Case No. S226753

In the Supreme Court of the State of California

CALIFORNIA BUILDING INDUSTRY ASSOCIATION, a California nonprofit corporation,

Petitioner,

vs.

STATE WATER RESOURCES CONTROL BOARD, et al.,

Respondents.

PETITIONER'S REPLY BRIEF

After a Decision by the First Appellate District, Division Two
Court of Appeal Case No. A137680

On Appeal from the Superior Court, City & County of San Francisco
Superior Court Case No. CGC-11-516510
Honorable Curtis E.A. Karnow, Judge Presiding

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I. INTRODUCTION

The Respondents' Brief strives to defend a "schedule of fees" despite the undisputed evidence in the record showing that the fees fail to meet either (a) the fundamental requirements for valid "regulatory fees" as repeatedly stated by this Court or (b) the specific statutory requirements mandated by the Legislature in the Water Code. As summarized below, however, there is no merit to any of the defenses and arguments asserted in the Respondents' Brief. The Court of Appeal's decision should be reversed.

The Respondents' Brief ("RB" at p. 2) acknowledges that one category of permittees subject to the Board's fee schedule – "those associated with storm water" – paid substantially more in fees than needed to cover the Board's costs or expenditures for its storm water permit activities in the years leading up to the approval of the disputed 2011-12 schedule of fees. These over-collections of storm water fees created a surplus that the Board used to hold down the amounts of fees charged to other classes of persons needing other types of waste discharge permits from the Board. (JA 0235-237.) The Board's own staff revealed that it had over-collected more than $23,500,000 in excessive fees from those paying for storm water discharge permits, far in excess of any amounts claimed as necessary for the Board's "expenditures" for its storm water permit activities. (JA 0220-221, 0236.)

The Respondents' Brief (p. 2) raises two flimsy arguments in its attempt to defend this admittedly skewed and disproportionate schedule of

fees: (1) the outdated, and self-incriminating, notion that "perfection is not required;" and (2) the unsupported contention that adjusting the fee schedule to recognize the prior over-collection of fees, as mandated by Water Code § 13260(f)(1), "would not necessarily have benefitted the same storm water dischargers who were responsible for the earlier years' payments."

Neither of the Board's arguments holds water.

A. The "Schedule of Fees" Was Too Far From "Perfection."

First, our courts have repeatedly made clear that State and local agencies have serious and enforceable responsibilities in establishing purported "regulatory fees" – even if "perfection" may not be required.[1] (See, e.g., *Capistrano Taxpayers Ass'n. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1507-1512 [rev. denied]; *Northwest Energetic Services v. Franchise Tax Board* (2008) 159 Cal.App.4th 841, 857-860; *Mills v County of Trinity* (1980) 108 Cal.App.3d 656, 659-660.)

The Board's own projected "expenditures" for storm water program activities as called for under the FY 2011-12 budget was $26.6 million (JA 0233). The admitted over-collections of storm water fees, in excess of $23.5 million, would have nearly covered the entire budgetted expenditures amount, had it been properly credited. This was far from "perfection."

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[1] Courts have also rejected the condescending notion that "close is good enough for government work." See, e.g., *Nasir v. Sacramento County Off. of the Dist. Atty.* (1992) 11 Cal.App.4th 976, 987.

This Court recently re-emphasized (in a case involving analogous Board fees) that a purported "regulatory fee" – such as those challenged here – "may be charged by a government entity so long as it does not exceed the reasonable costs of providing services necessary to regulate the activity for which the fee is charged" and that "a valid fee may not be imposed for unrelated revenue purposes." (*California Farm Bureau Fed'n. v. State Water Res. Control Board* (2011) 51 Cal.4th 421, 437 [emph. added], citing *Sinclair Paint Co. v. Board of Equalization* (1997) 15 Cal.4th 866, 878, and *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 375.) Even prior to Proposition 26, the Court explained that in order to sustain a regulatory fee, "the government should prove (1) the estimated costs of the service or regulatory activity, and (2) ... that the charges allocated to a payor bears a fair or reasonable relationship to the payor's burden on or benefits from the regulatory activity." (*Sinclair Paint, supra*, 15 Cal.4th at 878.)

The Respondents' Brief apparently recognizes that the Board's actions in this case cannot be supported by evidence in the record that would comply with those requirements, even under the more "fee-friendly" legal standards prevailing in those cases – pre-dating the amendment of the Constitution by Proposition 26 in 2010, by which the voters explicitly shifted

the burden of justification for all levies, charges, or fees to the State. (*Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1322.)[2]

Instead of providing citations to evidence in the record necessary to correlate the fees to costs, the Respondents' Brief erroneously pleads for "deference" to the Board's action, as a substitute for real evidence (RB 13). Even prior to Proposition 26, that would have been inappropriate and insufficient to sustain the fees. See, *Farm Bureau, supra*; *Northwest Energetic Services, supra,* 159 Cal.App.4th 841; cf., *Shapell Industries v. Governing Board* (1991) 1 Cal.App.4th 218, 232 ["If courts shun evidentiary review as beyond their province, the reasonableness of the agency's action is relegated to the agencies themselves, whose primary interest is in financing their own projects."].) Especially following voter approval of Proposition 26, however, agencies imposing charges or fees are no longer entitled to rely on any such deference, but have a constitutional burden to affirmatively justify the fees and distinguish them from taxes. (*Southern California Edison Co. v. Public Utilities Com.* (2014) 227 Cal.App.4th 172, 197.)

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[2] Proposition 26 "was an effort to close perceived loopholes in Propositions 13 and 218 and was largely a response to *Sinclair Paint*...." (*Schmeer, supra,* 213 Cal.App.4th at 1322.) "The effect of Proposition 26 is to narrow the *Sinclair Paint* decision and its allowance of regulatory fees regardless of whether the State confers a benefit or privilege on the payor." *It's a Question of Proportionality: Proposition 26's Impacts on Funding for the Global Warming Solutions Act of 2006*, 18 HASTINGS WEST-NORTHWEST JOURNAL OF ENVIRONMENTAL LAW & POLICY (Winter 2012) 39, 44.

B. It Is NOT Relevant Whether "the Same Fee Payers" Would Benefit By Adjusting the Fees to Credit Prior Over-Collections

California law generally requires governmental agencies to avoid accumulating surplus fee collections. "If the fees or service charges create revenues in excess of actual cost, those revenues shall be used to reduce the fee or service charge creating the excess." (Gov. Code § 66016, quoted in *Barratt American v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 703, affirming petitioner's right to challenge accumulated plan check and building inspection fees.) It does not matter if those who may benefit by a reduction of the fees going forward are the same as those who created the surplus – because this is not a "refund" remedy; it is a "pay it forward" remedy.

Not only is this argument based on pure speculation, it is legally irrelevant to the Board's duty to make a compensatory adjustment to the fees.

The petitioner's complaint in this action sought just such a compensating adjustment and reduction of the storm water fees going forward. Where, as in this case, an agency has in fact "over-collected" fees and accumulated a surplus, it must make a compensating adjustment in the fee schedule. (See, e.g., *County of Orange v Barratt American* (2007) 150 Cal.App.4th 420 [requiring the County to provide credit for over-collected building permit fees for the benefit of unknown future permit applicants].)

