenue to protect against future economic downturns]; *Professional*

Scientists, *supra*, 79 Cal.App.4th at p. 950 ["An inherent component of reasonableness in this context is flexibility"].)

CBIA contends that annual adjustments are required under *Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685. (CBIA's brief, p. 31.) Not so. *Barratt* was discussing the unique requirements of the Mitigation Fee Act, which does not apply to state agencies. (See *Barratt*, at p. 703, quoting Gov. Code, § 66016, subd. (a) [requiring that if a new fee or service charge imposed by a local agency generates actual revenue in excess of actual cost, "those revenues shall be used to reduce the fee or service charge creating the excess"].)

Rather than attempting to use the 2011-12 fee schedule to offset any earlier imbalances, the Board reasonably designed the fee schedule so that projected fee revenue for each program area was equal to budgeted spending from the Fund within each program area. (JA 232-233.) This was not an abuse of discretion. CBIA has failed to present even a prima facie case that the fee schedule violates Proposition 13.

III. THE FEE SCHEDULE DOES NOT VIOLATE PROPOSITION 26

A. The Fee Schedule Does Not Impose a "Tax" as Defined in Proposition 26

CBIA has never asserted that the fee schedule is a "tax" restricted by Proposition 26. Doing so would not assist CBIA's case.

Proposition 26 amended Proposition 13 in November 2010 and requires a two-thirds vote for "[a]ny change in state statute which results in any taxpayer paying a higher tax. . . ." (Cal. Const., art. XIII A, § 3, subd. (a).) The word "tax" is defined broadly but is subject to exceptions:

> (b) As used in this section, "tax" means any levy, charge, or exaction of any kind imposed by the State, *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 State of conferring the benefit or granting the privilege to the payor.
>
> * * *
>
> (3) A charge imposed for *the reasonable regulatory costs to the State incident to issuing licenses and permits*, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(Cal. Const., art. XIII A, § 3, subd. (b), italics added.)

The state bears the burden of proving that a charge falls within one of those stated exceptions:

> (d) The State bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

(Cal. Const., art. XIII A, § 3, subd. (d).) This subdivision incorporates the new definition of "tax" and changes the burden of proof, but in other respects its language "repeats nearly verbatim" the two-pronged test established by cases interpreting Proposition 13. (*Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982, 996; accord, *Southern California Edison Company v. Public Utilities Commission* (2014) 227 Cal.App.4th 172, 199; see part II.A. above.)

The court construes voter initiatives by applying the same principles governing the construction of a statute. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037.) The court's task is to ascertain the intent of the electorate to effectuate the purpose of the law. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894,

901.) The court first examines the language of the initiative as the best indicator of the voters' intent. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 321.) If the language is unambiguous and a literal construction would not result in absurd consequences, the court presumes that the voters intended the meaning on the face of the initiative, and the plain meaning governs. (*Professional Engineers, supra*, 40 Cal.4th at p. 1037; *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.)

The Board's fee schedule falls within two of the stated exceptions to the definition of "tax":

First, the fee is "imposed for the reasonable regulatory costs to the State incident to issuing licenses and permits . . . ." (Cal. Const., art. XIII A, § 3, subd. (b)(3).) This exception is consistent with cases decided under Proposition 13 regarding permit and license programs. (See *Collier v. City and County of San Francisco, supra*, 151 Cal.App.4th at p. 1340 [applying section 4 of Proposition 13 to uphold a building permit fee imposed "to cover services related to building permits and inspections"].) The Board's fee schedule falls within the exception, because the purpose of the fee schedule is to help pay for a permit program, and the fee schedule requires dischargers to pay only the Board's reasonable regulatory costs incident to that program. (JA 232-233, 412-413.)

Second, the fee is "imposed for a specific benefit conferred or privilege granted directly to the payor, and which does not exceed the reasonable costs to the State of conferring the benefit or granting the privilege to the payor." (Cal. Const., art. XIII A, § 3, subd. (b)(1).) The waste discharge permit provides dischargers with a privilege they would not otherwise enjoy, because "[a]ll discharges of waste into waters of the state are privileges, not rights." (§ 13263, subd. (g); see also *Communities For a Better Environment v. South Coast Air Quality Management Dist.*

(2010) 48 Cal.4th 310, 324 [California law provides no right to pollute].) And the fee does not exceed the reasonable costs of providing that privilege, because the fee is based on budgeted program costs. (JA 232-233, 412-413.)

