

**FILED**  
Superior Court of California  
County of Los Angeles

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Sherri R. Carter, Executive Officer/Clerk  
By Stephanie Chung Deputy

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES**

ADAM HOFFMAN, and SAMUEL JASON,  
Individually and on Behalf of All Others  
Similarly Situated,

Plaintiff,

v.

CITY OF LOS ANGELES,

Defendants.

LASC Case No: BC672326

Assigned for all purposes to  
Hon. Daniel J. Buckley, SSC-1

**STATEMENT OF DECISION**

Plaintiffs ADAM HOFFMAN and SAMUEL JASON, individually and on behalf of those similarly situated (“Plaintiffs”), filed this lawsuit against Defendant CITY OF LOS ANGELES (“Defendant” or the “City”) alleging the City overcharged residential sewer service customers. The Court held a four-day bench trial to determine two issues: <sup>1</sup>

1. Whether the City’s annual Dry Winter Compensation Factor (“DWCF”) determination was arbitrary, capricious or entirely lacking in any evidentiary support, and
2. whether the City of Los Angeles (“City”) violated the procedural requirements of Article 13 D, § 6(a)(1)-(2).

<sup>1</sup> The parties briefed the issue as to whether Plaintiffs were entitled to a jury trial for the first phase of trial, but in light of difficulties posed by the COVID-19 pandemic, Plaintiffs agreed to waive jury for the first phase of trial.

1 **I. BACKGROUND AND KEY FACTS**

2 **A. Prop. 218 Limits Local Governments' Ability to Increase Fees and Charges**

3  
4 Before Prop. 218 was passed, state and local governments were traditionally afforded wide  
5 latitude in enacting fees, assessments, and charges. *See Silicon Valley Taxpayers' Assn., Inc. v.*  
6 *Santa Clara County Open Space Auth.* (2008) 44 Cal.4th 431, 448. That changed with the passage  
7 of Prop. 218, also referred to as the "Right to Vote on Taxes Act," which was approved by  
8 California voters in 1996. The voters passed Prop. 218 in order to restrict the ability of state and  
9 local governments to impose taxes and fees. *See Plantier v. Ramona Municipal Water Dist.*  
10 (2019) 7 Cal.5th 372, 380-81. "Proposition 218 specifically states that '[t]he provisions of this  
11 act shall be liberally construed to effectuate its purposes of limiting local government revenue and  
12 enhancing taxpayer consent.'" *Silicon Valley*, 44 Cal.4th at 448. "Proposition 218 was designed  
13 to: constrain local governments' ability to impose assessments; place extensive requirements on  
14 local governments charging assessments; shift the burden of demonstrating assessments' legality  
15 to local government; make it easier for taxpayers to win lawsuits; and limit the methods by which  
16 local governments exact revenue from taxpayers without their consent." *Id.*

17 Prop. 218 added articles 13C and 13D to the California Constitution. *See Plantier*, 7 Cal.  
18 5th at 381. The article at issue here, 13D, addresses property-based fees and taxes. *See id.* at  
19 381. Cal. Const., art. 13D, § 6, subdiv. (a) imposes procedural limitations on local governments  
20 seeking to raise or impose fees or charges. *See id.*; Cal. Const., art. 13D, § 6(a). Pursuant to  
21 article 13D's procedural requirements, an agency seeking to raise or impose a fee must hold a  
22 hearing and send written notice to each affected parcel owner. Cal. Const., art. 13D, § 6(a)(1)-  
23 (2). "The notice must specify the amount of the proposed fee, the basis of calculation, and the  
24 reason for the fee. It must note the date, time, and location of the public hearing. At that hearing,  
25 'the agency shall *consider all protests* against the proposed fee or charge.'" *See Plantier*, 7 Cal.  
26 5th at 381 (emphasis in original). If written protests against the fee or charge are presented by a  
27 majority of the affected parcel owners, the agency cannot impose the fee or charge. *See id.*  
28 Sewer service charges are amongst the types of property-related fees or charges subject to Prop.

1 218's notice and hearing procedural requirements. *See e.g., id.* at 385; *Howard Jarvis Taxpayers*  
2 *Ass'n v. City of Roseville* (2002) 97 Cal. App. 4th 637, 643-48, *as modified on denial of reh'g*  
3 *(May 13, 2002)* (discussing applicability of Prop. 218 to sewer charges).

4  
5 **B. The City Implements the Winter Water Use Method, Intended to More**  
6 **Accurately Charge Residential Customers for Their Actual Sewer Usage**

7 Prior to 1997, the City used the "percentage discharge" system, which charged residential  
8 customers for 60% of the water delivered to their premises. Ex. 5-1.<sup>2</sup> The percentage discharge  
9 system was based on findings that for the average Los Angeles residential sewer service customer,  
10 over the course of a year, 60% of the water delivered to their premises ended up in the sewer. Ex.  
11 5-1. The other 40% of the delivered water was used for irrigation, which does not enter the sewer  
12 system. Ex. 5-1. Los Angeles typically experiences winters where rainfall is insufficient to  
13 obviate the need for outdoor irrigation. In other words, most Los Angeles winters are sufficiently  
14 dry that residents still need to expend a significant amount of the water delivered to their premises  
15 to watering their lawns, gardens, and trees. Accordingly, the percentage discharge system  
16 resulted in a "complicated" billing model with residential customers being charged greater  
17 amounts for sewer services during the summer months than in the winter months, even though  
18 they were not sending more water to the City for treatment during those months. Tr. at 89:14-  
19 90:15 (Feb. 22, 2021).<sup>3</sup>

20 With the goal of minimizing these discrepancies and more accurately billing residential  
21 customers for their actual sewage volume, in 1997, the City Council passed an ordinance changing  
22 the percentage discharge system to the new Winter Water Use ("WWU") system to determine  
23 residential sewer service charges for ratepayers residing in single family and small multifamily  
24 residences. *See* Ex. 5. One of the key components of the WWU model was the DWCF, which  
25 was intended to account for the delivered water that was being used for outdoor irrigation and thus  
26 not being discharged to the sewer in Los Angeles's typically dry winters. *See* Ex. 5.

27  
28 <sup>2</sup> All references to "Ex. \_\_" refer to exhibits admitted at trial.

<sup>3</sup> All citations to the trial transcripts are referred to as "Tr. at \_\_."

1 The WWU model, and in turn the DWCF, was intended to more accurately charge  
2 residential customers for their actual sewage volume. Tr. at 55:11-20 (Feb. 8, 2021). In contrast  
3 to the prior model, the Sewer Service Charge for each customer under the WWU model would be  
4 based on the lowest average daily amount of water which the customer used during a billing period  
5 during the previous winter's rainy season, less a variable percentage to account for irrigation—the  
6 DWCF—which was to be based on actual rainfall data.

7  
8 **C. Overview of the Municipal Code and Rules & Regulations Covering the**  
9 **DWCF**

10 The Los Angeles Municipal Code provides that all users of the City's sewer services shall  
11 be charged a Sewer Service Charge ("SSC") "for the receiving, transportation, pumping treatment  
12 and/or disposal of sewage through the sewer system." LAMC § 64.41.03(a). The Sewer Service  
13 Charge is calculated by multiplying the applicable rate by the user's sewage volume. LAMC §  
14 64.41.03(e). For residential users, the sewage volume is calculated by multiplying the Winter  
15 Water Use by the DWCF. The LAMC defines the DWCF as "[a] factor of 1.0 or less, determined  
16 annually by the Board [of Public works of the City], which is multiplied by the Winter Water Use  
17 of a premises to compensate for a Rainy Season with insufficient rainfall to obviate irrigation of  
18 outdoor planting." LAMC § 64.41.01(g).

19 On June 27, 1997, the Board of Public Works (the "Board") approved the Rules and  
20 Regulations for the Administration of the Sewer Service Charge ("Rules & Regs.") and  
21 recommended the delegation of authority to calculate and implement the Rainy Season Review  
22 Period ("RSRP") and the Dry Winter Compensation Factor to the Director of the Bureau of  
23 Sanitation (the "Director"). See Ex. 5; Ex.7, Rules & Regs., § 3. Sanitation recommended that  
24 the Board delegate these tasks to its Director to relieve the Board from "the calculation and  
25 implementation of the RSRP and DWCF [which] are annual routine determinations based on  
26 rainfall statistics." Ex. 5-2.

27 Pursuant to the Rules & Regs., the Director is to determine each customer's sewage volume  
28 according to the following ordered procedures. First, the Director is to determine the Rainy  
Season. See Ex. 7, Rules & Regs., § 4(A)(1). The Rainy Season is a period of consecutive days,

1 determined annually by the Board to be most representative of a period within each fiscal year,  
2 during which the need for irrigation of outdoor planting is minimized. *See* LAMC § 64.41.01(s).  
3 That period is normally when between 75% to 90% of the year's precipitation measured at the  
4 Downtown Civic Center of the City occurs. Ex. 7, Rules & Regs., § 4(A)(1).

5 Second, the Director is to determine the Rainy Season Review Period ("RSRP"). *See* Ex.  
6 7, Rules & Regs., § 4(A)(2). The Rainy Season Review Period is to be determined by adding 27  
7 days to each end of the Rainy Season. If the resulting period is less than 135 days, it shall be  
8 extended at each end by an equal number of days so that the Rainy Season Review Period is at  
9 least 135 days. Ex. 7, Rules & Regs., § 4(A)(2). Notably, it is not sufficient that the Rainy  
10 Season Review Period be 135 days. For example, if the Rainy Season were 140 days, the City  
11 would still have to add 27 days to each end, yielding a Rainy Season Review Period of 194 days.

12 Third, the Director is to determine the DWCF. *See* Ex. 7, Rules & Regs., § 4(A)(3). As  
13 codified by the Municipal Code, the DWCF is "[a] factor of 1.0 or less, determined annually by  
14 the Board [of Public works of the City], which is multiplied by the Winter Water Use of a premises  
15 to compensate for a Rainy Season with insufficient rainfall to obviate irrigation of outdoor  
16 planting." LAMC § 64.41.01(g). The Rules & Regs. delineate mandatory factors that the City  
17 must use *as the basis* for its determination of the DWCF: "past and present precipitation, water  
18 consumption, and sewage flows." Ex. 7, Rules & Regs., § 4(A)(3). The Rules & Regs. also  
19 provide that in determining the DWCF, the Director may also use other data deemed pertinent to  
20 the DWCF. *See id.*

21 Fourth, the Director is to submit the Rainy Season, Rainy Season Review Period, and  
22 DWCF to the Board for approval. Ex. 7, Rules & Regs., §4(B). After the Board approves, the  
23 Director then proceeds as follows.

24 Fifth, the Director is to determine the Rainy Season Billing Period ("RSBP"). Ex. 7, Rules  
25 & Regs., § 4(B)(1). The Rainy Season Billing Period is determined separately for each individual  
26 premises and consists of the bi-monthly billing period or two consecutive monthly billing periods  
27 within the RSRP having the lowest average daily amount of water supplied to the premises.  
28 LAMC § 64.41.01(f).

1 Sixth, the Director is to determine a customer's Winter Water Use ("WWU"). A  
2 customer's Winter Water Use is the average (mean) daily amount of water supplied to the premises  
3 during the Rainy Season Billing Period. See Ex.7, Rules & Regs., § 4(B)(2).

4 Finally, the Director is to calculate the sewage volume a customer will be billed for by  
5 multiplying the customer's Winter Water Use by the DWCF and the number of days in the billing  
6 period. See Ex. 7, Rules & Regs., § 4(B)(3).

7 As such, the DWCF has a significant impact on how much residential customers are  
8 charged for sewer services, and indeed, what rate they must pay. Inflating the DWCF charges  
9 residents for more sewage than they generate, and that is equivalent to charging residential  
10 customers a higher rate for a given volume of sewage.

11 **D. The City's DWCF Selection Process During the Class Period**

12 Since about 2000, Lisa Mowery ("Mowery"), the Chief Financial Officer ("CFO") of the  
13 City's Bureau of Sanitation ("Sanitation") selected each year's DWCF. Mowery Decl., ¶15.  
14 The parties stipulated to the fact that Mowery has been the final DWCF decisionmaker for the  
15 relevant timeframe of fiscal years 2015-2021. See Stipulation re: Deposition of Defendant's  
16 Person(s) Most Knowledgeable ("PMK"), ¶5 (Feb. 10, 2021). Three other people at Sanitation  
17 have assisted Mowery in the DWCF process during the relevant timeframe: Eva Sung ("Sung"),  
18 Division Manager of Sanitation's Financial Management Division; Alexander Vazquez  
19 ("Vazquez"), now-retired former Chief Engineer, and; Dale Burgoyne ("Burgoyne"), Wastewater  
20 Fund Manager. Tr. at 96:18-24, 97:13-16 (Feb. 8, 2021). Up until about May 2014, David  
21 Cheung ("Cheung"), a now-retired Senior Engineer with Sanitation, was also involved in assisting  
22 Mowery with the DWCF. Tr. at 49:14-50:3 (Feb. 8, 2021).

23 There are two sets of information Sanitation generates or is provided with for use in its  
24 DWCF process: rainfall data and the sewer trial runs (also referred to as winter water use trial runs  
25 by the City), the latter which are generated from the billing system of the Los Angeles Department  
26 of Water and Power ("LADWP"), which bills customers on behalf of Sanitation. Tr. at 98:22-  
27 24, 90:7-23 (Feb. 8, 2021); 45:20-46:15 (Mar. 18, 2021). Up until about 2014, LADWP was  
28 responsible for generating the sewer trial runs based on the parameters provided to them by

1 Sanitation. Tr. at 51:1-15, 21-24 (Feb. 8, 2021). Thereafter, LADWP switched over to a new  
2 computer system and Sanitation hired a consultant, Diedmar van der Ryst (“van der Ryst”) to  
3 generate the sewer trial runs from that system. Tr. at 74:12-26 (Feb 8, 2021).