C. Respondents' Legalistic Argument In Response To This Litigation That It Should Be Allowed To Create Separate Fees That "Allocate" The Board's Budgeted Expenditures For The Board's Entire Waste Discharge Permit Program WITHOUT REGARD To The Proportionate Cost Or Burdens Imposed By The Eight Discrete Classes Of Permit Applicants Is NOT Supported By Law Or Evidence.

Respondents' Brief persists in trying obscure the foregoing evidentiary lacuna by arguing that the Court should not examine the "cost/fee relationship" of the eight individual fees as created by the Board for different regulatory and permitting actiions under the schedule of fees, but should instead pretend that these eight separate fees are merely sub-components of one single fee to cover the cumulative costs of the eight separate permit programs funded out of the "waste discharge permit fund" (WDPF). (RB 5.) There is no support, legal or factual, for this argument.

The record shows that the Board conducts eight separate permitting programs under the umbrella of its authority to regulate and permit various types of waste discharges under Section 13260. The Respondents' Brief tries to give the impression that these separate programs are merely informal classifications created by the Board "for its own administrative purposes" (RB 3), having no legal significance. To the contrary, however, the Legislature itself has statutorily called out several of the distinct types of regulatory activities and distinct classes of permits under Sectioin 13260 for separate treatment, and these separate programs are not simple administrative contrivances. The Legislature, for example, has imposed specific accounting

rules for those separate programs under the waste discharge umbrella. See, e.g., §§ 13260(d)(1)(D) [separate fee classification for "confined animal feeding and holding operations"]; 13260(d)(2)(B) [separate requirements for fees on stormwater dischargers concurrently permitted under the federal NPDES system]; 13260(d)(3) [separate rules and waivers for some dischargers of solid waste; 13260(i) [requiring the Board to provide separate regulations governing the time for payment of fees from dischargers covered by the NPDES system]; 13260(j) [separate exemption for some permittees operating injection wells].

Not only are the Board's legal arguments contrary to the evidence, , they are also unsupported by legal authority. Respondents' contentions are contrary to the fundamental requirement that regulatory fees must reflect, and must not exceed, "the reasonable cost of providing services necessary to regulate the activity for which the fee is charged." (*Farm Bureau, supra*, 51 Cal.4th at 437 [emph. added].) Here, the Board had historically attempted to comply with this requirement by separately accounting for, and budgetting for, its discrete expenditures of the substantially different aspects of its regulatory and permitting responsibilities, and establishing separate fees intended to be reflective of the costs of covering those expenditures. (See, e.g., JA 0143-149; JA 0150-154; JA 0198-206.) The Board has established eight separate programs funded by eight separate fees, which are intended to reflect, as near as reasonably possible, the distinct costs of those various

activities.; see also, *Capistrano Taxpayers Ass'n. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1507-11.)

If the Board had intended to argue, as it does now in the Respondents' Brief, that its schedule of fees could be defended by the artifice of pouring all of its various permitting costs into one big bucket, then it should have been charging just one omnibus "waste discharge permitting fee" to all fee payers at the same rate (dividing the overall costs by the total number of permit applicants) – so that all fee payers would be treated fairly and would bear an equal share of the overall waste discharge program costs. To accept the *post hoc* arguments proferred in Respondents' Brief would in effect allow the Board to deliberately create a sub-class of waste discharge permittees and to disproportionately misallocate the actual costs of services so as to charge fees to that one class that admittedly overcharge them so as to be able to provide subsidies to other (more politically favored?) classes of fee payors. Neither the holdings of this Court's nor the Water Code would tolerate such an abuse.

D. Respondents' Brief Fails to Refute Other Evidentiary and Legal Deficiencies Requiring Invalidation of the Fees.

Evidently recognizing the impossibility of successfully defending the fees on the basis of the record, Respondents' Brief instead relies on unsupported assertions, legal arguments based on inapposite law, and misplaced appeals for judicial "deference" to the manifestly unjustified

actions of a mere minority of the Board.[3] Despite these efforts, however, the the lack of necessary legal and evidentiary support for the schedule of fees remains apparent – and dispositive – as further detailed below.

II. MANY OF THE ARGUMENTS AND ASSERTIONS IN THE RESPONDENTS' BRIEF ARE NOT SUPPORTED BY EVIDENCE IN THE RECORD OF THIS CASE.

The facts in the record were summarized in the Petitioner's Opening Brief (pp. 4 – 16), and were not disputed in the Respondents' Brief. Since this case was tried on the basis of a stipulated documentary "record" [JA 0035] and a set of jointly-submitted documentary exhibits, there is not much room legitimate disagreement about those facts in the agreed record.

However, the Respondents' Brief strays far beyond those record facts, making many unsupported arguments and assumptions, some of which are noted and corrected below.

A. Argument By Legal Counsel Is NOT Evidence.

The Respondents' Brief relies heavily on argumentative spin as to how the Board is supposed to annually establish and adjust its "schedule of fees" under counsel's version of the Water Code (RB pp. 3-8), and then implies or asserts that that was how the Board actually established the

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[3] References to "the Board" in this context should not be deemed to imply that the challenged actions taken by just two (2) members represented valid and enforceable final action of "the Board." As petitioner has consistently pointed out in this litigation, Water Code Section 183 required that "any final action" of the Board be taken only by a majority of the members of the Board, i.e., at least 3 votes, and that applies to the challenged "schedule of fees."

disputed "schedule of fees" in 2012 – without citation to any evidence in the record to support those assertions or implications. (Cf., *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1378: "An unsupported assertion below does not become a "fact" on appeal simply by repetition.")

The Respondents' Brief largely disregards the evidence actually contained in the record that refuted any pretense that the disputed "fees" complied with the applicable constitutional and statutory requirements. Respondents barely address, and fail to diminish the fatal significance of the evidence submitted by the Board's own staff – clearly demonstrating that the "fees" imposed by the Board for stormwater discharge permits under the would continue to substantially exceed the Board's reasonable or recoverable costs of administering the stormwater regulatory program.

On the flip side, the Respondents' Brief also ignores the glaring absence of evidence in the record necessary to the establishment of lawful "regulatory fees." For example, the Board never provided – and the record does not contain – essential evidence on key points, e.g. (1) there was no evidence as to the Board's reasonable and recoverable costs of the eight separate regulatory programs conducted by the Board and funded by eight separate fees in the schedule of fees; (2) there was no evidence as to the Board's reasonable and recoverable costs even as to the eight regulatory programs cumulatively; and (3) there was no evidence showing that the Board used a "reasonable method" for fairly allocating the (unknown) costs

of the various "waste discharge" regulatory activities included in the schedule of fees.

The Respondents' Brief now tacitly acknowledges the absence of such essential evidence in the record and instead offers a series of unsupported assertions by counsel as to the Board's supposed "policies" in establishing fees and equally-unsupported speculation as tohow the Board supposedly set fee schedules before FY 2011/12 (see, RB pp. 5-8).

B. The Board's Fee Schedules Before FY 2011-12 Are Not Relevant And Do NOT Support The Excessive Storm Water Fees.

Respondent's Brief (at pp. 6-7) congratulates the Board on having been "very accurate" in setting fees that have matched the Board's budgeted expenditures in the past. That may be so, but it is not relevant to the issues on appeal involving the 2011 schedule of fees.