B. Proposition 26 Only Restricts the State from Enacting a "Change in State Statute," and the Fee Schedule Is Not a Statute

A second reason why the fee schedule is not affected by Proposition 26 is that Proposition 26 only affects "change[s] in state statute." (Cal. Const., art. XIII A, § 3, subd. (a).) In contrast, the former provisions of Proposition 13 restricted "any changes in state *taxes* enacted for the purpose of increasing revenues . . . ." (Italics added.) CBIA has never challenged any change in statute or argued that the fee schedule is itself a statute, so Proposition 26 does not apply.

A regulation is not a statute. The Constitution defines "statute" and sets out the procedures for adopting and amending statutes. (Cal. Const., art. IV, §§ 8, 9, 10; see also, art. II, §§ 8, 9, 10 [statutes adopted by initiative or referendum].) In contrast, regulations are defined and governed by the Administrative Procedures Act. (See, e.g., Gov. Code, § 11342.600.) Regulations that "alter or amend the [enabling] statute or enlarge or impair its scope are void." (*Cal. Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11.) Accordingly, a regulation cannot constitute a "change in state statute" governed by Proposition 26. (*Western States Petroleum Assn. v. Board of Equalization, supra*, 57 Cal.4th at p. 423-424 [agency's modification of a regulation affecting tax liabilities merely implemented an existing statute and was not a "change in state statute" governed by Proposition 26]; see also, *Southern California Edison Company v. Public Utilities Commission, supra*, 227 Cal.App.4th at p. 198

[commission's decision was not a "change in state statute" governed by Proposition 26].)

As required by section 13260, the Board adopted its fee schedule by regulation, and not by statute. (Cal. Code Regs., tit. 23, §§ 2200, 2200.6, & 2200.7, Register 2011, No. 42 (Oct. 19, 2011); see § 13260, subd. (f)(1) [requiring the Board to "adopt, by emergency regulations, a schedule of fees"].) CBIA only challenges the fee schedule and has never challenged any statute. (JA 5, 21-22.) The Court of Appeal correctly concluded on that ground that Proposition 26 does not apply. (See slip opn., p. 18, fn. 9.)

IV. CBIA BEARS THE BURDEN OF PROVING THAT THE FEE SCHEDULE IS UNCONSTITUTIONAL

Actions not governed by Proposition 26 are subject to the traditional rule that a regulation is presumed valid and that a challenger therefore bears the burden of pleading and proving invalidity. "The plaintiff challenging a fee bears the burden of proof to establish a prima facie case showing that the fee is invalid. [Citations.]" (*Farm Bureau, supra*, 51 Cal.4th at p. 436.) If the plaintiff establishes a prima facie case that a fee violates Proposition 13, the agency then bears the burden of producing evidence to support its decision. (*Id.* at p. 437.) But the agency's potential burden of producing evidence is not equivalent to the burden of proof. (*Id.* at pp. 436-437.) Thus, " '[t]he burden of proof *does not shift*...it remains with the party who originally bears it.' [Citation.]" (*Id.* at p. 436, quoting *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1667.)

CBIA argues that Proposition 26 places the burden of proof on the state in every action challenging the constitutionality of a fee, even actions that are not based on any change in state statute. (CBIA's brief, pp. 25-28.) But the part of Proposition 26 that governs the burden of proof relates specifically to Proposition 26's new definition of "tax":

> The State bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction *is not a tax*, . . .

(Cal. Const., art. XIII A, § 3, subd. (d), italics added.) Thus, the new rule regarding the burden of proof is inseparable from the new definition of "tax." That rule cannot be applied in an action like this one where the new definition of "tax" does not apply. (Cf. *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 289 [a law merely governing the conduct of trials may be applied in a trial occurring after the law's effective date].)

No matter which side bears the ultimate burden of proof, CBIA's constitutional challenge to the 2011-12 fee schedule fails. The record shows that the fee schedule is consistent with Proposition 13, because it was designed to generate only the amount of revenue necessary to help pay the total cost of the waste discharge permit program, and it also allocated the fee by a reasonable method among the eight categories of dischargers. For those same reasons, among others, to apply Proposition 26 would not assist CBIA's case. The parties' dispute is over the law, rather than the evidence, and CBIA misconstrues the law.