4 Estimated revenue and estimated net gain or net loss in revenue are included on the trial  
5 run reports van der Ryst provides to Sanitation. Tr. at 75:2-17 (Feb. 8, 2021). Estimated  
6 revenue has always appeared on the trial run, and indeed, Sanitation asked van der Ryst to prioritize  
7 estimated revenue when processing the trial runs. Tr. at 76:3-77:23 (Feb. 8, 2021); Ex. 43-1.  
8 From his seven years’ experience in preparing the trial runs, van der Ryst understands that “[t]he  
9 objective of the trial runs is to calculate the effect of different factors, DWCF, on the next year’s  
10 revenue and consumption.” Tr. at 78:16-79:9 (Feb. 8, 2021); Ex. 172. For fiscal year 2020-  
11 2021, Sanitation asked van der Ryst to add “more elaboration of the revenue for the next fiscal  
12 year,” and he did so, adding another row of revenue information. Tr. at 85:10-24 (Feb 8, 2021).

13 Sanitation requests van der Ryst to run a few iterations of the sewer trial runs, with  
14 variations in the DWCF applied. Tr. at 78:2-8, 79:15-19 (Feb. 8, 2021). The different trial  
15 DWCFs directly generate the primary, and interrelated, results on the trial runs: estimated revenue  
16 and the so-called “average daily sewage volume” (“so-called” because this is not a measured  
17 sewage volume, but actually the delivered water multiplied by the DWCF) (“ADSV”). Tr. at  
18 78:16-79:19 (Feb. 8, 2021); 40:7-21 (Mar. 18, 2021); 97:26-98:16 (Feb. 9, 2021). As the DWCF  
19 increases (and becomes a number closer to 1.0), the revenue and ADSV increase; as the DWCF  
20 decreases, the revenue and ADSV decrease. The sewer trial runs allow Sanitation to assess how  
21 different DWCFs will impact estimated revenues before Sanitation selects the DWCF to be applied  
22 to customers’ bills for that year. Tr. at 51:25-53:4 (Feb. 8, 2021).

23 The DWCF process can be summarized as follows: Sung, Burgoyne and Vazquez gather  
24 in several meetings per year to make an initial DWCF recommendation. Tr. at 96:18-24, 97:13-  
25 16 (Feb. 8, 2021). Sung spends about 2-3 hours on the DWCF determination each year. Tr. at  
26 97:17-20 (Feb. 8, 2021). Then, Sung meets with Mowery to provide her with the group’s initial  
27 DWCF recommendation. Tr. at 97:21-98:11 (Feb. 8, 2021). Finally, Mowery unilaterally  
28 selects the DWCF. Tr. at 97:21-98:17 (Feb. 8, 2021). None of the participants keep written

1 notes on the selection process. Tr. at 69:26-70:1, 97:21-98:7, 98:18-20 (Feb. 8, 2021); 46:3-6  
2 (Feb. 9, 2021).

3 The sewer trial runs contain a series of numeric values; there are approximately 25 different  
4 line items. See Exs. 53, 88, 125, 153, 189, 250. Mowery has claimed to focus on certain  
5 numeric values on the trials runs: ADSV (which is not a measured sewage volume, but is rather  
6 the assumed sewage volume that results from selecting a particular DWCF); the total number of  
7 customer records with an increase in ADSV; the total number of customer records with a decrease  
8 in ADSV, and; estimated revenue (Tr. at 31:19-32:8 (Feb. 9, 2021)). However, revenue jumps  
9 out as the most prominent item on the trial runs—there are more rows on the trial runs devoted to  
10 revenue than to anything else.

11 Up until fiscal year 2020-2021, Sanitation stated that it used the estimated revenue  
12 information on the trial runs to select a DWCF that would ensure that there would be sufficient  
13 funds to cover Sanitation’s various obligations. Mowery Decl., ¶15; Tr. at 32:1-8 (Feb. 9, 2021).  
14 However, after the Court’s rejection of that approach at the Motion for Summary Adjudication  
15 stage, Sanitation contended that estimated revenue had no impact on the DWCF chosen for fiscal  
16 year 2020-2021. Tr. at 34:7-17 (Feb. 9, 2021).

17 **II. LEGAL STANDARD**

18 Two legal standards apply here: a strict, non-deferential standard for the City’s compliance  
19 with the California Constitution, and a potentially deferential standard for the City’s compliance  
20 with its own laws (the Municipal Code and Rules & Regs.).

21 **A. Standard for Compliance with the California Constitution**

22 When addressing the constitutionality of a fee or charge subject to Prop. 218, such as sewer  
23 service charges, the local agency has the evidentiary burden of demonstrating the legality of the  
24 fee or charge. See *Silicon Valley*, 44 Cal. 4th at 445-48. Before Prop. 218 was passed, local  
25 agency decisions concerning fees or charges were given significant judicial deference and would  
26 not be disturbed unless the agency was found to have abused its discretion. See *id.* at 443, 448  
27 (“Before Proposition 218 was passed, courts reviewed quasi-legislative acts of local governmental  
28 agencies ... under a deferential abuse of discretion standard[.]”). But Prop. 218 marked a



1 paradigm shift. The intent of California voters in passing Prop. 218 was to “constrain local  
2 governments’ ability to impose assessments; place extensive requirements on local governments  
3 charging assessments; shift the burden of demonstrating assessments’ legality to local government;  
4 make it easier for taxpayers to win lawsuits; and limit the methods by which local governments  
5 exact revenue from taxpayers without their consent.” *Id.* at 448-50.

6 Thus, while local governmental agencies may often exercise discretion in their operations,  
7 that discretion is strictly limited in the context of a Constitutional provision, such as Prop. 218.  
8 *See Silicon Valley*, 44 Cal.4th at 448. Indeed, local agencies cannot exercise their discretion in a  
9 manner that undermines or exceeds the limits of the California Constitution. *See id.* (“a local  
10 agency acting in a legislative capacity has no authority to exercise its discretion in a way that  
11 violates constitutional provisions or undermines their effect.”). Accordingly, as the California  
12 Supreme Court noted in *Silicon Valley*, “[b]ecause Proposition 218’s underlying purpose was to  
13 limit government’s power to exact revenue and to curtail the deference that had been traditionally  
14 accorded legislative enactments on fees, assessments, and charges, a more rigorous standard of  
15 review is warranted .... [C]ourts should exercise their independent judgment in reviewing whether  
16 assessments[, fees, or charges] violate article XIID.” *Silicon Valley*, 44 Cal. 4th at 448-50.  
17 And Prop. 218 shifted the evidentiary burden to local agencies to show the legality of fees or  
18 charges they imposed. *See id.* at 445-48; *Golden Hill Neighborhood Assn. Inc. v. City of San*  
19 *Diego* (2011) 199 Cal. App. 4th 416, 431; Cal. Const., art. 13D, § 6(b)(5).

20 Article 13D requires that “[a]n agency seeking to impose or increase a property-related fee  
21 must hold a hearing and send written notice of the hearing to the owner of each affected parcel.”  
22 *See Plantier*, 7 Cal.5th at 381–82; Cal. Const., art. 13D, § 6, subd. (a)(1). Specifically:

23  
24 The notice must specify the amount of the proposed fee, the basis of  
25 calculation, and the reason for the fee. It must note the date, time,  
26 and location of the public hearing. At that hearing, “the agency  
27 shall consider all protests against the proposed fee or charge.” In  
28 addition to mandating that the agency “consider” all protests,  
Proposition 218 establishes a majority protest remedy. “If written  
protests against the proposed fee or charge are presented by a  
majority of owners of the identified parcels, the agency shall not

1 impose the fee or charge.”

2  
3 *See Plantier*, 7 Cal. 5th at 381-82; Cal. Const., art. 13D, § 6, subd. (a)(1)-(2). Sewer service  
4 charges are considered property-related fees pursuant to Prop. 218. *See Howard Jarvis*  
5 *Taxpayers Ass’n v. City of Roseville* (2002) 97 Cal.App.4th 637, 647, *as modified on denial of*  
6 *reh’g* (May 13, 2002) (concluding that Prop. 218 applied to sewer service fee). Under the  
7 Government Code, the term “increased,” when applied to a tax, assessment, or property-related  
8 for charge, means a decision by an agency that does either of the following:

9 “(A) Increases any applicable rate used to calculate the tax, assessment, fee, or charge.

10 (B) Revises the methodology by which the tax, assessment, fee, or charge is calculated,  
11 if that revision results in an increased amount being levied on any person or parcel.”

12 Gov’t C. § 53750(h)(1).

13 *AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747 is instructive on  
14 the issue of what constitutes a revised methodology under the Government Code, such as to require  
15 compliance with Prop. 218’s procedural requirements. In *AB Cellular*, the City violated Prop.  
16 218 when it added a variable into the equation it used to calculate a cellular telephone tax, which  
17 had the result of increasing the amount of the tax, without first following Prop. 218’s procedural  
18 requirements. *See id.* at 760-62. The *AB Cellular* court noted that a tax is “increased” for  
19 purposes of Prop. 218’s procedural requirements “if the math behind it is altered so that either a  
20 larger tax rate or a larger tax base is part of the calculation.” *See id.* at 763. The Municipal  
21 Code section at issue limited the City’s ability to impose a cell tax to the extent allowed under the  
22 United States Constitution. *See id.* at 752-73. When U.S. constitutional law on that issue  
23 changed, the City accordingly imposed the cell tax to the new extent allowable. *See id.* at 760-  
24 61. On this basis, the City argued that it had not revised its methodology, and instead, that the  
25 tax increase was the result of its evolving constitutional analysis. *See id.* The City took the  
26 position that the court should find its actions lawful and should defer to its interpretation because  
27 it had maintained a reasonable, consistent historical interpretation of the laws at issue. *See id.* at  
28 766.

1           Significantly, in *AB Cellular*, the City was held to violate Prop. 218 even though the court  
2 agreed that the City’s interpretation was consistent and reasonable, and gave a significant degree  
3 of deference to the City’s interpretation, as “the contemporaneous construction of a statute by an  
4 administrative agency charged with its administration and interpretation, while not necessarily  
5 controlling, is entitled to great weight and should be respected by the courts unless it is clearly  
6 erroneous or unauthorized[.]” *See AB Cellular*, 150 Cal.App.4th at 765 (internal quotations  
7 omitted). However, the court noted that “[b]y any definition, adding a variable revised the  
8 methodology.” *See id.* at 761. As the City’s revised methodology resulted in a tax increase, it  
9 was required to follow Prop. 218’s procedural requirements before imposing it. *See id.* at 761-  
10 62. That the reason the City had increased the tax was “due to expanding constitutional  
11 boundaries” was of no import. *See id.* at 767. The court aptly stated that:

12  
13                       Contrary to the City’s position, a local government’s methodology  
14 cannot evolve—even if it is due to external factors []—and avoid  
15 submitting it to voter approval. The Proposition 218 voters  
16 rebelled against local government taxes that are *moving targets*. No  
17 doubt a useful precursor to the successful denial of new taxes, in  
18 whatever form, is their *transparency and consistency, for if taxes  
19 are fluid then their increase may well become an intractable  
20 problem that would “frustrate the purposes of voter approval.”*

21 *Id.* at 762 (emphasis added).

22           In *Plantier*, 7 Cal.5th at 385, the California Supreme Court reiterated the principle in *AB*  
23 *Cellular* that “a change to the method for calculating a fee is considered an increase in the fee for  
24 purposes of Proposition 218 if it results in an increased amount being levied on any person or  
25 parcel.” In *Plantier*, a municipal water district gave Prop. 218 notice to ratepayers of a  
26 wastewater service rate increase, but it did not give notice that it was going to change its  
27 assignment *method*. *See id.* at 384-85. There, the plaintiffs alleged that the district’s  
28 modification of the assignment method violated Prop. 218’s substantive requirement that a  
property-related fee or charge shall not exceed the proportional cost of the service provided to the  
property. *See id.* at 378. The agency argued that plaintiffs were required to exhaust their  
administrative remedies under Prop. 218 by protesting at the public hearing on the proposed rate

1 increase before suing. *See id.* at 380. However, the court held that plaintiffs were not required  
2 to exhaust their administrative remedies because it would have been futile to do so; the only topic  
3 of the public hearing was the proposed rate increase so “whatever the result of the public hearings  
4 on rates,” would have had no impact on the modified assignment method. *See id.* at 384-85.

5 As discussed in more detail below, the parties here stipulated that the City never provided  
6 Prop. 218 notice and a hearing with respect to the DWCF during the relevant timeframe. *See*  
7 Stipulation re: Deposition of Defendant’s Person(s) Most Knowledgeable, ¶7 (Feb. 10, 2021).  
8 Therefore, the Court is to decide whether the City’s chosen DWCFs constituted rate increases via  
9 overstating the amount of sewage used, with the City bearing the burden of proof on that question  
10 of Prop. 218 compliance.

11 **B. Standard for Compliance with the City’s Own Laws**

12 When assessing a local governmental agency’s compliance with its own laws, California  
13 courts typically draw a distinction between quasi-legislative rules and agency interpretations.  
14 *See Yamaha Corp. of Am. v. State Bd. Of Equalization* (1998) 19 Cal. 4th 1, 10. Quasi-legislative  
15 rules are “regulations adopted by an agency to which the Legislature has confided the power to  
16 ‘make law,’” as opposed to “ministerial and informal actions[.]” *See id.* at 3-4. “Unlike quasi-  
17 legislative rules, an agency’s interpretation does not implicate the exercise of a delegated  
18 lawmaking power; instead, it represents the agency’s view of the statute’s legal meaning and  
19 effect[.]” *Id.* at 11.