Respondent's Brief asserts that the state-wide decline in construction activity after 2005 resulted in lower Storm Water Permit fee revenues, and detours into irrelevant discussion of the Board's "reserve balance" for the entire WDPF program, funded on the backs of over-charged storm water permit fees (RB 8). However, it does not explain away the fact that the Board Staff still reported to the Board in 2011 that "between FY 2004-2005 and FY

2009-10, the Storm Water Program collected approximately $22 million more in revenue than it incurred in expenditures." (AR, Tab 9, p. 95.)[4]

Pursuant to Section 13260(f)(1), the Board still needed to "compensate" for those accumulated surplus Storm Water fees in the 2011-12 fee schedule. The Board's staff offered a proposal to do just that – the "stormwater rebalancing" suggestion (JA 0236-237). The Board arbitrarily failed to "compensate" for over-collected fees.

C. The Facts In the Record Contradict The Story Now Suggested In Respondents' Brief.

The Board staff produced a report presenting several options for increasing the entire schedule of fees charged to fund the various waste discharge regulatory programs in response to the budget act, and for allocating the fee increases among the eight different classes of fee payers (JA 0232-0238). There were several fatal deficiencies in that Report, and it fails to justify the new schedule of fees.

1. No Evidence Of The Reasonable Costs Of Permitting Activities.

This Court has held that valid regulatory fees must not exceed "the reasonable cost of providing services necessary to regulate the activity for

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[4] In fact, the Board's own documents (including the Table attached to Petitioner's Opening Brief at Appendix 1 (*Revenue and Expenditures by Program* [JA 0220-0221]), show that in every one of the seven (7) fiscal years leading up to September 2011, the Board had collected substantially more revenues than it reported as "expenditures" for the Storm Water program, and Board staff showed the **net surplus** over the seven years since FY 2004-05 as **$23,506,000**. (*Ibid.*)

which the fee is charged." (*California Farm Bureau Fed'n. v. State Water Res. Control Board* (2011) 51 Cal.4th 421, 437 [emph. added].) However, the Board did not provide evidence in the record to demonstrate its purported "reasonable costs" of providing the various permit issuance and administrative services for which the eight separate fees were charged.

To the contrary, the record showed that the fees admittedly had no demonstrated relationship to the "costs" of the Board's regulatory services, either individually for the eight separate fee-funded programs, or cumulatively for the overall "waste discharge requirement" program. (JA 0232-233). Respondents' Brief tries to excuse this fundamental omission by arguing that the fees were set based on annually-fluctuating dictates of the budget act's allocation of resources and expenditures. Even if that had been shown in the record, however, it would not excuse the setting of fees independently of any evidence of actual program costs.[5] (See, e.g., *Estate of Claeyssens v. State of California* (2008) 161 Cal.App.4th 465; *Northwest Energetic Services, supra,* 159 Cal.App.4th at 857-859.)

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[5] Respondents' Brief points to Section 13260(f)(1) as its support for this argument, and disregards the preceding statutory mandate in Section 13260(d)(1)(B), and controlling case law, requiring that regulatory fees must be limited to reasonable and recoverable costs of service. Section 13260(f)(1) does not purport to supersede that requirement but merely provides that the "total revenue collected each year from annual fees shall be set at an amount equal to the revenue levels set forth in the Budget Act for this activity" and requires the Board make adjustments, retrospectively, to the annual fees to keep fee revenues consistent with expenditures.

The Respondents' Brief fails to rebut the even more damning evidence in the record confirming that the huge increases in the challenged 2011-12 fees were a response to changes in the budget act and that the fee increases were due largely to "specific General Fund shifts" in the budget (JA 0233) and not related to any particular evidence of increased costs of regulating permits. As the Board's Staff definitively declared: "None of the increase is attributable to growth in WDPF fee funded programs." (JA 0233.)

Respondent's Brief asserts that "the actual fee that applies to any given discharge within any given program area depends on a host of different factors listed in the Board's fee schedule." However, it provides no evidence demonstrating that those factors include the recoverable costs of the various regulatory activities for which they are imposed (as required by Section 13260(d)(1)(B). Respondent's Brief cites no evidence purporting to show that the various fees resulting from the application of the "factors" in the Board's fee calculus are equal to (and do not exceed) the amount necessary to cover costs incurred in connection with the various regulatory programs.

2. No Evidence Of "Recoverable Costs."

In addition to the constitutional mandate that fees must not exceed the "reasonable" costs of providing services, Water Code § 13260(d)(1)(B) separately further limited the Board's authority to collect fees to just such amounts sufficient to "recover costs incurred" and defined those "recoverable costs" in § 13260(d)(1)(C). The Board, however, provided no

evidence separately identifying or accounting for any such recoverable costs as defined by statute to justify the 2011-12 fee schedule, either as to storm water permit fees or as to the waste discharge program collectively.

Accordingly, neither the Staff Report nor any other evidence in the record demonstrated whether or not the newly budgeted program "expenditures" were in fact limited to the "recoverable costs" of the Board's regulatory programs, as required and defined by Section 13260(d)(1)(C).

3. Budget Targets Are NOT "Costs."

The Respondents' Brief relies on the provision in Section 13260(f)(1), directing the Board to adjust is annual fees to reflect changes in the budget act's allocation of funding and expenditures, but ignores the mandate of Water Code 13260(d), limiting annual fees to recoverable costs incurred. Obviously, budgeted expenditures are not the same as "recoverable costs incurred." And, even if it could be assumed that such budgeted "expenditures" may roughly approximate the Board's reasonable "costs" of conducting its various activities, however, the record evidence still would not justify the fee schedule.

For example, the Board produced a table showing it "Revenues and Expenditures – By Program" for the years following FY 2004-05 (at JA 0220). That table shows that "expenditures" for Storm Water Program had ranged up and down between $13,069,000 and $17,641,000 (in FY 2007-08), and averaged $15,942,000 per year. That evidence of expenditures can be

contrasted with the extraordinary increases proposed in September 2011. The Board, however, provided no evidence correlating its statutory "recoverable costs" to the expenditure levels demanded by the State Budget, or that either reflected the "reasonable costs" of its regulatory activities.

4. No Evidence Justifying The Admittedly Skewed Allocation Of Regulatory Program Expenditures Or Costs.

The Staff Report acknowledged that the Board had previously accumulated $23.5 million surplus of over-collected Storm Water Fees for at least the prior seven (7) years, and that its skewed schedules had "allowed the Board to minimize fee increases during this time period" (JA 0236) because of the compelled subsidies extracted from the Storm Water Permit fee payers. (JA 0232-238.) This is contrary to the Court's decisions in *Farm Bureau, supra,* and *Sinclair Paint, supra,* which require that regulatory fees be set in a way that fairly and reasonably apportions costs among classes of fee payers. (See also, *City of Santa Barbara v. County of Santa Barbara* (1979) 94 Cal.App.3d 277, 287, noting "a consistent state policy against subsidization of one group of taxpayers by another.")

The Board argues that the Budget Act inflicted a substantial "fund shift" on the Board in FY 2011-12, resulting in a "shortfall" between the Legislature's projected expenditures for the Board's regulatory activities and the existing levels of fees. However, the Board offers no authority for the

notion that even such a budgetary "fund shift" would excuse or "justify" excessive or disproportionate "fees."