V. THE BOARD ADOPTED THE FEE SCHEDULE WITH SUFFICIENT AFFIRMATIVE VOTES

A. Except as Otherwise Provided, Water Code Section 181 Authorizes the Board to Take Action with a Majority Vote of a Three-member Quorum

The Board consists of five members. (§ 175, subd. (a).) A quorum of the Board consists of three members. (§ 181.) Unless provided otherwise by statute, the Board can adopt fee schedules with affirmative votes from a majority of a quorum. (§§ 175, subd. (a), 181.) This is consistent with the long-standing common law rule. (*County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 346, fn. 11 [recognizing common law rule that a majority of a quorum empowers a governmental body to act unless a

statute provides to the contrary]; accord, *Federal Trade Commission v. Flotill Products, Inc.* (1967) 389 U.S. 179, 183; 4 McQuillin, The Law of Municipal Corporations, § 13.37 (3d ed.); see Civ. Code, § 12 ["Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the Act giving the authority"]; Code Civ. Proc., § 15 [containing identical language].)

CBIA misreads *County of Sonoma v. Superior Court, supra*, 173 Cal.App.4th 322, as supporting the idea that requiring affirmative votes from a majority of a board's entire membership is "inherent in the principles of representative democracy." (CBIA's brief, p. 36.) To the contrary, *County of Sonoma* affirmed the common law rule that except where expressly provided otherwise, a majority of a quorum is sufficient. (*County of Sonoma*, at p. 345, fn. 11.) The case concerned a statute that required a unanimous vote of a county board of supervisors to reject arbitrators' rulings on labor disputes. (*Id.* at p. 333.) The court held that the statute impermissibly allowed a minority of the board to make an arbitration ruling binding merely by withholding their votes. (*Id.* at p. 346.) Rather than departing from the common law rule, the court was responding to a statute that prevented a majority of a board from taking action. (*Id.* at p. 347.)

Three members attended the meeting at which the Board heard and voted on the fee schedule, so there was a quorum. (JA 434.) Two members voted to approve the fee schedule and one abstained. (JA 434.) Thus, a majority of a quorum voted to approve the fee schedule. Under the common law rule, nothing more was required.

B. Section 183's Proviso that "Any Final Action" Must Be Taken by a Majority of the Board Members Does Not Apply

1. The proviso only applies after a single Board member independently conducts a hearing or investigation

CBIA argues that section 183 requires the Board to take action with affirmative votes from a majority of all the Board members, rather than a majority of a quorum. However, statutes are presumed not to alter the common law except as they expressly provide. (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297; *Saala v. McFarland* (1965) 63 Cal.2d 124, 130.) Consistent with that principle and with the language of sections 181 and 183, the trial court and the Court of Appeal correctly determined that the language cited by CBIA applies only in particular circumstances not presented here.

CBIA relies on the middle paragraph of section 183, which authorizes the Board to delegate hearings and investigations to just one Board member, so long as "any final action" is taken by the entire Board:

> *Any hearing or investigation by the board may be conducted by any member* upon authorization of the board, and he shall have the powers granted to the board by this section, *but any final action of the board* shall be taken by a majority of all the members of the board, at a meeting duly called and held.

(Italics added.) CBIA does not contend that any hearing on the fee schedule was ever conducted by one board member, and no such hearing ever occurred. Consequently, the middle paragraph of section 183 does not apply.

By authorizing the Board to delegate hearings and investigations to just one Board member, section 183 creates an exception to the quorum requirement stated in section 181. Section 183 then limits the exception with a proviso that "any final action" following a delegated hearing or

investigation requires a majority of the Board. If the Legislature meant to state a broad rule governing every Board vote, that rule would logically have been placed within section 181, rather than section 183. The only reason to place the proviso within section 183—and within the *same sentence* that authorizes the Board to delegate its authority—is to govern final actions that result from a delegation of authority.