20 Accordingly, quasi-legislative rules are afforded greater judicial deference than agency  
21 interpretations. *See Yamaha*, 19 Cal. 4th at 6-8. In the context of judicial review of quasi-  
22 legislative local agency actions, “[a] court must ask whether the public agency’s action was  
23 arbitrary, capricious, or entirely lacking in evidentiary support, or whether the agency failed to  
24 follow the procedure and give the notices the law requires.” *See Cnty. of Los Angeles*, 214  
25 Cal.App.4th at 653–65. The court’s task is to “ensure that an agency has adequately considered  
26 all relevant factors, and has demonstrated a rational connection between those factors, the choice  
27 made, and the purposes of the enabling statute.” *See Shapell*, 1 Cal.App.4th at 232; *Cnty. of Los*  
28 *Angeles*, 214 Cal.App.4th at 653-65. In ensuring that an agency did not abuse its discretion, “the

1 court must be able to assure itself that before imposing the fee the [agency] engaged in a reasoned  
2 analysis[.]” *See Shapell*, 1 Cal.App.4th at 235. Thus, “[t]he Board imposing the fee must  
3 therefore show that a valid method was used for arriving at the fee in question[.]” *Id.*

4 On the other hand, where agency interpretations, rather than rules, are at issue, courts are  
5 to apply their independent judgment and variable deference, if any. *See Yamaha*, 19 Cal. 4th at  
6 7-8. Trial courts can consider a variety of factors in determining what, if any, level of deference  
7 to apply to a local agency’s interpretation, as this inquiry is “fundamentally *situational*.” *See id.*  
8 at 12. Under the independent judgment standard applied to agency interpretations, a court is not  
9 required to follow an agency’s interpretation of a law that the court finds ambiguous, even if the  
10 agency’s interpretation is reasonable. *See Western States Petroleum Assn. v. Bd. Of Equalization*  
11 (2013) 57 Cal. 4th 401, 415; *Paradise Irrigation Dist. v. Commission on State Mandates* (2019)  
12 33 Cal. App. 5th 174, 185, *review denied* (June 19, 2019).

### 13 **III. LEGAL AND FACTUAL BASES FOR DECISION**

#### 14 15 **A. The City’s DWCF Calculation was Unlawful Under the Municipal Code, Rules** 16 **& Regs., and Prop. 218**

17 Even if the Court were to conclude that quasi-legislative rules as opposed to agency  
18 interpretations were at issue, and thus, that an abuse of discretion as opposed to an independent  
19 judgment standard was the appropriate legal standard, the Court would reach the same conclusion:  
20 the City’s actions were unlawful under the LAMC/Rules & Regs. For the same reasons that the  
21 Court finds that the City’s actions were unlawful under the LAMC and Rules & Regs., the Court  
22 also finds that the City failed to carry its burden to demonstrate compliance with Prop. 218.

23 The Court provides significant detail below, but an emphasis should be provided on three  
24 points:

25 The lack of evidentiary support starts with the complete inability of, or refusal by, the City  
26 to give any details on how decisions were made for any year. The Court practically begged the  
27 City to outline how the decisions were made. Instead, the evidence fails to reproduce or explain  
28 the decision-making process.

1 The City used revenue as the primary factor to make the decisions. The evidence is striking  
2 how revenue dictated the decisions.

3 The complete about-face by the City and Mowery on revenue has caused the Court to  
4 strongly suspect the credibility of Mowery.

5 **1. The City's DWCF Selection is Entirely Lacking in Evidentiary Support**

6 While courts are not to “concern themselves with [an agency’s] methods of marshalling  
7 and evaluating scientific data .... the court must be able to assure itself that before imposing the  
8 fee the [agency] engaged in a reasoned analysis[.]” *See Shapell*, 1 Cal.App.4th at 235 (Board’s  
9 imposition of districtwide school facilities fee to cover future anticipated costs of new development  
10 was insufficiently supported where Board based fee on its assessment that increases in student  
11 population would necessitate an estimated \$17.5 million increase in new development, but Board  
12 did not attempt to determine which portion of the total increase in student population was  
13 attributable to new development). This is analogous to the City’s repeated invocation here of  
14 “qualitative” evaluation as justification for selected DWCFs, meaning, in practice, that the City  
15 did not and could not explain how the factors purportedly considered led to particular DWCFs.

16 An agency “imposing the fee must show that a valid method was used for arriving at the  
17 fee in question[.]” *Id.*; *see Summerhill Winchester LLC v. Campbell Union School Dist.* (2018)  
18 30 Cal.App.5th 545, 555 (finding board abused its discretion in quasi-legislative imposition of fees,  
19 noting that “[w]hile courts defer to the reasonable legislative choices made by school district  
20 boards, those boards still must comply with the enabling statutes governing the fees that they  
21 impose. The Board did not do so here.”); *Martin v. Alcoholic Beverage Control Appeals Bd.* (1961)  
22 55 Cal.2d 867, 881 (despite wide discretion vested in Department of Alcohol Beverage Control,  
23 Department abused its discretion in denying liquor license to restaurant 70 feet away from a  
24 church; Department held public hearing on the matter, where the church did not protest against the  
25 restaurant and only one witness was called, which was insufficient evidence in the record to  
26 support Department decision on the grounds that granting the liquor license would contravene  
27 public welfare or morals).

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**(a) No Documentation Exists that Shows the City’s Analysis in Selecting Each Year’s DWCF**

Similar to *Shapell*, *Summerhill*, and *Martin*, the City’s calculation was entirely lacking in evidentiary support. The City did not present any tangible evidence of its analysis describing the basis for the yearly DWCF selection. The City maintains copies of the sewer trial runs and rainfall data for each year, but these documents are devoid of any analysis or even cursory explanation as to how the particular DWCF chosen was selected. *See Exs. 88, 125, 153, 189, 250.* The City conceded that it does not maintain any documentation about how the DWCF is ultimately chosen each year and further confirmed that it keeps no records of the meetings Sanitation’s employees conduct in the DWCF calculation process. Tr. at 97:21-98:7 (Feb. 8, 2021); 29:9-13, 34:15-26 (Mar. 18, 2021).

The City’s lack of documentation is apparently not due to a lack of need for such information. Indeed, Sung testified that in 2016 she had requested that someone create a step-by-step DWCF procedural manual and had even tasked an intern with this project. Tr. at 102:7-24 (Feb. 8, 2021). While the need for such a step-by-step written description never went away, the DWCF procedural manual was never finalized. Tr. at 102:7-103:9 (Feb. 8, 2021).

**(b) The City Could Not Identify a Step-by-Step Year-to-Year Analysis it Uses to Select the DWCF**

In addition to lacking documentary evidence of any analysis, the City was unable to provide any testimonial evidence regarding the existence of any identifiable analysis it utilizes in selecting each year’s DWCF. Significantly, when the Court asked the City to describe the “step-by-step, year-to-year analysis” it conducted each year to select the DWCF, the City was unable to do so. Tr. at 53:1-20, 57:2-64:9 (Mar. 18, 2021). When the Court further asked the City to describe the “specific actual numbers and factors” that it considered in reaching the DWCF selected, the City was unable to provide the Court with this information. Tr. at 63:20-67:17 (Mar. 18, 2021).

Mowery could not explain why the DWCF in one given year was one number and why in another year it was a different number. For example, when the Court asked Mowery what her

1 reasoning was for the DWCF to go from 0.90 in 2016-2017 to 0.98 in 2017-2018, Mowery  
2 explained: “In ‘17-18 there was more than an average amount of rain. I think that was the year  
3 we were above 18 inches. It was also very well distributed through the year. So in ‘17-18,  
4 customers didn’t have to do very much irrigation, which means we did not need to give them a  
5 very large discount for doing irrigation. So that’s the .98, a higher Dry Winter Compensation  
6 Factor, means we’re giving them less of a discount on that water they use during the winter.” Tr.  
7 at 52:17-28 (Mar. 18, 2021). This reasoning does not explain why a 0.98, as opposed to another  
8 number, was selected.<sup>4</sup> Sung similarly testified that she could not specifically identify or  
9 reproduce the process of how each year’s DWCF was selected. Tr. at 100:10-27 (Feb. 8, 2021).

10 While Mowery claimed that she used the same process in selecting the DWCF each year  
11 (Tr. at 30:2-6 (Mar. 18, 2021)), she proffered several different explanations to describe her process  
12 of selecting FY2020-2021’s DWCF. Specifically, Mowery narrowed down the range of potential  
13 DWCFs to 0.80-0.86, before selecting a final DWCF of 0.83. Tr. at 37:8-39:8 (Mar. 18, 2021).  
14 The notes to the FY2020-21 sewer trial run (Ex. 250-6, 7) stated this range was chosen because it  
15 would generate the same range of ADSVs as were selected in fiscal years 2015-2016 to 2018-2019.  
16 Tr. at 37:8-38:3 (Mar. 18, 2021). However, at her deposition in her capacity as the City’s Person  
17 Most Knowledgeable, Mowery stated that the 0.80-0.86 range for the of DWCFs was based on  
18 rainfall and rainfall distribution for that year, noting that there had been fourteen to fifteen inches  
19 of rain and that there had been early rain, late rain, and a two-month dry period. Tr. at 37:8-  
20 39:11 (Mar. 18, 2021). Then, at trial, Mowery testified that she chose this range of DWCFs to  
21 avoid charging residential customers higher amounts for their sewage volume, a revenue-based  
22 explanation that was consistent with the City’s earlier admissions that it based the DWCF on  
23 revenue but inconsistent with its more recent testimony attempting to avoid that finding. Tr. at  
24 72:16-74:5 (Mar. 18, 2021). These shifting explanations demonstrate the arbitrary and capricious  
25 nature of the City’s DWCF process.

26  
27 <sup>4</sup> Indeed, consistent with her practice of not using rainfall data quantitatively, Mowery did not know how “well  
28 distributed” the rainfall had been that year. Tr. at 69:1-70:22 (Mar. 18, 2021). Further, as discussed below, a  
DWCF of 0.98, meaning an assumption that only 2% of delivered water was used for irrigation in 2017-2018 Fiscal  
Year, was unreasonable and entirely lacking in evidentiary support.



1  
2 (c) **The City’s Claim that it Bases the DWCF on Rainfall, Sewage**  
3 **Flows, Water Conservation Trends, and ADSV Is Unsupported**  
4 **by Evidence**

5 Mowery testified that in selecting the DWCF each year, she looks at: rainfall (total amount  
6 and distribution); sewage plant flows; water conservation trends (both internal and external), and;  
7 average daily sewage volume in comparison to prior years. Tr. at 30:2-15 (Mar. 18, 2021).  
8 However, Mowery conceded that she could not describe in a quantitative way how any of these  
9 pieces of information impacted her DWCF selection. Tr. at 71:3-72:9 (Mar. 18, 2021).  
10 Mowery testified that she conducted a “qualitative” analysis of these items but did not provide any  
11 explanation concerning what her “qualitative” analysis consisted of. Tr. at 23:7-15 (Feb. 9, 2021);  
12 105:9-106:17, 107:27-108:22 (Feb. 22, 2021); 27:22-28:3, 28:23-29:8, 67:22-68:15, 71:3-11,  
13 71:28-72:9 (Mar. 18, 2021). Notably, contradicting Mowery, Sung stated that the City does not  
14 consider water conservation or past years’ rainfall in selecting the DWCF. Tr. at 103:15-17,  
15 104:25-105:9 (Feb. 8, 2021).

16 Mowery concedes that she has no formula or consistent manner of applying rainfall  
17 amounts or distribution to the DWCF. Tr. at 35:1-16 (Mar. 18, 2021). Nor does she have any  
18 consistent manner of applying water conservation trends to the DWCF. Tr. at 35:17-20 (Mar. 18,  
19 2021). The City could not point to any evidence upon which it based even a qualitative analysis  
20 of water conservation trends. When asked by the Court what she looks at to determine water  
21 conservation trends, Mowery responded that she looks at mandatory conservation requirements  
22 implemented by the City and programs driving conservation, but Mowery could not provide any  
23 specific example of either mandatory conservation requirements or programs driving conservation  
24 that she looked at to determine the DWCF during the relevant timeframe. Tr. at 49:17-50:9 (Mar.  
25 18, 2021). Mowery further confirmed that despite the existence of data regarding water  
26 conservation trends, Mowery did not obtain the available data or use it in selecting the DWCF.  
27 Tr. at 67:22-68:15 (Mar. 18, 2021).

28 Mowery even admitted that changes in actual sewage flows do not have a consistent impact  
on the DWCF—despite the decline of actual sewage flows, Mowery has not always chosen a

1 DWCF that results in a lower ADSV, but testified that instead she has either “decreased it or left  
2 it steady in all of those years.” Tr. at 28:4-22 (Mar. 18, 2021). Mowery confirmed that there is  
3 no particular way and there is no formula as to how she applies actual sewage flows to the DWCF  
4 selected. Tr. at 28:23-29:8 (Mar. 18, 2021). Mowery keeps no notes where she has documented  
5 the impact of actual sewage flows on the DWCF selected. Tr. at 28:23-29:13 (Mar. 18, 2021).  
6 Mowery testified that “we don’t base it [the DWCF] on sewage flows” but that they are merely  
7 “another factor that we *can* use to help direct where we end up with that” (Tr. at 107:27-108:6  
8 (Feb. 22, 2021)) (emphasis added), and when asked “you don’t actually use sewage volume, and  
9 it certainly doesn’t show up anywhere in the trial runs, right?” Mowery answered, “Correct.”  
10 Tr. at 40:15-25 (Mar. 18, 2021).