To the contrary, in the wake of Proposition 13, courts have recognized that governmental attempts to use "fees" to replace a shortfall of General Fund revenues is a hallmark of a "tax" being camouflaged as a "fee." (*Northwest Energetic Services, supra,* 159 Cal.App.4th 841, 857; *Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022, 1038.) Thus, the Board's reliance on Budget Act targets and "General Fund shifts" as justification for its increases in the storm water fees further demonstrates that these "fees" are set are rates necessary to replace general fund tax revenue shortfalls, i.e. Prop 13 taxes. (*Northwest Energetic Services v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 861; *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132.)

Although the Staff Report included a "rebalancing option" the Board failed to provide for "compensation" by way of adjustments to the proposed new schedule of fees, as pointed out by the many letters in opposition to the proposed schedule of fees. (E.g., JA 0276-77; 0285, 0295; 0297; 0305.) Even the "re-balancing" option fell considerably short of providing compensation or credit for the full $23 million surplus. (E.g., 0285.)

5. Arbitrary Action On The Proposed Fee Schedule.

Respondent's Brief contends that one of the "reasons" for the Board not compensating for the over-collection of storm water fees was based on

staff's speculation that "those who contributed to the surplus were *probably* not the same dischargers who would benefit" by a "compensatory" adjustment to the storm water fees in 2011-12 (JA 0238, 0332). Even if that had been a legally-relevant concern (cf. Section I (B), above) there was no evidence in the record to support such speculation.

To the contrary, many of the 33 or more letters of opposition to the proposed fee schedule came from cities, public agencies and public service districts, who would be just the type of dischargers who *could* have benefitted from the rebalancing option. (AR at Tab 18, 33 separate letters of objection to the new schedule of fees.) The letter from the California Stormwater Quality Association [whose members represent storm water services to 22 million Californians] (at JA 0276-277) was especially poignant in explaining why this should not have been a relevant concern to the Board.

There is, in any event, no legal requirement that the Board make a compensatory adjustment only if the exact same dischargers would benefit (cf., Section 13260(f)(1).) To the contrary, California law requires such a periodic adjustment to provide credits for accumulated surplus fee collections, regardless of who may "benefit." (See, e.g., *County of Orange v Barratt American* (2007) 150 Cal.App.4th 420 [requiring the County to provide credit for over-collected building permit fees for the benefit of unknown future permit applicants].)

Government agencies are not allowed to accumulate surplus fee collections or to use them to subsidize general reserves or other classes of fee payers. "If the fees or service charges create revenues in excess of actual cost, those revenues shall be used to reduce the fee or service charge creating the excess." (Gov. Code § 66016, quoted in *Barratt American v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 703, affirming petitioner's right to challenge accumulated "excess" plan check and inspection fees.) Water Code § 13260(f)(1) similarly requires the Board to avoid accumulating surplus fee revenue by annually determining if there have been over-collections in prior years and providing a compensatory adjustment to the fees going forward.

Respondents note that Section 13260 requires the Board to set its schedule of fees based on projections, and to balance the expenditures for regulatory programs set forth in the Budget Act against projected fee revenues in the coming year, as if that were an excuse for the arbitrary actions challenged in this case. Even if that is not an easy task, it is what the Legislature has required. Moreover, the Legislature also recognized the probability that from time to time, shortfalls or surpluses may accumulate as a result of the unintended under collection or over collection of fee revenues. That is why Section 13260(f)(1) requires the Board each year to determine whether "the revenue collected during the preceding year was greater than,

or less than, the revenue levels set forth in the Budget Act" and to further adjust the annual fees "to compensate for the over and under collections."

The Board's staff properly called out such "over collections" and the accumulated $23 million surplus of Storm Water Permit Fee revenues in 2011, and included a "re-balancing" as a "fix." The eventual rejection of the "rebalancing" option, and the purported adoption of the new schedule of fees, with no compensatory adjustment for the $23 million surplus Storm Water Permit fee accumulation, and with no evidence demonstrating any reasonable relationship between the amount of the new Storm Water Fees and the reasonable (or statutorily recoverable) costs of the regulatory programs for which the fees are imposed, was arbitrary and substantively invalid.

D. The Evidence In The Record Shows That The Board Actually Imposes Eight (8) Separate Fees For Eight (8) Separate Regulatory Programs – NOT "One Big Fee" As Now Argued In Respondent's Brief.

The Board's response to the constitutional and statutory challenges to the 2011 schedule of fees in this action is largely based on the new, litigation-driven, fiction that Section 13260 only authorizes – and that the Board only imposes – one fee (RB, p. 14.)

Not only are such arguments unsupported by law, they are also contrary to the record evidence (see Section I (C), above.). The record evidence shows that the Board has actually created at least eight (8) distinct programs and separately budgets and accounts for each of those regulatory

programs within the omnibus "Waste Discharge Permit Fund" ("WDPF"), and sets separate fees for each of those distinct Programs. Not only does the Water Code require the Board to establish a schedule of multiple "fees" (plural) that are based on the reasonably estimated costs of the separate regulatory activities and programs run by the Board, and to separately account for its Storm Water fee in WDPF, the Board's own evidence shows that is has done precisely that. This reality is clearly revealed in the record, and summarized in petitioner's briefing in the trial court (see, e.g., Petitioner's Opening Brief at JA 0050-56; Petitioner's Reply Brief, at JA 0528-0550, and supporting evidence in the record; see, e.g., SWRCB "*Table of Revenues and Expenditures by Program*" in the Agreed Record ("AR") at AR Tab 9, pp. 0079-80.)

III. LEGAL CONTEXT

The Respondents' Brief gives an upside-down portrayal of the relevant constitutional and statutory constraints on the subject fees, emphasizing the Board's claims that it "complied" with the letter of the Water Code in approving the schedule of fees, but giving little consideration to the paramount constitutional requirements for valid regulatory fees., which is the primary focus of Respondents' Brief, that alone would not be sufficient to create valid "regulatory fees."

A state agency must act within the specific limitations on its authority as specified by the Legislature. (*WaterKeepers Northern California v. State*

Water Resources Control Bd. (2002) 102 Cal.App.4th 1448, 1461) Even if the Board could somehow show that its adoption of the schedule of fees appeared to meet the specific statutory criteria or limitations set by the Water Code, the Board must also demonstrate that such fees comply with fundamental constitutional standards in order to be valid as purported regulatory fees; i.e., "the government should prove" the requisite reasonable relationship between costs of the particular regulatory activity for which the fee is charged and that it used a fair and reasonable method for allocating those costs among the appropriate classes of regulated fee-payers. (*Sinclair Paint, supra*, 15 Cal.4th at 878.

Merely striving to demonstrate compliance with the statutory scheme authorizing the establishment of regulatory fees is necessary – but is not sufficient if the statutory scheme or agency practices fail to satisfy overriding constitutional requirements. (See, e.g., *Morning Star Co. v. Board of Equalization* (2011) 201 Cal.App.4th 737, 750-753 [Board's annual schedule of fees for various hazardous waste control activities adopted under Health & Safety Code § 25205.6 were held not to be valid regulatory fees; *Estate of Claeyssens v. State of California* (2008) 161 Cal.App.4th 465 [probate court "fee" were held to be an invalid tax; *Northwest Energetic Services v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 861 [fees charged by state agency for LLC registrations in compliance with statutes were nevertheless invalid because the Legislature's process for setting regulatory

fees was not consistent with constitutional requirements limiting regulatory fees].)