A published Attorney General opinion confirms that conclusion. When section 183 (then section 193) was originally enacted in 1956, it governed the Board's predecessor, the three-member State Water Rights Board. The chair of that board requested an opinion to determine whether the section required motions to be carried by a unanimous vote. (28 Ops.Cal.Atty.Gen. 259, 260 (1956).) The Attorney General concluded that the clause in question was not intended to establish the number of votes necessary to take action, but was intended merely to limit the scope of any delegation of authority:

> The phrase ["but any final action of the board shall be taken by the board as a whole"] when viewed in its context, simply constitutes a *proviso* to the clause preceding it and authorizing the board to delegate all its powers to any one of its members. The phrase constitutes a command only that the board not delegate to *one* member its final decision-making power.

(28 Ops.Cal.Atty.Gen. at p. 260.)

"Opinions of the Attorney General, while not binding, are entitled to great weight. [Citations.] In the absence of controlling authority, these opinions are persuasive 'since the Legislature is presumed to be cognizant of that construction of the statute.' " (*California Assn. of Psychology Providers v. Rank, supra*, 51 Cal.3d at p. 17, quoting *Napa Valley Educators' Assn. v. Napa Valley Unified School Dist.* (1987) 194 Cal.App.3d 243, 251.) "It must be presumed" that the Attorney General's interpretation of a statute "has come to the attention of the Legislature, and

if it were contrary to the legislative intent that some corrective measure would have been adopted . . . ." (*Rank*, at p. 17, quoting *Meyer v. Board of Trustees* (1961) 195 Cal.App.2d 420, 431-432.)

The Legislature has never expressed any intent to override the Attorney General's 1956 opinion, despite amending section 183 repeatedly in other respects. (Stats. 1957, ch. 1824, p. 3221, § 2; Stats. 1967, ch. 284, p. 1444, § 5.2, operative Dec. 1, 1969; Stats. 1969, ch. 482, p. 1046, § 2, operative Jan. 1, 1970; Stats. 1969 ch. 800, p. 1617, § 1, operative Jan. 1, 1970; Stats. 1971, ch. 1288, p. 2522, § 1.)

CBIA assumes that the word "any" within the phrase "but any final action" refers to all final actions, regardless of the circumstances. However, "any" immediately follows the word "but." As noted by the Court of Appeal, "but" is a conjunction and is "used to express a difference or to introduce an added statement." (Slip opn., pp. 7-8, quoting <http://dictionary.cambridge.org/dictionary/english/but> [as of Oct. 22, 2015].) If the Legislature intended to state a universal rule, rather than a proviso, the Legislature would not have placed that rule within section 183 and introduced the rule with "but."

The meaning of "any," like any other word, depends on its context. (See, e.g., *Dye v. Caterpillar, Inc.* (2011) 195 Cal.App.4th 1366, 1374-1383 [interpreting the term "any amended complaint"]; see also *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 ["The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context"].) In the context of section 183, "any" refers to any final action taken *after* a hearing or investigation conducted by one Board member. The Court of Appeal correctly noted that "[t]his construction is consistent with a broad rather than a narrow application of 'any.' " (Slip opn., p. 8.)

Throughout the Water Code, the phrase "any final action" is used only to qualify the authority of a board or commission to delegate proceedings to

others. (See § 164 [authorizing the California Water Commission to delegate proceedings to any member or nominee, "but any final action of the commission shall be taken by a majority of the members of the commission at a meeting duly called and held"]; § 13228.14, subd. (a) [authorizing the regional boards to delegate proceedings to a panel of three or more members, "but any final action in the matter shall be taken by the regional board"]; § 85210, subd. (k) [authorizing the Delta Stewardship Council to delegate proceedings to any council member or other designee, "provided that any final action of the council shall be taken by a majority of the membership of the counsel at a meeting duly called and held"].) In each instance, as in section 183, the phrase "any final action" logically refers only to a final action that *results* from a delegated proceeding and serves to make clear that the final action *cannot* be delegated.

The proviso also specifies that "any final action of the board shall be taken . . . *at a meeting duly called and held.*" (Italics added.) To require a "meeting" serves no purpose unless one of the Board members has been conducting business without a quorum. (See slip opn., p. 8.) And if the Board could only take action with three affirmative votes, it would serve little purpose for section 181 to require a three-member quorum at all; CBIA's interpretation of section 183 renders the quorum requirement almost meaningless.