11 Moreover, Mowery confirmed that the ADSV is just an output of the sewer trial runs,  
12 generated by mathematically applying different test DWCFs to the amount of actual delivered  
13 water in the Rainy Season Billing Period. Tr. at 29:12-30:18 (Feb. 9, 2021); 30:2-31:5 (Mar. 18,  
14 2021). Indeed, Mowery admitted that the ADSV and the DWCF are reflections of one another—  
15 the ADSV is not independent data that informs the DWCF; instead, the ADSV is just a result of  
16 the DWCF:

17 Q. So when you say I’m looking at Average Daily Sewage Volume,  
18 you are effectively looking at a version of the Dry Winter  
19 Compensation Factor, right?

20 A: Yes.

21 Q. So, for example, to say well, I knew that the Dry Winter  
22 Compensation Factor was the right one because I had this Average  
23 Daily Sewage Volume that resulted from it, you could just as easily  
24 say I knew the Average Daily Sewage Volume was correct because  
25 I had this Dry Winter Compensation Factor that applied to it. They  
26 are just two sides of the same calculation, correct?

27 A: Yes.

28 Tr. at 30:22-31:5 (Mar. 18, 2021). In other words, the ADSV, revenue, and DWCF all move up  
and down together, and in fact the ADSV and revenue are generated by choosing a particular  
DWCF. Ex. 125-4 (annotated excerpt). 0.98 was the DWCF chosen that year. If instead, the  
trial DWCFs of 0.97 or 0.96 had been selected, then the ADSV and revenue associated with those  
DWCFs would have been lower..

1 Mowery testified that she assumes that ADSV will be somewhat consistent year-to-year,  
2 and in selecting each year's DWCF, she looks to see whether the ADSV that corresponds with her  
3 chosen DWCF is about the same as it was in prior years. Tr. at 29:25-30:12 (Feb. 9, 2021).  
4 However, Mowery has no evidentiary basis for her assumption that ADSV will be consistent each  
5 year, or, if it was, what that consistent level in actuality was.

6 In sum, the City's "methodology" in calculating the DWCF is entirely lacking in  
7 evidentiary support. The City was unable to "show that a valid method was used for arriving at  
8 the fee in question, 'one which established a reasonable relationship between the fee charged'" and  
9 the purpose of the DWCF, which is to "remove[] irrigation water that does not go to the sewer  
10 from [customers'] Sewer Service Charge bill[s]." See *Shapell*, 1 Cal.App.4th at 235; Ex. 15-11;  
11 LAMC § 64.41.01(g).

## 12 **2. The City Failed to Adequately Consider all Relevant Factors**

13 The City is required to base the DWCF on past and present precipitation, sewage flows,  
14 and water consumption. Ex. 7, Rules & Regs., §4 (A)(3). However, the City did not base the  
15 DWCF on these factors, but did base the DWCF on revenue.

### 16 **(a) The City Bases the DWCF on Revenue Needs**

17 It is undisputed that Sanitation's revenue needs are included in the City's yearly DWCF  
18 selection process. Each of the sewer trial runs used by Sanitation in setting the yearly DWCF  
19 prominently feature multiple rows that are related to estimated revenue. Exs. 53, 88, 125, 153,  
20 189, 250.

21 The sewer trial runs demonstrate the domineering influence of revenue on the DWCF  
22 selected each year. The sewer trial runs consist of testing different potential DWCFs and seeing  
23 their impact on estimated revenue. As van der Ryst, who has been responsible for generating the  
24 sewer trial runs since about 2014, aptly explained, "the objective of the trial runs is to calculate  
25 the effect of different DWCFs on the next fiscal year's revenue and [water] consumption." Ex.  
26 172. The DWCF functions as an input—different DWCFs are inputted into the trial run, and the  
27 trial runs show how much estimated revenue is associated with each of those test DWCFs. Tr. at  
28 79:15-19 (Feb. 8, 2021). There is a direct correlation between the potential DWCFs and

1 estimated revenue; as the DWCF increases (becomes a number closer to 1.0), estimated revenue  
2 increases, and vice versa. The DWCF is then selected *after* Sanitation can see the impact of  
3 various test DWCFs on estimated revenue.

4 Mowery, who is the ultimate DWCF decisionmaker, acknowledged on numerous occasions  
5 that revenue needs are part of the DWCF selection. Mowery stated in a declaration that in setting  
6 the DWCF, she has used estimated revenue “to ensure that the Bureau of Sanitation will have  
7 sufficient sums to cover its maintenance, operational and management obligations ... and to cover  
8 debt (i.e., bond) repayment and related revenue-ratio obligations.” Mowery Decl., ¶15.<sup>5</sup> At her  
9 initial deposition, Mowery was asked the following question: “So does the question of whether the  
10 Bureau of Sanitation has sufficient sums to cover its various obligations, does that have any direct  
11 impact on the question of what percentage of water goes into the sewer?” Mowery answered,  
12 “We’re required to have full cost recovery for our operations. So we need to make sure that, based  
13 on the revenue that we’re going to receive, we’re going to be able to pay that. It’s, again, it’s just  
14 sort of a verification that we’re in the right area, [as far as] selecting the Dry Winter Compensation  
15 Factor. It’s not the—it doesn’t drive the selection of that.” Tr. at 34:7-20 (Feb. 9, 2021).  
16 When Mowery was asked about an email she had written to other Sanitation employees regarding  
17 the DWCF, Mowery testified as follows:

18  
19 Q. I want to have a look at Exhibit 22. This is you writing to David  
20 Cheung, Alexander Vazquez, and others, including Mr. Burgoyne.  
21 You write -- and this is about -- the sole subject is DWCF. “Based  
22 on the revenue to be generated in the Median Daily Sewage Volume,  
23 .87 seems to be the best fit.” That’s you saying that DWCF is based  
24 on revenue, right?

25  
26 A. Revenue is part of the equation, just like the  
27 daily sewage volume and the DWCF.

28  

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<sup>5</sup> The City’s general resolution authorizing bond issuances provides that the debt service coverage ratio (the net revenues divided by principal and interest due on the debt) be 110% for all debt and 125% for senior debt. Sanitation uses higher coverage ratios of 145% for all debt and 245% for senior debt, meaning “that Sanitation takes in more revenue relative to its debt than required by the general resolution.” Tr. at 42:22-43:26 (Feb. 9, 2021). The City attempted to justify this practice by claiming that increases its ratings and thus decreases the interest charge on the bonds, (Tr. at 78:8-23 (Feb. 9, 2021)) but admitted that it had done no analysis of the extent to which exceeding the required debt service coverage ratios resulted in higher ratings. Tr. at 79:26-80:3 (Feb. 9, 2021).

1  
2 Tr. at 41:18-27 (Mar. 18, 2021) (emphasis added). While Mowery implied that revenue was not  
3 an aspect of the DWCF selection for fiscal year 2020-2021 when she was deposed a second time  
4 in December 2020 (Tr. at 35:2-36:2 (Feb. 9, 2021)), Mowery also testified that the DWCF selection  
5 process for 2020-2021 had not changed at all compared to prior years (and even more data points  
6 related to revenue were added to the sewer trial runs for fiscal year 2020-2021). Tr. at 30:2-6  
7 (Mar. 18, 2021); Ex. 250.

8 Sanitation's other witnesses either admitted that revenue needs are part of the DWCF  
9 determination or denied that revenue played a role, only to be impeached by their prior deposition  
10 testimony. For example, Cheung claimed that he did not discuss revenue in the DWCF process,  
11 only to be impeached by his deposition testimony, where he had stated that in the DWCF process,  
12 he would discuss the amount of revenue needed "to keep this system in good condition and  
13 compare that to the projected revenue." Tr. at 56:22-57:21 (Feb. 8, 2021). Further, Burgoyne  
14 confirmed that in the meetings he attends to determine the DWCF, Sanitation chooses the Winter  
15 Water Use which returns the amount of revenue that matches previous years' revenue. Tr. at  
16 53:8-15 (Feb. 9, 2021).

17 For years, Sanitation has emphasized revenue in emails regarding the yearly DWCF  
18 selection. For example, in an email discussing the potentially negative impact of water  
19 conservation on Sanitation's revenue, Mowery stated: "we also have the ability to adjust our dry  
20 winter compensation factor .... I'm not too concerned about the residential revenue due to  
21 conservation[.]" Ex. 13. Mowery admitted that in making this statement, her understanding  
22 was based on water consumption data from residential customers, but also that Sanitation could  
23 not distinguish between inside and outside water consumption data, even though doing so is "vital"  
24 to the DWCF process. Tr. at 11:8-12:23 (Feb. 9, 2021). In another email, Mowery stated, "I  
25 just want to calculate how much revenue will be generated at a certain DWCF based on the actual  
26 WWU." Ex. 20. And in another email, Mowery stated, "[b]ased on the revenue to be generated  
27 and the median daily sewage volume, 0.87 [as a DWCF factor] seems to be the best fit." Ex. 22.

28 An email from Sung to Mowery highlights the preeminence of revenue in Sanitation's

1 sewer service charge process. Ex. 139. In the email, Sung proposes two options for that year's  
2 Rainy Season (October 15, 2016-April 15, 2017 and October 17, 2016-April 8, 2017) and provides  
3 two potential DWCFs for each date range (with the lowest potential DWCF as 0.97 and the highest  
4 potential DWCF as 0.99), and lists how much revenue each potential DWCF was expected to  
5 generate. Tr. at 105:17-107:14 (Feb. 8, 2021); Ex. 139. At the end of the email, Sung suggests  
6 that the City select a Rainy Season of October 17, 2016 through April 8, 2017, with a DWCF of  
7 0.98. Of the four options presented by Sung, this was the one that was expected to generate the  
8 most revenue:

9 Diedmar did the runs for both Rainy Season boundaries below, please see attached files.

10 10/15/2016 - 4/15/2017 (98% 239.76M, 99% \$242.13M)

11 10/17/2016- 4/8/2017 (97% \$244.23M, 98% \$246.64M)

12 I prefer using 10/17/2016- 4/8/2017 (98% \$246.64M). What do you think?

13  
14 Ex. 139. And the City in fact implemented Sung's preferred Rainy Season and DWCF for that  
15 year. See Joint Stipulated Facts for Trial, ¶9 (Feb. 5, 2021). Notably, contrary to what Sung  
16 did in the above correspondence, per the Rules & Regs., the Rainy Season boundaries are to be  
17 based only on that year's rainfall. Ex. 7, Rules & Regs., § 4(A)(1). There is no rational basis  
18 for revenue to be considered in any capacity for purposes of determining year's Rainy Season.  
19 Indeed, Mowery testified at her PMK deposition that it was not appropriate to consider revenue  
20 when selecting the Rainy Season Review Period, "[b]ecause revenue needs have nothing to do  
21 with the rainfall patterns." Tr. at 35:26-36:2 (Feb. 9, 2021).

22 Similarly, revenue should not be considered in any capacity for purposes of setting each  
23 year's DWCF, because, as Mowery admitted, revenue has "nothing to do with how much our  
24 customers may have irrigated or how wet or dry a year was." Tr. at 35:11-36:2 (Feb. 9, 2021).  
25 Yet, revenue was considered, always, and as shown in the above correspondence, it in fact drove  
26 the process.

27 With respect to Ex. 139, Sung attempted to proffer a detailed explanation at trial as to why  
28 Sanitation had identified two possible Rainy Seasons for that year: first, she had the sewer trial run

1 conducted with a Rainy Season of October 17, 2016-April 8, 2017, but the resulting ADSVs were,  
2 in her eyes, “too low” in comparison to prior years; thus, she had a second sewer trial run conducted,  
3 expanding the Rainy Season to October 15, 2016-April 15, 2017, to see if the resulting ADSVs  
4 were higher. Tr. at 105:17-106:28 (Feb. 8, 2021). However, even though the second trial run  
5 (with the Rainy Season period of October 15, 2016-April 15, 2017) did produce higher ADSVs,  
6 Sung nonetheless recommended the first trial run’s Rainy Season—the one with the higher  
7 revenue—thereby contradicting her explanation. Tr. at 10:11-15:11 (Feb. 22, 2021).<sup>6</sup>

8 In sum, the evidence shows that Sanitation has based the DWCF on its revenue needs.

9 **(b) The City Does Not Base the DWCF on Sewage Flows**

10 The City is required to base the DWCF on sewage flows. Ex. 7, Rules & Regs., § 4(A)(3).  
11 However, the evidence shows that Sanitation failed to do so. Indeed, Mowery admitted that  
12 despite being statutorily required to, she does not “base” the DWCF on sewage flows, instead  
13 sewage flows are just “another factor that we *can* use to help direct where we end up[.]” Tr. at  
14 107:27-108:6 (Feb. 22, 2021). Mowery is also unaware of any documentation about the way in  
15 which sewage flows play into the DWCF calculation. Tr. at 28:23-29:13 (Mar. 18, 2021).  
16 Mowery additionally noted that the City does not perform any kind of calculation of sewage flow  
17 level data in setting the DWCF. Tr. at 24:14-25:4 (Feb. 9, 2021); 71:3-27 (Mar. 18, 2021). The  
18 only two sources of information Sanitation uses in determining the DWCF are rainfall data and  
19 the sewer trial runs; neither of these contains information about actual sewage flows. *See e.g.*,  
20 Ex. 88 (FY 16/17), Ex. 125 (FY17/18), Ex. 189 (FY 19/20).