The Respondents' Brief describes some of the statutes governing fees that may be charged by the Board in connection with waste discharge reports ("permits") and strives to claim that the Board complied with the Water Code (RB, pp. 3- 5). However, the Board appears to think that is the end of the story and gives minimal consideration to the higher constitutional bar required in order to establish valid regulatory fees. (E.g., *California Farm Bureau Fed'n. v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 437-38;; *Sinclair Paint Co. v. Board of Equalization* (1997) 15 Cal.4th 866, 878 [valid regulatory fees "do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged, and which are not levied for unrelated revenue purposes."]; *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, 659-660.)

A. Constitutional Criteria For Valid "Regulatory Fees"

"A fee may be charged by a government entity so long as it does not exceed the reasonable cost of providing services necessary to regulate the activity for which the fee is charged." (*Farm Bureau, supra*, 51 Cal.4th at 437; *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 375 [valid fees "do not exceed the reasonable costs of providing services necessary to the activity for which the fee is charged ...."]; *California Ass'n of Professional Scientists v. Dept. of Fish & Game* (2000) 79 Cal.App.4th 935, 945 [the government

agency imposing regulatory fees must establish "(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"].)

Respondents' Brief omits these requirements from its overview of the relevant 'legal background' presumably in recognition of the fact that the stipulated record demonstrates just the opposite, i.e., that the Board presented no evidence of the "costs" of the various regulatory activities "for which the [various different] fees are charged, either individually as to the eight separate programs or as to all of the waste discharge regulatory programs combined.

Even more clearly, the record positively demonstrated that the Board had not used a reasonable method to fairly allocate the costs of the various waste discharge regulatory programs among the different classes of fee payers in any "relationship" to their burdens on the regulatory activity – quite the contrary: the Board's own evidence showed that the Board had misallocated the costs of its activities such that those paying for storm water discharge permits had been over-charged by $22 million in recent years, and were in fact subsidizing other classes of waste dischargers. (JA 0235-237.)

Even if the Board could somehow make it appear that it had superficially complied with the Water Code in establishing a "schedule of

fees" it would be irrelevant, because of the failure to satisfy the applicable constitutional standards governing regulatory fees in general.

B. Statutory Criteria for Valid Waste Discharge Fees

California's statutory scheme applicable to water quality, including "waste discharge" regulation, stems from the Porter-Cologne Water Quality Control Act (Water Code §§ 13000 et seq.), which was enacted in 1969, three years before the federal Clean Water Act was adopted. (See, e.g., *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619–620.) The Porter-Cologne Act established the respondent State Water Resources Control Board "to formulate statewide water quality policy," and nine regional boards to administer the state program in their respective regions. (*Building Industry Ass'n of San Diego County v. State Water Resources Control Board* (2004) 124 Cal.App.4th 866, 875.)

> The actual administration of the Porter-Cologne Act rests on the power of the Regional Boards to prescribe waste discharge requirements for all persons discharging waste into inland surface waters, enclosed bays and estuaries within their jurisdiction. (§ 13263.) ... All persons subject to waste discharge requirements must file discharge reports with the Regional Boards containing prescribed information. (Wat. Code § 13260; see also Wat. Code § 13267; Cal. Code Regs., tit. 23, § 2200 et seq.) ....
>
> After enactment of the [federal] Clean Water Act, the Legislature "amended the Porter-Cologne Act to require the State Board and regional boards to issue discharge permits that ensure compliance with the Clean Water Act. (See § 13370 et seq.). (*WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1452.)

As further explained in *California Assn. of Sanitation Agencies v. State Water Resources Control Bd* (2012) 208 Cal.App.4th 1438, 1444-45:

> Shortly after the Clean Water Act was adopted, the Porter-Cologne Act was amended to add the necessary requirements so that California could obtain EPA approval to issue NPDES (National Pollutant Discharge Elimination System) permits. ... Accordingly, "the waste discharge requirements issued by the regional water boards ordinarily also serve as NPDES permits under federal law. (Wat. Code, § 13374.) .... In prescribing waste discharge requirements and in establishing water quality objectives, the regional boards are required to consider a number of factors, including "[p]ast, present, and probable future beneficial uses of water" and "[e]conomic considerations" (§ 13241, subds. (a) & (d); see § 13263(a).)

Section 13260(a) of the Water Code describes the persons who are required to file a "waste discharge report" ("WDR") which is the functional equivalent of an application for a permit) with the appropriate regional board, and subd.(c) requires a similar WDR relative to any material change in an existing discharge. Water Code Section 13260, subd.(d)(1)(A), in turn requires that persons filing a WDR "shall submit an annual fee according to a fee schedule established by the state board."

Section 13260, subd. (d), prescribes the substantive requirements for the Board's fee schedule: Section 13260(d)(1)(B) mandates ("shall") that "the total amount of annual fees collected 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." Section 13260(d)(1)(C) describes

the types of "recoverable costs" that may be included in the Board's "cost-recovery" fees authorized under Section 13260(d).

Section 13260, subd. (f)(1), prescribes the procedure for the Board's adoption annually of "a schedule of fees" [plural] authorized under subdivision (d)." It calls for the Board to react to the annual budget act's allocation of resources and expenditures in setting "total fee revenues" and also requires the Board to adjust the annual fees to reflect over or under collections of fee revenues in prior years.

The Board failed to do so.

IV. STANDARD OF REVIEW

The Respondent's Brief now appears to agree that the appropriate standard of judicial review for the questions of law that dominate this appeal is *de novo*, as explained in *Farm Bureau, supra,* 51 Cal.4th at 436-437.

The Respondent's Brief nevertheless improperly tries to embellish on that standard of review, by pleading for "deference" to the purported "quasi-legislative determination" by the Board. Respondents make no effort to reconcile such "deference" with independent *de novo* judicial review, as the two are inherently irreconcilable. In any event, the "Board" itself did not take any valid action that would warrant any "deference," and the Respondents' Brief cites no authority for the proposition that action purportedly taken by a *minority* of a Board is somehow entitled to judicial deference of any type.

In any event, the legal question of whether the schedule of fees complied with constitutional and statutory mandates is not be the type of issue that may appeal for any judicial deference. Whether a state agency has complied with state law raises questions of law that the Court decides *de novo*. (*See Kelsoe v. Calif. State Water Resources Control Bd.* (2007) 153 Cal.App.4th 569, 578 ["We review *de novo* a question of statutory interpretation."].) The Court does "not accord the Board's interpretation controlling weight" and the Board's "interpretation is subject to [the Court's] independent review." (*Id.*)

Purported "fees" are not "presumed to be valid," particularly following the voter approval of Proposition 26 in November 2010, amending Cal.Const. XIIIA and C. Section 3 of article XIIIA now provides, at subd. (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."[6] (See, *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, 1326.)

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6 This constitutional requirement echoes *Sinclair Paint, supra*, 15 Cal.4th at 878.