Contrary to CBIA's assertion, *Marina County Water District v. State Water Resources Control Board* (1984) 163 Cal.App.3d 132, does not support CBIA's interpretation. (CBIA's brief, p. 36.) *Marina County Water District* does not interpret section 183, and the court's decision is not authority for a proposition not considered. (*People v. Banks* (1993) 6 Cal.4th 926, 945.) The decision only mentions section 183 when discussing an earlier judgment against the Board. (*Marina County Water District*, at p. 136.) The decision does not explain why the Board decided

not to appeal that earlier judgment; the Board may have based its decision on strategic or economic considerations unrelated to the merits of the case. It is also possible that a hearing or investigation had been conducted by just one Board member, so that section 183 was applicable under the facts presented. The present case involves no such facts.

Read in context, section 183 is not susceptible of more than one reasonable construction. In the absence of any delegation of authority, the proviso does not come into play.

2. The Board's interpretation of section 183 is consistent with the legislative history

CBIA and the dissenting justice in the Court of Appeal misconstrue a letter by Senator Gordon Cologne in the legislative history. (CBIA's brief, p. 35; dis. opn., pp. 12-15.) The court need not address this issue, because legislative history should be considered only when a statute is ambiguous. (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1055.) But, in any event, Senator Cologne's letter is consistent with the Board's interpretation. His letter, like the proviso itself, only addressed circumstances where the Board has delegated its authority to one or more of its members.

Senator Cologne chaired the Senate Committee on Water Resources, and his letter quoted a report of that committee regarding AB 412, which amended section 183 in 1969. Two years earlier, the Board had been expanded from three members to five. (Stats. 1967, ch. 284, p. 1444, § 5.2.) When there were only three Board members, taking action at a meeting always required at least two affirmative votes, no matter whether two members or three attended the meeting. When the Board was expanded to five members, anywhere from three to five members might attend a meeting. For that reason, a question arose whether the proviso, *when applicable*, always required three affirmative votes—a majority of the

entire Board's membership—or whether sometimes, when only a three-member quorum was present, the proviso only required two affirmative votes. The committee's comment explained that the 1969 amendment to section 183 was intended to answer that particular question:

> *Comment.* The present law is ambiguous as to whether final action by the state board *always requires a majority consisting of three members* of the five-man state board, or whether the majority required is only that of the "members of the board (present) at a meeting duly called and held." In the latter case three members could constitute a quorum, and *the vote of two members would constitute a majority* of the members at the meeting. An amendment has been made to this section to remove the ambiguity by requiring that final board action shall always require the concurrence of a majority of all the members of the board, not merely a majority of a quorum.

(3 Sen. Journal (1969-1970 Reg. Sess.) p. 5154, first italics in original, second and third italics added.)

The comment focused entirely on the number of votes required by the proviso, rather than the circumstances in which the proviso applied. The comment did not discuss section 181, and it did not address how many votes are required for matters that have not been delegated to one Board member.

The court can reasonably infer that the authors of the comment understood the context of the 1969 amendment. They understood that section 183 allowed the Board to delegate hearings and investigations to help the Board manage its broad quasi-adjudicative responsibilities. (See generally, Ferrier, *Administration of Water Rights in California* (1956) 44 Cal. L.Rev. 833, 834-838 [exhibit A-16 to CBIA's request for judicial notice filed Apr. 1, 2014]; Attwater & Markle, *supra*, 19 Pacific L.J. at p. 1001.) They knew of the earlier Attorney General opinion that the proviso within section 183 was only intended to limit the scope of any delegation of authority. (See *California Assn. of Psychology Providers v.*

Rank, supra, 51 Cal.3d at p. 17.) They understood the circumstances in which the proviso was, and was not, intended to apply. The committee's three-sentence comment does not identify those circumstances. The comment does not support CBIA's interpretation of section 183.

3. The Board's interpretation of section 183 is consistent with the Board's composition and function

The dissent below expressed concern that the Board's interpretation of section 183 defeats the purpose of having Board members with different areas of expertise. (Dis. opn., p. 15; see § 175, subd. (a).) Not at all. All the Board members can vote, and they can all share their special knowledge during the Board's deliberations. The Board can also choose to delegate hearings and investigations to whichever Board member has the most relevant expertise. The Board's composition does not make special voting requirements necessary.