21 After hearing Plaintiffs’ case, and specifically, Dutill’s adaptation of her 2020-2021 DWCF  
22 method to include sewage flows, Mowery claimed it would be inappropriate to use at-the-plant  
23 sewage flow data because it was not exclusively residential flow. Tr. At 107:27-108:19 (Feb. 22,  
24 2021). But when Mowery does claim to consider sewage flows, it is only the at-the-plant sewage  
25 flow data that she points to. Tr. at 12:15-13:4 (Mar. 18, 2021). Indeed, and contrary to the  
26 City’s assertion that it could not quantitatively use the overall system flows when making

27 \_\_\_\_\_  
28 <sup>6</sup> While in a given trial run, DWCF, ADSV, and revenue will move in the same direction, different trial runs can use  
different assumptions for different parameters that make them not directly comparable. Tr. at 15:12-20 (Feb. 22,  
2021). If everything else is equal, a higher DWCF will mean higher revenue.

1 determinations about less than all of its customers, the City also has used the full-system flows  
2 when making water conservation analyses concerning commercial customers. Tr. at 44:6-17  
3 (Feb. 9, 2021). However, in another piece of evidence showing that sewage flows were not  
4 actually used in any meaningful way in the DWCF process, Burgoyne, despite attending the  
5 DWCF meetings each year, when presented with the total system flow numbers, was surprised that  
6 they had declined as much as they had. Tr. at 45:7-16 (Feb. 9, 2021).

7 While Mowery claims to consider average daily sewage volume in setting the DWCF  
8 (Mowery Decl., ¶15), it is critical to understand that what Mowery is referring to as “sewage  
9 volume” is *not* measured sewage volume, but instead, the amount of water delivered to residential  
10 customers’ premises multiplied by the DWCF, resulting in the “ADSV.” Tr. at 98:17:-99:2 (Feb.  
11 9, 2021). Actual delivered water amounts do not provide any information about how much of  
12 that water goes into the sewer. Further, Mowery assumes that average daily sewage volume will  
13 not change in any significant way from year to year when deciding the yearly DWCF, but she does  
14 not base this assumption on any sewage flow measurements or data. Tr. at 29:25-30:12 (Feb. 9,  
15 2021).

16 Again, the DWCF functions as an input—different DWCFs are inputted into the trial run,  
17 and the trial runs show the ADSV generated by each of those test DWCFs. Tr. at 97:26-98:16  
18 (Feb. 9, 2021). There is a direct correlation between the potential DWCFs, the ADSV, and  
19 estimated revenue; as the DWCF increases (becomes a number closer to 1.0), both ADSV and  
20 estimated revenue increase. The DWCF is then selected *after* Sanitation can see the impact of  
21 various test DWCFs on sewage volume and estimated revenue. Thus, the DWCF is not at all  
22 based on sewage flows, nor is it based on sewage volume, as Mowery claims—the “sewage volume”  
23 Mowery says she actually uses is simply the amount of delivered water multiplied by the DWCF.  
24 Indeed, Mowery admitted at trial that the ADSV results directed from her chosen DWCF, and that  
25 she can see immediately what the impact on revenue will be when she selects the DWCF/ADSV.  
26 Tr. at 29:25-30:21 (Feb. 9, 2021). Similarly, Plaintiffs demonstrated that the ADSV is “an output  
27 of DWCF. It is not a basis for DWCF.” Tr. 97:26-99:2 (Feb. 9, 2021).



1 (c) The City Does Not Base the DWCF on Past and Present  
2 Precipitation

3 The City is statutorily required to base the DWCF on past and present precipitation, but  
4 failed to do so.<sup>7</sup> Ex.7, Rules & Regs., § 4(A)(3). Indeed, when asked if the City considers past  
5 precipitation in calculating the DWCF, Sung admitted that it does not. Tr. at 104:20-105:9 (Feb.  
6 8, 2021). In addition to the express language of the Rules & Regs., in a 1997 Board Report from  
7 the Director of the Bureau of Sanitation to the Board of Public Works, the Director defined the  
8 “calculation and implementation of the Rainy Season Review Period and Dry Winter  
9 Compensation Factor [as] annual routine determinations based on rainfall statistics.” Ex. 5-2.  
10 Mowery agreed with this statement. Tr. at 31:27-32:9 (Mar. 18, 2021). Yet, Mowery curiously  
11 testified that rainfall statistics would not assist her in determining the DWCF because looking at  
12 the entire Rainy Season Review Period (which is the period when 75% to 90% of the year’s rain  
13 fell) and how much irrigation was required could result in “a customer...getting sort of a double  
14 benefit.” In Mowery’s telling, this “double benefit” could apparently result because the entire  
15 RSRP includes time periods that are not part of an individual customer’s billing period. Tr. at  
16 107:1-26 (Feb. 22, 2021). This is contrary to the “annual routine determinations based on rainfall  
17 statistics” characterization that Sanitation made to the Board of Public Works in order to obtain  
18 delegation of DWCF selection. Ex. 5-2.

19 Thus, while the City has rainfall data available to it during the DWCF process, it is unclear  
20 how, if at all, the City utilizes that information in selecting the DWCF. Further, with the  
21 exception of FY21, the City has never had any metric for quantifying the rainfall distribution,  
22 without which, it is impossible to actually base the determination of the DWCF on that information.  
23 Tr. at 59:1-3, 104:5-19 (Feb. 8, 2021); 23:7-15, 111:12-27 (Feb. 9, 2021); 3:25-4:20 (Feb. 22,  
24 2021). The City claims that rainfall data and distribution result in it choosing a higher DWCF or  
25 a lower DWCF but can provide no further detail as to how these sets of information actually impact  
26 the DWCF selection, and actually admitted the absence of a correlation. Tr. at 58:12-28, 104:5-

27  
28 <sup>7</sup> FY2020-2021 is a possible exception, but as discussed *infra*, the City provided three conflicting explanations for  
how it determined a DWCF range of 0.80 to 0.86 that year, only one of which involved rainfall. See *infra* 17-18.

1 19 (Feb. 8, 2021); 23:7-15 (Feb. 9, 2021); 69:1-22 (Mar. 18, 2021). The City went so far as to  
 2 claim that it is impossible to quantify rainfall data and rainfall distribution's impact on the DWCF,  
 3 despite, again, Sanitation having told the Board of Public Works that the DWCF was a "routine  
 4 annual determination based on rainfall statistics," and the fact that "past and present precipitation"  
 5 is the very first factor that the Rules & Regs. require the DWCF to be based upon. Tr. at 58:12-  
 6 59:3 (Feb. 8, 2021); Ex. 5-2; Rules & Regs. Sec. 4.A.3.

7 The City's quantification of the rainfall distribution in FY21, and its claim to base the rough  
 8 DWCF range of 0.80 to 0.86 (a seven-point spread) on rainfall distribution, was highly significant  
 9 because Plaintiffs' expert was able to independently apply the City's claimed criteria for  
 10 determining what percentage of days required irrigation. He did so both for FY21 and the prior  
 11 years at issue. Specifically, the calculated rainfall distributions were as follows:

Fiscal Year	Portion of Rainy Season Review Period Requiring Irrigation
2015-2016	54%
2016-2017	47%
2017-2018	42%
2018-2019	65%
2019-2020	31%
2020-2021	36%

19 Tr. at 19:19-20:17 (Feb. 22, 2021).<sup>8</sup>

20 Notably, as discussed above, the City selected a DWCF of 0.98 for FY2017-2018, meaning  
 21 that it assumed only 2% of delivered water in a customer's Rainy Season Billing Period was used  
 22 for outdoor irrigation, even though 42% of the Rainy Season Review Period required irrigation.  
 23 In comparison, after the Court's summary judgment decision and the City's claim that it selected  
 24 the FY21 DWCF primarily based on rainfall distribution, it selected a DWCF of 0.83 for a Rainy  
 25 Season Review Period in which 36% of the days required irrigation. This inconsistency  
 26 demonstrates that the City has not, in any meaningful or consistent way, based the DWCF on past  
 27

28 <sup>8</sup> See Plaintiffs' Expert's Slides Presented at Trial, Nos. 37-43 ("Plaintiffs' Expert's Slides"). This table is simple and the Court has copied it for ease of understanding.

1 and present precipitation, nor has it treated the DWCF as a routine determination based on rainfall  
2 statistics.

3 Further, Dutill then converted each of those rainfall patterns to a DWCF midpoint in a 7-  
4 point range, just as the City claimed to do for FY21. After then adjusting within that range based  
5 on actual sewage flows and water consumption (the two other mandatory factors under the Rules  
6 & Regs.), Dutill calculated the following DWCFs:

7 Fiscal Year	Calculated DWCF	Difference from City's DWCF
8 2015-2016	.75	.09 lower
9 2016-2017	.77	.13 lower
10 2017-2018	.81	.17 lower
11 2018-2019	.66	.13 lower
12 2019-2020	.87	.08 lower
13 2020-2021	.81	.02 lower

14 Tr. at 26:25-27:25 (Feb. 22, 2021); Plaintiffs' Expert's Slides, No. 52. Again, the table is used

15 Thus, for every year, the DWCF calculated based on the City's own claimed methodology  
16 for FY21 (articulated for the first time after the Court's denial of the City's Motion for Summary  
17 Adjudication), adjusted with the required factors of sewage flows and water consumption, was less  
18 than the DWCF implemented by the City. Notably, for every year except the one determined  
19 after the Court's decision denying the City's Motion for Summary Adjudication, each actual  
20 DWCF selected by the City was sufficiently inflated that it was not even within the 7-point range  
21 generated by the method the City claimed to use for FY21.

22 **(d) The City Does Not Base the DWCF on Water Consumption**

23 The City is statutorily required to base the DWCF on water consumption but failed to do  
24 so. While Mowery claims to look at water conservation trends, Mowery conceded that no  
25 evidence had been presented at trial to show that she had done so. Tr. at 49:17-50:9 (Mar. 18,  
26 2021). Mowery also admitted that she had never made any attempts to quantify water  
27 consumption trends and that she solely conducted a "qualitative" analysis of water conservation  
28

1 trends with respect to selecting the DWCF. Tr. at 17:3-8, 112:21-23 (Feb. 9, 2021). Vazquez  
2 stated that he did not know whether or how water conservation was considered as part of the  
3 DWCF process. Tr. at 70:6-9 (Feb. 8, 2021).

4 As described above, Mowery has not identified any evidence that supports her assumptions  
5 about water conservation trends and their impact on the DWCF. Mowery has assumed that  
6 residential customers seeking to conserve water will primarily focus their efforts on lessening their  
7 outdoor water usage instead of indoor water usage, thus assuming that water conservation efforts  
8 will have no impact on the sewage volume that Sanitation charges its residential customers for—  
9 but Mowery has not based these assumptions on any data. Tr. at 19:6-20:9 (Feb. 9, 2021). In a  
10 2015 email chain, Mowery wrote that it was “critical” to get LADWP’s information on external  
11 and internal water conservation so that Sanitation could “determine what we believe the correct  
12 residential billable winter water volume for next year should be.” Ex. 69. However, Sanitation  
13 never received that information from LADWP and gave up trying to obtain it. Tr. at 18:18-26  
14 (Feb. 9, 2021). What that data showed was that in the period of 2014 through 2019, 83% of the  
15 water savings were indoor, with only 17% outdoor, contrary to Mowery’s assumption. Tr. at  
16 37:9-38:14 (Feb. 22, 2021).

17 Indeed, for residential customers, Sanitation almost entirely assumed away indoor  
18 conservation, allowing it to capture an average 6.3% annual revenue gain, compared to the 6.5%  
19 annual revenue gain it would have achieved had there been no indoor conservation whatsoever.  
20 In other words, the City obtained 97% of the revenue increases it had projected back in 2011,  
21 before the substantial indoor water conservation that took place since then. Tr. at 105:19-106:11  
22 (Feb. 9, 2021).

23 Further, to the extent that using ADSVs, which are the incoming water adjusted by the trial  
24 DWCFs, could be considered basing the DWCF on water consumption, the City’s decision to  
25 ignore the information it obtained from the ADSVs means that the City did not in fact base the  
26 DWCFs on water consumption. In particular, in discussing at trial the email discussed above in  
27 which Sung sets out choices of Rainy Season Review Period, DWCF, and revenue for the FY2017-  
28 2018 fiscal year, Sung stated that she viewed the ADSVs generated from the first run to be “too

1 low compared to the prior year’s estimated sewer volume,” even at a DWCF of 1. Tr. at 11:4-20  
2 (Feb. 22, 2021). But a DWCF of 1 means no adjustment at all. So, if the City thought the  
3 ADSVs were too low, even with no adjustment, then its expectations of the ADSVs were incorrect.  
4 Tr. at 11:22-12:5 (Feb. 22, 2021). That should have caused the City to make a major  
5 reassessment of what actual indoor water use was, but it did not do so.