Even if the "arbitrary and capricious" standard applied to these fees, the Board still failed to carry its burden. (See, *Farm Bureau, supra.*) "A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rationale connection between those factors, the choice made, and the purposes of the enabling statute." (*American Coatings Ass'n v. South Coast Air Quality Dist.* (2012) 54 Cal.4th 446, 460.) In marked contrast to the extensive evidentiary showing made by the Air District there, the record here affirmatively shows the opposite, i.e. arbitrary action following incomplete consideration of the relevant factors.

V. REBUTTAL TO WATER BOARD'S ARGUMENTS

A. The "Schedule of Fees" Did NOT Comply With the Water Code

The new schedule of fees failed to comply with Water Code Section 13260 in numerous respects, as presented in the Petitioner's Opening Brief.

1. Section 13260(d)(1)(B) requires the Board's fees to equal, but not exceed, the recoverable costs of the Board's regulatory programs as defined in Section 13260(d)(1)(C).

The respondent Board failed to provide any *evidence* of the statutorily recoverable costs of its Storm Water program, or any *evidence* that the new storm water fee is *reasonably related* to those statutorily recoverable costs. The Board's references to the "expenditure levels" authorized by the state Budget Act are not equivalent to the statutorily recoverable costs, nor to common law "reasonable costs" of the Board's regulatory programs.

Since the Board failed to provide any evidence of its statutory "costs" or its actual "costs" for its reasonable regulatory services, it could not and did not point to any evidence that its Storm Water fee is "equal to" those (unknown) costs of the Storm Water program. By contrast, over the previous seven fiscal years, these reported "expenditures" for the Storm Water Program never exceeded $18,200,000. (AR 79-80.) The Board's staff report showed that the new Storm Water fees would generate more than $26,600,000, far in excess of those historic actual costs. (JA 0232-233.)

2. The Board failed to comply with Section 13260(f)(1).

The Board's own materials demonstrated that it failed to comply with Section 13260, because it admittedly collected more than $22,000,000 in *excessive storm water fees* over the previous seven years. (*See* Board's Staff Report at JA 236 ["Between FY 2004-05 and FY 2009-10, the Storm Water Program collected approximately $22 million more in revenue than it incurred in expenditures."].) Section 13260(f)(1) requires the Board to annually adjust its fees "to compensate for the over-collection of excess fees" in previous years.

Although the Board apparently made such a compensatory fee adjustment in 2005 (see, e.g., Joint Exhibits, submitted to the trial court, at p. 000027), the Board rejected its own staff's "Rebalancing Option" in 2011, and arbitrarily refused to make any "compensatory" fee adjustment for the

seven years of excessive storm water fees, on the flimsiest of pretexts, mere speculation as to "who" might "benefit" from such an adjustment..

Even if the Board might have been excused for over-collecting excessive fees in one or two years, after *seven years* of excessive Storm Water fee collections, the Board could be held to account and required to "rebalance" these excesses. (See, e.g., Gov. Code § 66016; *Barratt American v. City of Rancho Cucamonga, supra,* 37 Cal.4th at 703; also, *County of Orange v. Barratt American, Inc.* (2007) 150 Cal.App.4th 420.)

3. The Board's Claim That It Only Imposes "One Big Fee" Under Water Code Section 13260 Is Contrary to Fact and Law.

In response to this action challenging the 2011 fee schedule, the Board has now contrived an argument that "Section 13260 only imposes one fee" and therefore the Board should be deemed to collect just "one big fee" – despite the evidence showing, without dispute, that the Board repeatedly adopts a "schedule of fees" establishing eight (8) separate program fees, and even though it maintains and accounts for the various fees it collects under at least eight separate programs.

a. No Legal Authority Supports the Board's "One Fee" Argument.

The Board cites no applicable legal authority to support its argument that it should be allowed to continue to collect fees for Storm Water Permits that are far higher than reasonably necessary to cover the Board's

expenditures for its Storm Water regulatory activity, and further allows the Board to transfer or apply the excess Storm Water fees to subsidize other Board regulatory activities,

To the contrary, the *Collier v. City & County of San Francisco* (2007) 151 Cal.App.4th 1326 case cited in Respondent's Brief for this proposition actually refutes the Board's contentions. *Collier* involved the city's practice of charging a single fee for issuance of building permits, and sharing the proceeds of that fee among the three city departments that provided the building inspection and regulation services for which the fee was charged. The Court found no fault with that practice, as the amount of the fee was directly and reasonably related to the reasonable costs of the regulatory services provided by the three departments.

This case, however, is the flipside of *Collier*. In *Collier*, there really was "only one fee" charged and the amount of the fee was based on services provide in one regulatory program (even though the program was carried out by staff in three departments). Here, by contrast, there are at least eight distinct fees, and the amount of each fee is ostensibly based on the Board's budgeted "expenditures" (not necessarily the same as its reasonable 'costs') for each distinct regulatory activity.

The reasoning which led to approval of the single fee in *Collier* undercuts the Board's schedule of fees in this case. The Board admittedly over-charges for Storm Water Permits, consistently in excess of that

Program's costs or expenditures, and uses the surplus proceeds elsewhere including the subsidization of distinct regulatory activities having no relationship whatsoever to needs caused by Storm Water permittees.

Similarly, the Respondent's Brief misinterprets the holding of this Court in *Farm Bureau, supra.* The Court there rejected the Board's argument that it could require one small group of permit applicants to bear the entire costs of its entire water rights permitting activity. The Court agreed with the Court of Appeal's conclusion that "there is nothing in the "total amount' or 'total revenue' provisions [Water Code 1525] that requires the SWRCB to set the fees so as to collect anything more than the administrative 'costs incurred' in carrying out the permit functions authorized [in the Water Code]." (51 Cal.4th at 440.)

b. The Board's "One Fee" Argument Is Contrary to the Evidence in the Record.

Some of the evidence contradicting the Board's new fiction of the "one fee" has been described in Section I (C), above. The record is full of additional evidence clearly refuting the contention that the Board only operates "one regulatory program" and charges only "one big fee."

For example, the Board staff reported (May 19, 2005 Staff Report, at JE 000027) that the WDPF had accumulated $5.2 million in "surplus revenue" by 2005, and that "most of this surplus is attributable to over collection of storm water ($4.3 million) and land disposal ($1.1 million)

fees." (I.e., separate and distinct fees.) Staff recommended that the Board "refund approximately $3 million to storm water and land disposal dischargers as a one-time credit in fiscal year 2005-06" (*id.;* see also Board Resolution No 2005-0039 at JE 00040.). This resembled the staff recommendation in 2011 that the Board "rebalance" the schedule of fees to reflect the $22 million of surplus Storm Water Permit fees it had collected .

Similarly, Board recognized the distinct and separate identity of its program when it reported in 2008 that the WDPF was "running a structural deficit" and recommended substantial increases in seven (7) of the separate eight (8) fees imposed by the Board under Section 13260. Again, as shown by that Staff report for October 7, 2008, Board meeting (at JE 000091) the Board maintains separate accounts and budget for each of its various fees.