The dissent also questioned why the proviso would impose a different voting requirement after the Board has delegated its authority than in other circumstances. (Dis. opn., p. 15.) One logical answer is that when the Board delegates a hearing or investigation, the other Board members generally base their votes on the transcript of the delegated proceedings. (See Holsinger, *Procedures and Practice Before the California State Water Rights Board* (1957) 45 Cal. L.Rev. 676, 681 [exhibit B-10 to CBIA's request for judicial notice filed Apr. 1, 2014].) To ensure a carefully considered outcome, the Legislature could reasonably require greater consensus among the Board members after a delegation of authority than in other circumstances.

The Board's understanding of its own procedural rules is entitled to deference. (See generally *Yamaha Corp. of America v. State Bd. of Equalization, supra*, 19 Cal.4th at p. 13 [agency interpretations that have

been consistently maintained are entitled to deference].) Neither the language of section 183 nor the statutory composition of the Board's membership supports CBIA's case.

C. Even if CBIA's Interpretation of Section 183 Were Otherwise Correct, the Fee Schedule Was Approved by a Majority of the Three Seated Board Members

CBIA's interpretation of section 183 also fails to consider that two seats on the Board were vacant when the Board approved the 2011-12 fee schedule. Since the fee schedule was approved with two affirmative votes out of the Board's three seated members, it was approved by a majority of the entire Board as the Board then existed.

The effect of vacant board seats depends on the statutory language. Where the statute requires a measure to be passed by a majority of all the "members elected" to a board or by a majority of a board's entire statutory "membership," vacant seats are generally included in the calculation of what constitutes a majority. (See, e.g., *Pimental v. City of San Francisco* (1863) 21 Cal. 351, 360 [city charter declared that no ordinance should be passed "unless by a majority of all the members elected"].) When that rule is applied to a board of eight members, a majority is five, even if two seats are vacant. (See Sturgis, Standard Code of Parliamentary Procedure (4th ed. 2001) p. 133.) But where the statute requires only that a measure be passed by a majority vote of all the "members" of a board, vacant positions are not counted when calculating what constitutes a majority. (*Ibid.*)

The proviso within section 183, when applicable, requires any final action of the Board to "be taken by a majority of all the members of the board." It does not state that any final action requires a majority of the Board's entire statutory membership. If there are vacancies on the Board, there are fewer "members of the board" than if the Board is fully constituted. Where two seats on the Board are vacant and a quorum of

three members is present, two affirmative votes of the quorum are sufficient to constitute "a majority of all the members of the board."

The comment in the 1969 committee report does not address what section 183 means when Board seats are vacant. To the contrary, the comment explicitly assumes that there is a "five-man state board." (3 Sen. Journal (1969-1970 Reg. Sess.) p. 5154.) The comment also refers to the number of Board members "present" at a meeting; where a Board seat is vacant, no member associated with that seat can be either present or absent. (*Ibid.*)

There were two vacancies on the Board when the fee schedule was adopted. (JA 434, 450 [noting that there were two affirmative votes, one abstention, and no Board members absent].) Thus, even if the court were to accept CBIA's contention that affirmative votes from a majority of all the Board's members were required, the 2011-12 fee schedule still received a sufficient number of votes.

CONCLUSION

The Court of Appeal's decision affirming the trial court's judgment should be affirmed.

Dated: November 17, 2105 Respectfully submitted,

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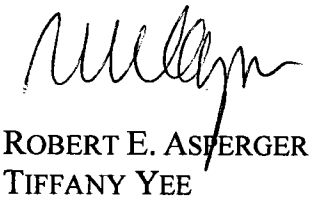

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CERTIFICATE OF COMPLIANCE

I certify that the attached Answer Brief on the Merits uses a 13 point Times New Roman font and contains 12,785 words.

Dated: November 17, 2015

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **California Building Industry Assoc. v. State Water Resources Control Board**
Case No.: **S226753**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On November 18, 2015, I served the attached ***ANSWER BRIEF ON THE MERITS*** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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Case No. CGC-11-516510

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 18, 2015, at Sacramento, California.

Terry Lee Farster
Declarant

Signature

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