6  
7 **3. The City’s DWCF Calculation has no Rational Connection to**  
8 **Effectuating the DWCF’s Purpose**

9 While local governments are entrusted with the discretion to determine how they calculate  
10 sewage charges, that discretion is not unfettered. *See Cnty. Of Los Angeles*, 214 Cal. App. 4th at  
11 653-54; *Shapell*, 1 Cal.App.4th at 235; Tentative Ruling on City’s MSA (Dec.12, 2019) (“Contrary  
12 to the City’s assertions, however, the Court will ‘correct abuses of discretion,’ [] for discretion is  
13 not unbounded.”). Local governments are still required to make such calculations in a manner  
14 reasonably related to the purpose of those calculations. *See Western States Petroleum Assn. v.*  
15 *Superior Ct.*, (1995) 9 Cal. 4th 559, 577. Here, the City’s calculation of the DWCF, which is  
16 based on revenue, and fails to adequately consider past precipitation, sewage flows and water  
17 consumption, has no reasonable relationship to the DWCF’s purpose. *See Cnty. Of Los Angeles*,  
18 214 Cal. App. 4th at 654; Tentative Ruling on City’s MSA (Dec. 12, 2019) (“Clearly there is no  
19 ‘rational connection’ between the consideration of the City’s revenue needs and the DWCF’s  
20 purpose of compensating utility users.”).

21 The DWCF is intended to compensate residential sewer service customers for dry winters  
22 with insufficient rain to obviate outdoor irrigation. LAMC § 64.41.01(g). In other words, it is  
23 supposed to enhance the accuracy of the estimated sewage discharge for which customers are  
24 charged. Pursuant to the plain language of the City’s own laws, this is the DWCF’s only purpose.  
25 And, the City reinforced that understanding in 2011, when, in connection with the then-pending  
26 rate increases, it told customers that it would “still bas[e] residential bills on the Winter Water Use  
27 method, which removes irrigation water that does not go to the sewer from your Sewer Service  
28 Charge bill.” Ex. 15-11. However, the City’s DWCF calculation is not reasonably related to

1 carrying out the DWCF's purpose.

2 The City's witnesses could not explain how any of the numbers in the sewer trial runs are  
3 related to compensating customers for dry winters with insufficient rain to obviate outdoor  
4 irrigation; nor could they explain how the numbers in the sewer trial runs are related to more  
5 accurately charging customers for their actual sewage discharge. Indeed, the City's witnesses  
6 were largely unsure of what data points comprise the sewer trial runs as well as what the data  
7 points mean—although all of them were aware that estimated revenue was provided on the trial  
8 runs. Tr. at 100:10-25 (Feb. 8, 2021).

9 Notably, none of the City's witnesses explained how estimated revenue is relevant to more  
10 accurately charging customers for their sewage discharge. And none is possible. Revenue is  
11 simply not reasonably related to determining residential sewage volume. Mowery even conceded  
12 in her second deposition that revenue has "nothing to do with how much our customers may have  
13 irrigated or how wet or dry a year was." Tr. at 35:11-36:2 (Feb. 9, 2021). And the City admitted  
14 that DWCFs set too high would mask actual reductions in residential volume. Tr. at 51:16-21,  
15 52:17-53:3 (Feb. 9, 2021). The City attempted to explain away the fact that all of the service  
16 categories (large multifamily, commercial, governmental, industrial) for which Mowery does not  
17 have the ability to set a DWCF have seen much more significant decreases in billable volume by  
18 saying that those decreases came from outdoor conservation in the summer; however, the City had  
19 previously stated in writing that the decrease in billable volume in those categories was due to  
20 "indoor water conservation." Tr. at 58-12-59:8. (Feb. 9, 2021); Ex. 75. And such indoor  
21 residential water conservation was occurring throughout the class period, in the residential  
22 category for which the DWCF is applicable. Tr. at 33:13-18 (Feb. 22, 2021).

23 Indeed, the City's witnesses explained that revenue is relevant to the DWCF calculation  
24 because they need to budget sufficiently and ensure sufficient funds to cover Sanitation's various  
25 costs—although Mowery claimed that for fiscal year 2020-2021, unlike in all prior fiscal years,  
26 she did not consider revenue in calculating the DWCF. Tr. at 35:11-36:2 (Feb. 9, 2021). Yet  
27 estimated revenue was still the most prominent data point on the 2020-2021 sewer trial runs and  
28 Mowery confirmed that nothing had changed in 2020-2021's DWCF selection process, other than

1 that the City improved its documentation. Tr. at 16:14-17:8, 30:2-6 (Mar. 18, 2021); Ex. 250.  
2 Thus, with the exception of the DWCF selected for fiscal year 2020-2021, the City has admitted  
3 that it bases the DWCF on revenue. While the City is not required to use a perfect method in  
4 calculating the DWCF, the City *is* required to use a method that is reasonably related to the purpose  
5 of the DWCF. The City has not done so. See *Shapell*, 1 Cal.App.4th at 235; *Summerhill*, 30  
6 Cal.App.5th at 555; *Martin*, 55 Cal.2d at 881.

7  
8 **4. The City’s Consideration of Revenue is Contrary to the Protocol Set  
9 forth in the Rules & Regs., as is the City’s Process for Setting the RSRP**

10 The City has failed to follow the procedures in the order delineated by the Rules & Regs.  
11 See *Cnty. of Los Angeles*, 214 Cal.App.4th at 654 (in assessing whether an agency acted  
12 unlawfully, “[a] court must ask . . . whether the agency failed to follow the procedure and give the  
13 notices the law requires.”). Had the City done so, it would not have been looking at revenue  
14 when selecting the DWCF. That is because the revenue information comes from multiplying the  
15 per-HCF rate by the DWCF and the daily Winter Water Use. Ex. 250-5. Indeed, the City is  
16 required to set the DWCF *before* calculating the Winter Water Use. See Ex. 7, Rules & Regs., §  
17 4(A)(3)-(B)(2). But instead, the City sets the DWCF *after* it determines the Winter Water Use,  
18 thus giving itself a sneak peek at revenue, which it then uses to select which of the trial DWCFs it  
19 wishes to implement.

20 Moreover, the City has violated the Rules & Regs.’ requirements with respect to its  
21 determination of the Rainy Season Review Period. The City is required to determine the Rainy  
22 Season before it sets the Rainy Season Review Period. See Ex.7, Rules & Regs., § 4(A)(1)-(2).  
23 The City is required to set the Rainy Season as the period during which “a substantial portion of  
24 annual precipitation occurred,” which “will normally mean 75% to 90% of precipitation occurring  
25 in a fiscal year, depending on the precipitation patterns of each particular year.” Ex. 7, Rules &  
26  
27  
28

1 Regs., § 4(A)(1). Then, the City is required to set the Rainy Season Review Period by adding 27  
2 days to each end of the Rainy Season. Ex. 7, Rules & Regs., § 4(A)(2).

3 However, the City does not actually set a Rainy Season. The City skips this step and  
4 calculates the Rainy Season Review Period based on whenever it decides the first “significant”  
5 day of rain and last “significant” day of rain for the year occur. This has the effect of unlawfully  
6 shortening the Rainy Season Review Period, which means that customers who have a billing period  
7 that has lower water use than their Rainy Season Billing Period, and where that billing period  
8 would have been a Rainy Season Billing Period had the City properly set the Rainy Season Review  
9 Period, are overcharged.

10 While the City claimed that it determined Rainy Season Review Periods by adding 27 days  
11 to each end of the Rainy Season, (Tr. at 8:24-91 (Feb. 9, 2021)), there was no written evidence  
12 that the City did so, and the evidence at trial showed that for the FY21 determination, had the City  
13 actually done so, then it would have selected a Rainy Season that only contained 55% of the year’s  
14 precipitation, contrary to the Rules & Regs., which state that the Rainy Season will normally  
15 contain between 75% to 95% of the annual rainfall. Tr. at 70:24-71:21 (Feb. 9, 2021). After  
16 this was demonstrated at trial, the City emphasized that the Rules & Regs. only “normally” require  
17 that the Rainy Season contain between 75% to 95% of the annual rainfall. That was of no  
18 moment, however, because the same City witness who offered that excuse had, only minutes  
19 earlier, confirmed that there was nothing abnormal about the rainfall that year that would mean  
20 that the rainy season would not contain the “normal” 75%-95% of rainfall. Tr. at 65:5-66:6 (Feb.  
21 9, 2021). Thus, the attempted explanation was another unfortunate instance of the City  
22 attempting to invent facts or rationales only after its noncompliance has been pointed out in this  
23 litigation.

24 The City’s failure to follow the clearly delineated order of operations in setting the Rainy  
25 Season, Rainy Season Review Period, DWCF, and Winter Water Use, as well as the City’s failure  
26 to set the Rainy Season Review Period in accordance with the guidelines it has created, further  
27 demonstrate the arbitrary and capricious manner of the City’s actions under the Municipal Code  
28 and Rules & Regs.



1                                   **5. The City Failed to Demonstrate That it Did Not Effectuate a Rate**  
2                                   **Increase By Inflating the DWCF in Violation of Prop. 218**

3           The parties stipulated to the fact that the City never provided notice and a hearing with  
4 respect to the DWCF during the relevant timeframe. *See* Stipulation re: Deposition of  
5 Defendant’s Person(s) Most Knowledgeable, ¶7 (Feb. 10, 2021). The parties further agreed that  
6 whether the City followed the Prop. 218 notice and hearing requirements in enacting a series of  
7 formal rate increases that went into effect in 2012 was not an issue before the Court in this trial.  
8 *See* Joint Stipulated Facts for Trial, ¶1 (Feb. 5, 2021). Thus, the Prop. 218 issue to be decided in  
9 the first phase of trial was whether the City had carried its evidentiary burden to demonstrate it  
10 had not inflated the DWCF, resulting in an increased amount of sewer service charges being levied  
11 on residential ratepayers. If the City failed to carry its burden, the Court would necessarily find  
12 that the City had failed to comply with Prop. 218’s procedural notice and hearing requirements.

13           Here, similar to *AB Cellular*, the City added a new variable—its revenue needs—in its  
14 calculation of the DWCF, but the City did not disclose this to its residential customers. As  
15 discussed in greater detail above (*see* Sec. VI(A)(2)(a), *supra*), revenue is unquestionably built  
16 into the City’s DWCF selection. The sewer trial runs, which are used to select the DWCF, consist  
17 of testing different potential DWCFs and seeing their impact on estimated revenue. Mowery  
18 herself confirmed on multiple occasions that revenue is a factor in the DWCF selection because  
19 she needs “to ensure that the Bureau of Sanitation will have sufficient sums to cover its  
20 maintenance, operational and management obligations[.]” Mowery Decl., ¶15. Sanitation’s  
21 other employees similarly confirmed the prominence of revenue in the DWCF selection process—  
22 for example, Cheung stated that as part of the DWCF process, he would discuss with Mowery the  
23 amount of revenue needed to keep the sewer system in good condition (Tr. at 56:22-57:21 (Feb.  
24 8, 2021))—and numerous emails admitted at trial confirm revenue’s prominence as well.

25           Similar to *Plantier*, here, the City provided residential customers with notice that it was  
26 raising the formal *rates* charged per HCF of sewage, but it did not provide notice that it would be  
27 using revenue as a variable in its methodology of calculating the SSC, such that customers would  
28 be charged even more than the rates described in the notice. To the contrary, the City told

1 customers that it would “still bas[e] residential bills on the Winter Water Use method, which  
2 removes irrigation water that does not go to the sewer from your Sewer Service Charge bill.” Ex.  
3 15-11. Nor did the City tell customers that it would select DWCFs that were too high to  
4 compensate them for outdoor irrigation.

5 By inflating the DWCF, the City inflates the effective rates that residential customers are  
6 obligated to pay. The City’s sewer service charge system is volumetric—the more sewage a  
7 customer generates, the more the customer pays. The DWCF, if properly calculated—meaning,  
8 if based on past and present precipitation, sewage flows, and water consumption—ensures that the  
9 residential customer class pays for the portion of delivered water that enters the sewer, and not for  
10 the portion of delivered water that is used for irrigation. Accordingly, the numeric value of the  
11 DWCF should be representative of the split between indoor and outdoor use, such that if in the  
12 Rainy Season Billing Period, indoor use was 60% and outdoor use was 40%, the DWCF should  
13 be 0.60 to compensate for that outdoor use. An inflated DWCF means that residential customers  
14 are being charged for a greater volume of sewage than they produce.

15 In a volumetric system, there is no difference between overstating customer volume and  
16 increasing the per-unit rate paid for the actual volume. Tr. at 27:26-30:23 (Feb. 22, 2021). For  
17 example, in FY2017-2018, the City selected a DWCF of 0.98, meaning that the City billed  
18 customers on the assumption that 98% of their delivered water went into the sewer, whereas  
19 evidence at trial established that a DWCF of 0.81 was more appropriate, meaning that only 81%  
20 of the delivered water went into the sewer. While the official rate that year was \$4.80/HCF (Ex.  
21 15-16), using a DWCF that was 0.17 higher than it should have been made the actual rate charged  
22 \$1.01 higher, meaning that customers were actually charged \$5.81 per HCF: a significant increase,  
23 without Prop. 218 notice. Tr. at 30:24-32:1 (Feb. 22, 2021).

24 Thus, the evidence presented by Plaintiffs showed that the City overcharged residential  
25 sewer customers by inflating the DWCF from FY 2015-2016 through the present, which resulted  
26 in rate increases throughout that timeframe. The City’s failure to adequately consider the  
27 statutorily required factors of past and present precipitation, sewage flows, and water consumption,  
28 and its decision to instead base the DWCF on revenue needs, resulted in a rate increase to

1 residential customers. The City’s refusal to quantify any of the required factors in calculating the  
2 DWCF has rendered it impossible for the City to demonstrate that it did not improperly inflate the  
3 DWCF, and is inconsistent with the law’s demand for “*transparency and consistency*” in the  
4 setting of fees in the Prop. 218 context. *AB Cellular*, 150 Cal.App.4th at 762. While the City  
5 failed to carry its burden and did not set forth any evidence of a step-by-step analysis it used to  
6 select the DWCF, Plaintiffs’ expert demonstrated that the City had masked real decreases in  
7 residential sewage volume by choosing DWCFs that were too high. Tr. at 38:15-39:24 (Feb. 22,  
8 2021).