Again, in 2009, the Board staff reported that the burdens of its NPDES fees, a distinct fee imposed under Section 13260, had shifted because of changes in the schedule of fees made in FY 2008-09, and recommended that the Board review "this large shift in fiscal burden from one fee payer group to another." (JE 000125.) At the same time, the staff recommended that the Board should adopt a new flat fee to reimburse the costs of implementing and administering a new General Permit of landscape irrigation uses of recycled water in compliance with new legislation (JE 000128). The staff report recommended a new, separate, fee "in the range of $2,000 to $4,000 should provide sufficient revenue to cover ongoing permit costs." (*Id.*)

Thus, once again the Board recognized that its various separate fees, the proceeds of all of which go into the WDPF, should nevertheless be established and allocated to fee payers on a basis that is reasonably related (or limited) to the amount necessary to cover the costs of each distinct regulatory program or activity.

In the year leading up to the 2011 schedule of fees challenged in this action, the Board Staff Report for the Board's October 19, 2010 meeting (at JE 000158-162), explaining that the recent "shortfall in [fee] revenue" going into the WDPF was "a result of under-collection of revenue in the Surface Water Ambient Monitoring Program (SWAMP) in FY 2009-2010 and a substantial drop in enrollment under the Board's recently adopted storm water construction permit." (JE 000158.) The Staff Report includes "Table 1" (at JE 000159) which separately lists eight (8) WDPF Programs, with separately-budgeted amounts for each Program, and "shows the [Board's WDPF] budget changes from FY 2009-10 to FY 2010-11 for each program." The same Staff Report includes "Table 2" (JE 000160) which again breaks down the gross WDPF budget into eight separate Program budgets, showing "project Program fee increases" separately for each of the eight Programs. For example, the distinct fees for the Board' "Stormwater Program" would increase 12.1%. The Staff Report further explains, with particular reference to the Storm Water Permit fees, that in view of the anticipated "sharp decline" in the number of Storm Water permit applications in the coming year, the

fees charged for each Storm Water permit would need to be increased in order to cover the budgeted expenditures for the distinct Storm Water program: "The Storm Water program needs to generate an additional $2.6 million in revenue to meet the FY 2010-11 Budget." (JE 000161.)

The Board has never (prior to this litigation) taken the position that if the Budget Act authorizes expenditures of, say, $100 million in any particular fiscal year, the Board should establish "fees" such that each permittee would pay a simple pro rata share of that amount ($100 M / number of permittees) without regard to the reasonable costs of the particular regulatory activity for which the permit is required. Nor has the Board – prior to this litigation – taken the position that it could lawfully adopt a schedule of fees that would impose $99 million of its $100 million gross expenditures on just those who pay Storm Water Permit fees, regardless of the actual costs of running the Storm Water Program, while subsidizing all other regulated parties. While the Respondent's Brief argues that the Board is entitled to some "flexibility" in setting its fees, it is not entitled to knowingly perpetuate a skewed schedule of fees resulting in at least seven years of over-collections.[7]

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[7] See Judge Karnow's critical questioning of counsel on this point during the hearing, in the *Reporter's Transcript of Proceedings* of September 20, 2012:
Mr. Lanferman (Counsel for Petitioner CBIA): Conceivably, the Board's approach would allow them to adopt seven fees that were - - that generated $1 of revenue each, and the rest of the Board's $100 million activity budget comes out of the storm water program and the excuse would be, "well, the storm water people can pay 99.9 percent of the costs, because we're dumping it all into one big waste discharge fee program." So having chosen to adopt eight separate fees, to fund

The Supreme Court explicitly rejected such misallocation of fees in the *Farm Bureau* case. Such an approach – the approach now advocated in Respondent's Brief – would also make a nullity of the Legislature's mandate that the Board periodically "compensate" for "over-collection or under-collection of fees."

The Respondents' Brief provides no authority for its argument that so long as the total sum of all of the Board's separate and distinct fees charged to various groups of fee payers does not exceed the Board's budgeted "expenditures" (not the same as "costs") for all of the Board's programs under the umbrella of "waste discharge regulation" then it should be of no judicial concern whether the fees for various specific types of permits are deliberately skewed, disproportionate to burdens, and shifted to subsidize different activities. To the contrary, this approach has been explicitly rejected. (*Capistrano Taxpayers Ass'n. v. City of San Juan Capistrano*

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eight separate activities, and significantly those fees are imposed on and paid by eight separate groups of fee payers, the Board cannot turn around and now try to excuse the imbalance and the lack of proportionality by saying, "oh, you need to look at the bigger picture." ....

The Court (To Mr. Asperger, Counsel for Respondent BOARD): Well, is it possible for you to charge $1 for seven programs and charge $400,000 per se, for a person involved in a storm, and what I've called the ESWP, and just fund yourself that way?

Mr. Asperger: Well, it would depend on the facts, your Honor. ...

The Court (To Mr. Asperger): But, I mean, it sounds like what you are saying is that if, in fact, the $400,000 is what it cost to provide the storm water discharge, the storm water program, then that's reasonable, and it's your obligation to show that correlation; but otherwise, it would not be reasonable.

That's exactly the Petitioner's position in this case that's exactly what they say you haven't shown and you've got a surplus of about $23 million that proves it.

(2015) 235 Cal.App.4th at 1506-1511 [rejecting the claim that fees could be deemed valid, so long as the total of all water fees collected at various rates from different groups of fee payers did not exceed total program costs].)

B. The Fees Violate Proposition 13 And Should Be Deemed To Be Unconstitutional Taxes Rather Than Regulatory Fees.

The Respondents' Brief (RB 17) apparently acknowledges that its fees must meet the requirements of *Farm Bureau* and *Sinclair Paint* to be considered as valid "regulatory fees" (rather than as taxes) under the standards of art. XIII A. This record, however, fails the test the Court re-emphasized in *Farm Bureau, supra,* (at p. 441) involving another, similar, challenge to the Board's "regulatory fees." "The question revolves around the scope and cost of the Division's regulatory activity and the relationship between those costs and the fees imposed." (*Id.*, at p. 441.)

Respondents list a litany of inapt older cases in which "fees" of various types were deemed valid. (RB 24.) Many of Respondents' cases, however, such as *Brydon v. East Bay M.U.D.* (1994) 24 Cal.App.4th 178, rest on outdated legal analyses that "simply have no application to post-Proposition 218 cases." (*Capistrano, supra*, 235 Cal.App.4th at 1512, expressly declining to follow *Brydon*, and citing *Silicon Valley Taxpayers v. Santa Clara County O.S. Authority* (2008) 44 Cal.4th 431, 445.) "[I]t seems safe to say that *Brydon* itself was part of the general case law which the

enactors of Proposition 218 wanted replaced with stricter controls on local government discretion." (235 Cal.App.4th at 1513.)[8]

Where, as here, the amount of the purported "fee" is shown to be unrelated to the actual costs of the regulatory activity for which it is charged, it may properly deemed to be a "tax" and invalidated. (*Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022, 1038; *Northwest Energetic Services v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 861.)