9 Further, while the City admitted that it had no consistent, reproducible model or formula  
10 for selecting the DWCF, Plaintiffs’ expert presented a model for “consisten[tl]y” and  
11 “transparen[tl]y” (*AB Cellular*, 150 Cal.App.4th at 762) calculating the DWCF for all relevant  
12 years that was based on Mowery’s purported methodology for selecting 2020-2021’s DWCF,  
13 based on the same information that Mowery claimed to base her selection on that year. The  
14 model showed that for fiscal years 2015-2021, the City selected a DWCF that was higher than it  
15 should have been. Inflating the DWCF meant that the City increased the Sewer Service Charge  
16 above the rates that it had provided notice to residential customers of, by the following amounts:

Fiscal Year	Overcharge Per HCF
2015-2016	\$0.51
2016-2017	\$0.76
2017-2018	\$1.01
2018-2019	\$1.01
2019-2020	\$0.50
2020-2021	\$0.14

24 Tr. at 30:24-32:1 (Feb. 22, 2021). The Court again uses the table provided by Plaintiffs.

25 Moreover, the City even recognized that it might be overstating residential customer  
26 sewage usage by setting the DWCF too high. The City acknowledged that wastewater volumes  
27 for single family and small multi-family residential classes fell prior to 2013 but leveled out after  
28

1 that year, even though the drought did not start until a few years later, when LADWP started using  
2 a new billing system. Burgoyne confirmed that there were only two possible explanations for  
3 this situation: either billed residential sewage volume was reflective of mysteriously high  
4 residential sewage volume, or the DWCF was masking the fact that *billed* sewage volume was  
5 higher than the actual sewage volume—with the latter meaning that the DWCF itself had been set  
6 too high. Tr. at 51:1-53:3 (Feb. 9, 2021); Ex. 146.

7 As such, in accordance with *AB Cellular* and *Plantier*, the City’s inflated DWCFs were  
8 rate increases, but the City did not provide the required Prop. 218 notice and hearing before  
9 effectuating these increases. Under Prop. 218, the City bears the burden of proving that it did not  
10 raise rates without first following the procedural notice and hearing requirements. The City failed  
11 to carry its burden. While Mowery criticized the model proffered by Plaintiffs—which was based  
12 on her own purported methodology for 2020-2021—the City proffered no evidence contradicting  
13 Plaintiffs’ evidence that the City’s inflation of the DWCF has resulted in increased residential  
14 SSCs.<sup>9</sup> Nor could the City have satisfied its evidentiary burden, as Mowery testified that the City  
15 made no quantification of the impact that estimated revenues or the City’s revenue needs have on  
16 the determination of the DWCF. Tr. at 34:7-20 (Feb. 9, 2021). Indeed, the City admitted that  
17 it does not quantify the impact that *any* of the factors it claimed to base the DWCF had on the  
18

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19 <sup>9</sup> The City put in evidence from a bond document that “typical” single family monthly residential sewer service charge  
20 bills were lower than the City had earlier projected. Tr. at 22:8-24:24 (Mar. 18, 2021); Ex. 266-47. For purposes of  
21 Prop. 218, that is irrelevant. The question is whether the City increased the rate, not what a typical customer, who  
22 pays based on the rate times volume, pays. Indeed, as Mowery herself chalked up the difference to “water  
23 conservation that was occurring in those years that we had not fully anticipated when we did the projections in 2012,”  
24 not the City charging a lower rate than those formally disclosed. Tr. at 24:2-6 (Mar. 18, 2021).  
25 Even if it was relevant, the evidence at trial called into serious question the City’s reported typical single-family  
26 charges. First, the sewage volumes on which the City’s “typical” charges were reported are based on approximate  
27 volumes and “do not reflect effects of low-income assistance program,” (Ex. 266-46) and those approximate volumes  
28 are considerably lower than those reported on Sanitation’s Winter Water Use trial runs. Tr. at 26:1-27:14 (Mar. 18,  
2021). While Mowery attempted to justify this discrepancy by claiming that what appears on the trial runs is only “a  
projection based on a point in time,” she previously testified that the average daily sewage volumes on the trial runs  
provide “a very clear indication of what the customer *would actually be charged* for under a selected Dry Winter  
Compensation Factor.” Tr. at 2:23-3:12 (Mar. 18, 2021). And indeed, the trial run “projection” is performed in May,  
looking *back* at the previous winter. Second, Ex. 250-4 contains both the estimated and actual billables for three  
fiscal years, and those figures diverge from each other far less than the ADSVs reported on the trial runs diverge from  
the reported volumes on the City’s bond document.  
The Court need not resolve these discrepancies, because, again, Ex. 266 does not bear on the Prop. 218 question at  
all.

1 DWCF selected each year. Without any evidence of an identifiable, step-by-step analysis the  
2 City performs in selecting the DWCF, the City simply cannot meet its evidentiary burden to  
3 demonstrate that it has not effectuated a rate increase by inflating the DWCF. In conclusion, the  
4 City's process has not involved "transparency and consistency," and the SSC rate increases  
5 resulting from the City's inflation of the DWCF, are unlawful under Prop. 218.

6  
7 **B. The City Cannot Do Whatever It Wants, and Its Interpretations are not**  
8 **Entitled to Deference**

9 **1. Only Agency Interpretations are at Issue**

10 As noted above (*see* Sec. V, B, *supra*), courts apply an abuse of discretion standard in  
11 reviewing quasi-legislative acts and an independent judgment standard with variable deference in  
12 reviewing agency interpretations. *See Yamaha*, 19 Cal. 4th at 1, 10. In other words, a greater  
13 degree of judicial deference attaches to an assessment of quasi-legislative acts than to an  
14 assessment of agency interpretations. *See id.* Quasi-legislative rules are "regulations adopted  
15 by an agency to which the Legislature has confided the power to 'make law,'" as opposed to  
16 "ministerial and informal actions[.]" *See Yamaha*, 19 Cal.4th at 3-4. In contrast, where an  
17 agency's interpretation of its own rules is at issue, such as a city's interpretation of its own  
18 municipal ordinances, a court is to apply less deference. *See Harrington v. City of Davis* (2017)  
19 16 Cal.App.5th 420, 434-35 ("We exercise independent judgment on legal issues, including the  
20 interpretation of municipal ordinances."); *see also City of Monterey v. Carrnshimba* (2013) 215  
21 Cal.App.4th 1068, 1091; *Horwitz v. City of Los Angeles* (2004) 124 Cal.App.4th 1344, 1354. "In  
22 reviewing the City's interpretation of the Municipal Code, we apply the framework developed  
23 in *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8 ... in which our  
24 Supreme Court explained that the degree of deference accorded an agency's interpretation is 'not  
25 susceptible of precise formulation, but lies somewhere along a continuum,' or, in other words, is  
26 'situational.'" *Harrington*, 16 Cal.App.5th at 434-35.

27 Here, only agency interpretations are at issue, as the central issue in this case involves  
28 "reviewing the City's interpretation of the Municipal Code[.]" *See Harrington*, 16 Cal.App.5th at

1 434-35; *see also Western States*, 57 Cal. 4th at 415 (noting that independent judgment standard  
2 should be applied to questions of “whether an agency has incorrectly interpreted the statute it  
3 purports to implement[.]”) Accordingly, the Court was to apply its independent judgment with a  
4 degree of deference, if any, was found appropriate under the circumstances. *See Yamaha*, 19 Cal.  
5 4th at 7-8. For the reasons described herein, no deference is due to the City’s interpretation.

## 6 **2. The City’s Discretionary Arguments are Self-Defeating**

7 Significantly, the DWCF determination was intended to be a ministerial “routine”  
8 calculation as described by the Board of Public Works—this was the very reason why the Board  
9 deemed it appropriate to delegate the task to Sanitation. *See Ex. 5*. Indeed, in seeking  
10 delegation of the DWCF and RSRP in 1997, Sanitation told the Board that “[t]he calculation and  
11 implementation of the RSRP and DWCF are annual routine determinations based on rainfall  
12 statistics. To relieve the Board of the annual task of implementing the RSRP and DWCF and to  
13 expedite calculating each customer’s WWU, it is recommended, herein, that the Board delegate  
14 this task to the Director for future determinations.” *Ex. 5* (emphasis added). Thus, Sanitation  
15 represented that the DWCF determination was ministerial, not discretionary.

16 Further, because the DWCF calculation was delegated, it cannot, as a matter of law, be  
17 discretionary. “[P]ublic agencies may delegate the performance of ministerial tasks,” but  
18 “powers conferred upon public agencies and officers which involve the exercise of judgment or  
19 discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates  
20 in the absence of statutory authorization.” *See Am. Fed’n of Teachers v. Bd. of Educ.* (1980) 107  
21 Cal. App. 3d 829, 834. While the City takes the position that the DWCF calculation was  
22 discretionary and that Sanitation had been vested with broad discretion, the Board of Public Works  
23 never received statutory authorization to delegate the DWCF calculation to the Director of  
24 Sanitation, and thus, could only have done so if the DWCF calculation was ministerial—which is  
25 exactly what Sanitation told the Board in describing it as “routine determinations based on rainfall  
26 statistics.” *Ex. 5*. The June 1997 Board Report (*Ex. 5*) is the only evidence of the Board’s  
27 authorization to allow the Director of Sanitation to calculate the RSRP and DWCF. *See*  
28 *Stipulation re: Deposition of Defendant’s Person(s) Most Knowledgeable*, ¶6 (Feb. 10, 2021).

1 Accordingly, either (1) the DWCF is ministerial in nature, consistent with Sanitation telling the  
2 Board of Public works that the DWCF was an “annual routine determination[] based on rainfall  
3 statistics[,]” (Ex. 5-2) and thus no deference is possible, or; (2) the DWCF is discretionary and  
4 was the result of an improper delegation from the Board of Public Works to the Director of  
5 Sanitation.

6 Even if the City had obtained proper authorization to delegate a discretionary task, that  
7 could not help the City, for the reasons described in the following section.

8 **3. The City’s Interpretation is Not Entitled to Any Degree of Deference**

9 Trial courts consider a variety of factors in assessing the degree of deference, if any, to  
10 apply to an agency’s interpretation. *See Yamaha*, 19 Cal. 4th at 7-8. Factors that tend to support  
11 a degree of deference include: if the interpretation was adopted in accordance with Administrative  
12 Procedure Act provisions (*see Alvarado v. Dart Container Corp. of Calif.* (2018) 4 Cal. 5th 542,  
13 557, *as modified* (Apr. 25, 2018); indications of careful consideration by senior agency officials,  
14 as “an interpretation of a statute contained in a regulation adopted after public notice and comment  
15 is more deserving of deference than [one] contained in an advice letter prepared by a single staff  
16 member”; evidence that the agency “has consistently maintained the interpretation in question,  
17 especially if [it] is long-standing” and; “indications that the agency’s interpretation was  
18 contemporaneous with legislative enactment of the statute being interpreted.”). *See State Farm*  
19 *Mutual Automobile Ins. Co. v. Quackenbush* (1999) 77 Cal. App. 4th 65, 75-77; *AB Cellular LA,*  
20 *LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747, 765-67 (noting that a consistent  
21 interpretive position and contemporaneous construction of a statute by an administrative agency  
22 charged with its administration and interpretation, while not necessarily controlling, is entitled to  
23 greater weight).

24 On the other hand, where evidence of these factors is lacking, courts have found that little  
25 or no deference should be given to the agency. *See e.g., Quackenbush*, 77 Cal. App. 4th at 75-  
26 77 (where Insurance Commissioner’s interpretation of insurance code section had “not been  
27 formally adopted in a process including public participation[,]” and was not “contemporaneous  
28 with the enactment of” insurance code section at issue, Commissioner’s interpretation given only

1 “limited deference”).

2 As such, an agency’s determination that is poorly reasoned, lacking in analysis,  
3 inconsistent, or contradicts an earlier interpretation is entitled to little, if any, weight. See e.g.,  
4 *American Nurses Ass’n v. Torlakson* (2013) 57 Cal. 4th 570, 588-90 (agency advisory statements  
5 were entitled to no deference where the statements contained conclusions but no analysis and were  
6 contrary to the agency’s current interpretation); *Newton-Enloe v. Horton* (2011) 193 Cal. App. 4th  
7 1480, 1490-91 (declarations by Department of Public Health officials entitled to little weight  
8 where officials did not state the basis for their understanding); *De La Torre v. California Horse*  
9 *Racing Bd.* (2017) 7 Cal. App. 5th 1058, 1071-72 (board’s interpretation of statute not entitled to  
10 deference where board had vacillated on its interpretation, board’s interpretation was not  
11 contemporaneous with enactment of statute, and board’s interpretation “was not the result of  
12 careful consideration by senior agency officials[.]”).

13 Here, none of the factors typically considered by courts in the deference inquiry weighed  
14 in favor of deferring to the City’s interpretation. It is undisputed—indeed, the parties stipulated  
15 to the fact—that Mowery has been the ultimate decisionmaker of the DWCF for the relevant  
16 timeframe, and as such, it is Mowery’s interpretation that governs the DWCF. It is undisputed  
17 that Mowery’s interpretation was not adopted in accordance with Administrative Procedure Act  
18 provisions. It is undisputed that Mowery’s interpretation was not contemporaneous with the  
19 legislative enactment of the relevant provisions of the LAMC or Rules & Regs. It is undisputed  
20 that Mowery’s interpretation was not adopted after public notice and comment.