C. Proposition 26 Is Applicable to the Schedule of Fees Adopted in September 2012

The Board erroneously contends that "Proposition 26 does not apply" to this case (RB 17), basing that contention on the unfounded assumption that the "burden-of-proof" shifting provision of Proposition 26 (art XIII A, § 3, subd.(d)) applies only to "a change in state statute." The Board, however, misreads and unduly narrows the Proposition, as illustrated in *Schmeer, supra*, 213 Cal.App.4th at 1322-24. The phrase relied upon by the Board ("change in state statute") appears only in subdivision (a) of Section 3 of amended Article XIII A. By contrast, the part of Proposition 26 shifting the burden of proof to the State (Section 3, subd. (d)) applies broadly to any "levy, charge, or other exaction" challenged as being a disguised tax. See

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[8] Some of these older cases cited by the Board are also distinguishable on the basis that, unlike this case, the litigants had not challenged "the reasonableness" of the agency's costs used as the basis for charging fees. E.g., *San Diego Gas & Electric v. San Diego County APCD* (1988) 203 Cal. App.3d 1132, 1146.

also, the "findings and declaration of purpose" for Proposition 26 (quoted in *Schmeer*, at 213 Cal.App.4th 1323: "(f) In order to ensure the effectiveness of these constitutional limitations, this measure also defines a 'tax' for state and local purposes so that neither the Legislature nor local governments can circumvent these restrictions on increasing taxes by simply defining new or expanded taxes as 'fees.'"

"Proposition 26 fundamentally changes [how] an increasingly large percentage of state and local government regulatory programs are financed." 18 HASTINGS WEST-NORTHWEST JOURNAL OF ENVIRONMENTAL LAW & POLICY, *supra*, at 40 (quoting Richard M. Frank). (Winter 2012) 39, 44.) As explained in Petitioner's Opening Brief (pp. 26-27) a State agency cannot unilaterally exempt its purported "fees" from the new stricter burdens of proof simply by asserting that they are labeled as fees rather than taxes. (Cf., *Sinclair Paint, supra*, noting that the distinction between a fee and a tsx does not depend on the name attached by the agency.)

The Board begs the question by simply asserting that its fees are intended to be limited to "reasonable regulatory costs." However, it bears the burden of proof on that point, before it can claim any exemption from art. XIII A § 3 as amended by Proposition 26. (*Southern California Edison Co. v. Public Utilities Com.* (2014) 227 Cal.App.4th 172, 197; *Schmeer, supra*, 213 Cal.App.4th at 1322; see also Cal. Const. art. XIII A, § 3 subd. (d); art. XIII C, § 1, subd. (e); art. XIII D, § 6, subd. (b)(5).)

D. The Fee Schedule Was Not Approved By "A Majority Of All Members Of The Board" As Required By Water Code Section 183.

Although the case was litigated below on the question of whether or not the Board had complied with Water Code Section 183 which states that "any final action of the board shall be taken by a majority of all members of the board," following the first appellate argument in this case the majority of the Court of Appeal latched onto Section 181 as a basis for avoiding the otherwise unavoidable conclusion that the 2-member vote was invalid.

Significantly, however, the Board itself never invoked Water Code Section 181 before that time, in any of its previous briefing to the trial court or during the initial round of briefing in the Court of Appeal. If Water Code Section 181 were intended to authorize just two members of the Board to take "final action" on behalf of the Board, one might have expected the Board to raise that argument long before the second appellate argument.

To the contrary, the Board itself has recognized that Section 183 governs its votes on matters similar to this, and requires at least three (3) affirmative votes by Board members in order to take valid action. (See, *Marina County Water District v. State Water Resources Control Bd.* (1984) 163 Cal.App.3d 132, 136 [following challenge to purported Board action based on Section 183, the Board rescinded its prior approval and took new action supported by at least 3 votes].)

This statutory requirement that the Board take final action only by way of a vote by a majority of the Board's total membership is fully consistent with many similar provisions of California law applicable to public agencies, and indeed, inherent in the principles of representative democracy, as explained in *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 345-346. The Court also explained California's requirement that public agencies act by a majority of the full membership of the governing entity:

"California's statutory law provides additional support for this reading. The firmly established common law rule is "that legislative action is only valid if it has been approved by a majority of the members elected." (2 Martinez, Local Government Law (2008) *Processes of Governance*, § 11:9, p. 11-55.) This rule finds specific expression in the Government Code provisions relating to the boards of supervisors of general law counties. Under Government Code section 25005, "[n]o act of the board shall be valid or binding *unless a majority of all the members concur therein.*" (Italics added.) In addition, under the Ralph M. Brown Act, Government Code section 54950 et seq., " 'action taken' means a collective decision made by a *majority* of the members of a legislative body … ." (Gov. Code, § 54952.6, italics added.) The Legislature has therefore determined that only a majority of a county board of supervisors has the power to pass valid or binding legislation."

County of Sonoma also pointed out that California's rule requiring "a majority of the members of a board" is deliberately different than the "majority of a quorum" rule that had previously been urged by the Board, before the Court of Appeal discovered Water Code Section 181 and held it to be the controlling statute as to the Board's voting.

The dissenting opinion is more consistent with the normal rules of statutory interpretation, and properly held Sectioni 183 to be applicable.

VI. CONCLUSION

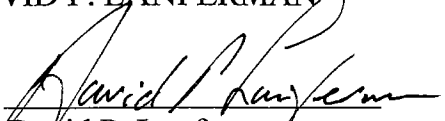
For each of the foregoing reasons, the decision of the Court of Appeal should be reversed.

The schedule of fees was not properly adopted by the Board, was not properly justified by evidence in the record complying with constitutional or statutory requirements, and should be deemed to be invalid. The Board should be mandated to set aside the fee schedule and to provide appropriate and equitable relief, consistent with California law as to accumulated surplus fee collections.

Dated: December 21, 2015

Respectfully submitted,

RUTAN & TUCKER, LLP
DAVID P. LANFERMAN

By: 
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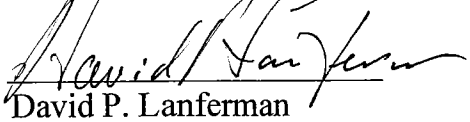
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed Petitioner's Reply Brief is produced using 13-point Roman type including footnotes and contains approximately 10,503 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 21, 2015

RUTAN & TUCKER, LLP
DAVID P. LANFERMAN

By: 
David P. Lanferman
Attorneys for Petitioner
California Building
Industry Association

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

I am employed by the law office of Rutan & Tucker, LLP in the County of Santa Clara, State of California. I am over the age of 18 and not a party to the within action. My business address is Five Palo Alto Square, 3000 El Camino Real, Suite 200, Palo Alto, CA 94306-9814.

On December 21, 2015, I served on the interested parties in said action the within:

PETITIONER'S REPLY BRIEF

as stated below:

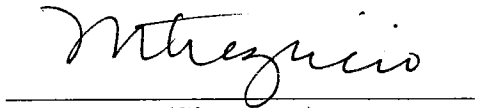
☒ (BY FEDEX) by depositing in a box or other facility regularly maintained by FedEx, an express service carrier, or delivering to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed as shown on the attached mailing list, with fees for overnight delivery provided for or paid.

I certify that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on December 21, 2015, at Palo Alto, California.

I declare under penalty of perjury that the foregoing is true and correct.

Maryknol Respicio
(Type or print name)


(Signature)

SERVICE LIST

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Hon. Curtis E.A. Karnow San Francisco County Superior Court 400 McAllister St. San Francisco, CA 94102	Trial Court Case No. CGC-11-516510
Court of Appeal of the State of California First Appellate District, Division Two 350 McAllister St. San Francisco, CA 94102	Appellate Court Case No. A137680