21  
22 **(a) The City’s DWCF Process is Neither Thorough Nor Well-Reasoned**

23 An agency’s determination that is poorly reasoned or lacking in analysis is entitled to little,  
24 if any, weight. See e.g., *American Nurses*, 57 Cal. 4th at 588-90; *Newton-Enloe*, 193 Cal. App.  
25 4th at 1490-91; *De La Torre*, 7 Cal. App. 5th at 1071-72.

26 The City’s yearly DWCF calculation is not the product of careful consideration by senior  
27 members of the agency in the course of conducting adversarial proceedings. Contrary to  
28



1 established engineering practice and even contrary to the own desires of DWCF process  
2 participants for whom Mowery is the direct or indirect supervisor, Sanitation has no procedure  
3 manual for the DWCF that can be followed step-by-step. Tr. at 107:24-108:19 (Feb. 9, 2021).  
4 Instead, it is undisputed that the DWCF is the product of one person—Sanitation’s Chief Financial  
5 Officer, Lisa Mowery—unilaterally making a decision. Stipulation re: Deposition of  
6 Defendant’s Person(s) Most Knowledgeable (“PMK”), ¶5 (Feb. 10, 2021). In the process of  
7 selecting the DWCF, none of Sanitation’s witnesses have disagreed with Mowery, nor with each  
8 other. Tr. at 97:21-98:4, 98:15-17 (Feb. 8, 2021).

9 In the meetings held by Sung, Burgoyne and Vazquez to make an initial DWCF  
10 recommendation, no one takes notes or keeps records. Tr. at 69:26-70:1, 97:21-98:7, 98:18-20  
11 (Feb. 8, 2021); 46:3-6 (Feb. 9, 2021). The yearly DWCF determination process is so undefined  
12 and lacking in clarity that Sung—who is the second most integral employee in the DWCF  
13 determination—admitted she did not understand the DWCF calculation well enough to be able to  
14 do it on her own for any given year, or to be able to explain it afterward. Tr. at 100:5-25 (Feb. 8,  
15 2021). Sung also stated that everything she learned about the DWCF, she largely learned from  
16 Vazquez. Tr. at 97:3-12 (Feb. 8, 2021). Yet Vazquez stated that he did not know what  
17 methodology Sung (or Mowery) used in the DWCF process. Tr. at 69:16-25 (Feb. 8, 2021).

18 Sanitation’s employees do not know how Mowery ultimately reaches her decision on the  
19 final DWCF. Tr. at 69:16-25 (Feb. 8, 2021); 29:24-30:1 (Mar. 18, 2021). There is no  
20 documentary evidence of any analysis Mowery engages in to determine the DWCF. Mowery  
21 keeps no notes on why she chooses given DWCFs, even anecdotal discussions of where she felt  
22 the ratio of indoor and outdoor water use was in a particular year. Tr. at 22:22-23:6 (Feb. 9,  
23 2021). Sung is not aware of any notes or records that show how Mowery comes to her final  
24 decision on the yearly DWCF. Tr. at 98:18-21 (Feb. 8, 2021). Further, in setting the DWCF,  
25 Mowery claims to remember her own watering habits from six months earlier, although she does  
26 not make any record of that watering, which is not appropriate engineering practice for data to be  
27 used in a determination. Tr. at 109:16-110:8 (Feb. 9, 2021).

28 There is no procedure manual or instructions that Sanitation has ever used or created in

1 determining the DWCF. Tr. at 50:9-11, 102:11-103:9 (Feb. 8, 2021); 99:3-7, 107:21-108:19 (Feb.  
2 9, 2021). Sung noted in an email dated June 24, 2016 that a project assistant should be tasked  
3 with capturing Mowery’s “thought process/instruction” as to how Mowery reviews rainfall data  
4 and what lines of the sewer trial runs Mowery focuses on. Ex. 102-1. Eventually Sung tasked  
5 an intern named with the task of drafting a DWCF procedural manual later in 2016. Tr. at 102:11-  
6 18 (Feb. 8, 2021). However, after the intern submitted an initial draft, which stated, *inter alia*,  
7 “During the DWCF trial run, the SSC revenue generated either has to **match** the previous year or  
8 exceed **very** slightly. Once these revenues are generated based on the different DWCF tested, a  
9 value OR factor is selected for the year[.]” Sanitation never saw the project through. Ex. 112-2  
10 (emphasis in original); Tr. at 101:4-27, 102:25-103:9 (Feb. 8, 2021).

11 In sum, under California precedent, Sanitation’s determination of the DWCF was lacking  
12 in analysis, and was not thorough or well-reasoned. *See e.g., American Nurses*, 57 Cal. 4th at  
13 588-90; *Newton-Enloe*, 193 Cal. App. 4th at 1490-91; *De La Torre*, 7 Cal. App. 5th at 1071-72.

14  
15 **(b) The City’s DWCF Calculation for Fiscal Years 2015-2019 is**  
16 **Inconsistent with, and Contradicts, its Current Interpretation**  
17 **for Fiscal Year 2020-2021**

18 The City’s 2020-2021 DWCF process was significantly inconsistent with, and contradicts,  
19 the City’s process for prior fiscal years. Agency interpretations that lack consistency, or  
20 contradict its earlier interpretations, are not entitled to deference. *See e.g., Quackenbush*, 77 Cal.  
21 App. 4th at 75-86 (court rejected agency interpretation despite agency’s significant expertise in  
22 ratemaking, noting lack of consistency in agency’s interpretation of its own regulations as a factors  
23 weighing against judicial deference to agency’s interpretation); *Murphy v. Kenneth Cole*  
24 *Productions, Inc.* (2007) 40 Cal. 4th 1094, 1106, n. 7 (an agency interpretation that contradicts  
25 agency’s earlier interpretation is not entitled to “significant deference”); *American Nurses*, 57 Cal.  
26 4th at 588-90 (agency advisory statements that were contrary to agency’s current interpretation  
entitled to no deference).

27 Notably, Mowery contradicted her prior characterization of how revenue is factored into  
28 the DWCF with respect to fiscal year 2020-2021. Regarding prior fiscal years, Mowery declared

1 that estimated revenue was one of the factors she considered in determining the DWCF, noting  
2 that she needed to ensure that Sanitation “will have sufficient sums to cover its maintenance  
3 operational, and management obligations[.]” Mowery Decl., ¶15. Similarly, at her deposition  
4 on September 19, 2019, Mowery confirmed that estimated revenues were factored into the DWCF,  
5 stating that estimated revenues were “sort of a verification that we’re in the right areas, [as far as]  
6 selecting the Dry Winter Compensation Factor.” Tr. at 34:7-17 (Feb. 9, 2021).

7 Yet, in sharp contrast to her prior testimony, when Mowery was deposed the following  
8 year in her capacity of the City’s Person Most Knowledgeable on the topic of the FY2020-2021  
9 DWCF, after the Court’s denial of the City’s Motion for Summary Adjudication—which  
10 unsuccessfully argued that it was proper to base the DWCF on revenue needs—Mowery claimed  
11 that revenue was not taken into consideration and had “nothing to do with choosing the dry winter  
12 compensation factor or the rainy season review period.” Tr. at 35:11-19 (Feb. 9, 2021).  
13 Mowery further stated that revenue had “no relevance to how dry or wet the year was.” Tr. at  
14 35:20-25 (Feb. 9, 2021). These contradictory statements concerning estimated revenue’s role in  
15 setting the DWCF between fiscal year 2020-2021 and prior fiscal years negates any judicial  
16 deference to the City’s interpretations.

17 In addition, the City’s 2020-2021 DWCF process was documented in a significantly  
18 different manner from the prior years during the Class Period. In sharp contrast to prior years,  
19 the City added some detail and documentation. Tr. at 5:15-9:13 (Feb. 22, 2021). The 2020-  
20 2021 trial runs contained a line item for actual versus estimated revenue from previous years,  
21 which prior trial runs did not contain. Ex. 250-4, *compare* Exs. 125, 153, 189. The 2020-2021  
22 trial runs contained a notes section which indicated the identity of the person leaving the notes and  
23 the date the notes were made, in contrast to prior trial runs which did not include this detail. Ex.  
24 250-6, 7, *compare* Exs. 125, 153, 189.

25 For 2020-2021, the City also made changes to the documentation of rainfall information  
26 used as part of the RSRP and DWCF determination. Historically, the City had made “no attempt  
27 to identify in any quantified way the days that would require irrigation.” Tr. at 25:17-24 (Feb. 9,  
28 2021). Unlike in prior years, for 2020-2021, the City included “dates that were likely to require

1 irrigation” in its rainfall readings. Ex. 218-1 *compare* Exs. 122, 154, 196. In contrast to prior  
2 years, for 2020-2021, the City provided a graphical comparison of rainfall distribution of prior  
3 years. See Ex. 218-2. Moreover, for 2020-2021, the City memorialized the justification for its  
4 RSRP in a document aptly titled “RSRP Justification”—which it did not do for prior years. See  
5 Ex. 218-4.

6 Mowery tacitly admitted that the DWCF determination for prior years was inconsistent and  
7 unsupported by substantial evidence by stating that the reason for Sanitation’s increased  
8 documentation for 2020-2021’s DWCF was to provide new employees with “a more well-rounded  
9 view of how we make the selection each year.” Tr. at 16:17-17:8 (Mar. 18, 2021). Mowery  
10 also confirmed that Sanitation’s notes supporting its 2020-2021 RSRP determination was a new  
11 practice intended to document what went into staff discussions and to assist in training new  
12 employees. Tr. at 16:17-17:8 (Mar. 18, 2021).

13 Significantly, those notes further demonstrate the inconsistencies in Sanitation’s DWCF  
14 process. While Mowery testified that the rough range of 0.8 to 0.86 was selected by looking at  
15 the rainfall distribution, the notes state that the rough range of 0.8 to 0.86 was selected to generate  
16 ADSVs consistent with the City’s expectation that indoor use would be very similar to prior years.  
17 Tr. at 7:25-8:10 (Feb. 22, 2021); Ex. 250-7. And at trial, Mowery proffered a third, different  
18 explanation for that range: that she wanted to avoid “higher bills for the customers.” Tr. at 72:24-  
19 73:18 (Mar. 18, 2021).

20 In sum, the significant inconsistencies and contradictory nature of the City’s DWCF  
21 calculation for fiscal year 2020-2021 as compared to all relevant prior fiscal years further undercuts  
22 the degree of judicial deference that should apply to the City’s interpretation. See *Quackenbush*,  
23 77 Cal. App. 4th at 75-86; *Murphy*, 40 Cal. 4th at 1106, n. 7; *American Nurses*, 57 Cal. 4th at 588-  
24 90.

25 The Court concludes that under an independent judgment standard, the City has acted  
26 unlawfully and no deference should be afforded to the City’s interpretation. Further, regardless  
27 of whether the Court applies an abuse of discretion standard or an independent judgment standard,  
28 the Court reaches the same conclusion. The Court concludes that the City has acted in a manner

1 that is arbitrary, capricious, and entirely lacking in evidentiary support, and that the City failed to  
2 follow the procedure the law requires.

3 **IV. OBJECTIONS AND JUDICIAL NOTICE**

4 The City separately filed "DEFENDANT CITY OF LOS ANGELES' OBJECTIONS TO  
5 PLAINTIFFS' SUBMISSION OF NON-ADMITTED AND IMPROPER EVIDENCE" which set  
6 forth objections to the submission of 1) Notice of Lodging Plaintiffs' Expert's Slides Presented at  
7 Trial; 2) Notice of Lodging Plaintiffs' Opening Statement Slides; and 3) Appendix of Evidence in  
8 Support of Plaintiffs' [Proposed] Tentative Statement of Decision. The objections are overruled.  
9 It is proper to lodge documents which were used and referenced during the trial. But the Court did  
10 not review those documents after trial while preparing this Statement of Decision.

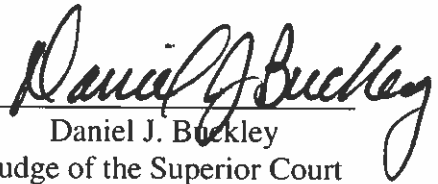
11 The Court grants the City's request for judicial notice for and takes judicial notice of each  
12 of the following:

- 13 (a) City of Los Angeles's Municipal Code Section 64.41.01 *et seq.*
- 14 (b) Sections 21.1, 21.2, 21.20 and 22.320 of the City of Los Angeles's Administrative  
15 Code.
- 16 (c) The Board of Public Works Rules and Regulations for Administration of the Sewer  
17 Service Charge adopted March 7, 2007.
- 18 (d) Sections 506, 510, 580 and 581 of the City of Los Angeles' Charter.
- 19 (e) Los Angeles Bureau of Sanitation Board Report No. 1 (June 27, 1997; agenda item  
20 9).
- 21 (f) Los Angeles Bureau of Sanitation Board Report No. 2 (June 27, 1997; agenda item  
22 10); and
- 23 (g) Board of Public Works Approval of Agenda Items 9 and 10, the Los Angeles  
24 Bureau of Sanitation Board Reports Nos. 1 and 2 (Friday, June 27, 1997).

1 **V. CONCLUSION**

2 The Court finds the City's annual Dry Winter Compensation Factor ("DWCF")  
3 determination was arbitrary, capricious and entirely lacking in any evidentiary support, and  
4 the City violated the procedural requirements of Article 13 D, § 6(a)(1)-(2).

5  
6 Dated: June 30, 2021

7   
8 Daniel J. Buckley  
9 Judge of the Superior Court