

Protect Yourself from a Rate Lawsuit!

Implementing the ACWA Prop. 218 Bill (AB 2257)

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PROGRAM OVERVIEW

Prop. 218 – What it is and how we must comply

Litigation Problems – How Prop. 218 lawsuits have created uncertainty and expensive problems for water agencies

Legislative Solutions – How recent laws have given agencies the ability to create rate certainty and limit litigation exposure

Water Agency Options – Steps your agency can take to take advantage of the new laws and reduce risk

Proposition 218 – What it is and how we must comply

- Property-related fees and special assessments [examples – recharge assessments, landowner irrigation districts, pre-prop 218 standby charges]
- 45-day protest period and ballot proceeding – 50%-plus-one veto
- Cost of property-related service (not general governmental services) / Assessment Benefit analysis
- Proportionality
- Burden on public agency to prove compliance (no deference)
- Independent court review (admin record + questions re admission of extra-record and expert evidence)

Proposition 218 – Litigation Problems

- **No Warning**: Surprise-attack lawsuits alleging Prop. 218 violations that were not identified before new rate adoption. Agencies had no ability to avoid suit because no “exhaustion” procedure
- **Uncertain Statute of Limitations**: Lawsuits often challenge rates years after their adoption
 - Threatens stability and certainty of revenue stream needed to build, operate, maintain, replace and protect critical infrastructure in the face of increasing regulatory pressure and water-critical environmental issues such as fires, floods, and droughts
- **Uncertain Evidence**: Lawsuits supported by “expert” testimony offered for the first time during litigation
- **Significant Costs**: Years of after-the-fact rate adjustments potentially at stake, plus interest and attorney’s fees. Current cases in point: Patz, Coziahr, HJTA v. CVWD

Proposition 218 – The Exhaustion Problem

Water and sewer agencies have argued in litigation that Prop. 218's protest and ballot assessment procedures are required administrative remedies that must be exhausted before litigation. Reasons:

- Enhances ratepayer engagement
- Permits agency to resolve factual issues
- Permits agency to apply its expertise
- Permits agency to develop administrative record on specific issues to be litigated
- Preserves separation of powers despite agency burden of proof and independent court review
- Promotes judicial economy by avoiding or narrowing disputes

Proposition 218 – The Exhaustion Problem

Courts have considered, but then rejected administrative exhaustion defense under prior law:

- *Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist.* (2001) suggested protest is a required administrative remedy
- *Plantier v. Ramona Municipal Water District* (2019) said “no” in challenge to sewer agency’s exercising discretion under existing rates to change EDUs assigned to certain individual commercial customers
- *KCSFV I LLC v. Florin County Water District* (2021) said “no” in water service ratemaking proceeding
- *Malott v. Summerland Sanitary District* (2020) said “no” in sewer ratemaking proceeding
- *Miner’s Camp v. Foresthill Public Utility District* (2022) said “no” in water service ratemaking proceeding
- *Hill RHF Housing Partners LP v. City of Los Angeles* (2023) said “no” in special assessment ballot proceeding for business improvement district

Proposition 218 – The Exhaustion Solution?

But..... Plantier v. Ramona found that Prop. 218 protest and ballot procedures do not provide a “clearly defined machinery for submission, evaluation, and resolution of complaints by aggrieved parties.” But.... Prop. 218 doesn’t preclude exhaustion.

The Court called upon the legislature to provide clarity/an administrative exhaustion procedure.

AB 2257 answers that call.

But wait, there’s more.....

Proposition 218 – The Extra-Record Evidence Problem

Plaintiffs could bring in “expert” evidence undermining a rate study or structure years after the rate had been adopted and implemented.

- *Coziahr v. Otay Water District* (2024): Court considered expert testimony by Plaintiff and Defendant re tiered rates (based on an agreed trial plan).
- *Malott v. Summerland Sanitary District* (2020): Trial court had granted motion to strike experts’ declaration as “improper extra-record evidence” on basis that it had not been provided at the public hearing. Court of appeal reverses, ruling that Plaintiffs’ expert testimony on wastewater service rates should have been admitted to challenge the method the District used to calculate residential service rates.

Proposition 218 – The Extra-Record Evidence Solution?

Water agencies cried foul. Undermining rate structures, many years after the fact, with “experts” who have questionable credentials for evaluating a complex rate structure, creates huge uncertainty for agencies and their ratepayers.

AB 2257 solves for this.

ACWA Works to Solve the Problems!

ACWA's Legal Affairs Committee and its Prop. 218 Working Group have been working on these, and related Prop. 218 issues for several years, through:

- **Amicus briefs**
- **Legislative advocacy, including**
 - SB 323 enacted 120-day statute of limitations and requirement for challenges to use reverse validation procedure
 - AB 2257 authorizes local agencies to adopt administrative exhaustion procedures in Prop. 218 ratemakings and special assessment proceedings

And now.... How to implement it.

Understanding & Implementing AB 2257

AB 2257 (2024) adds Sections 53759.1 and 53759.2 to the Government Code

Link:

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB2257

AB 2257: Gov. C. 53759.1

The Exhaustion of Remedies Requirement

53759.1 creates the “Exhaustion of Remedies Requirement”:

(b) For purposes of any fee or assessment adopted by a local agency pursuant to Section 4 or 6 of Article XIII D of the California Constitution, if the local agency complies with the procedures described in subdivision (c), a person or entity shall be **prohibited from bringing a judicial action or proceeding** alleging noncompliance with Article XIII D of the California Constitution for any new, increased, or extended fee or assessment, **unless that person or entity has timely submitted to the local agency a written objection to that fee or assessment that specifies the grounds for alleging noncompliance.**

AB 2257: Gov. C. 53759.2

The Record Evidence Requirement

53759.2 prescribes (1) what evidence a court may review and (2) the limited circumstances when extra-record evidence may be admitted.

BUT ONLY IF YOU FOLLOW THE PROCEDURES IN 53759.1

How to Implement AB 2257

- Adopt ordinance or resolution establishing objection procedure. [Client/consultant/counsel collaboration – include in your rate consultant's scope of work]
- Objection procedure runs parallel to Prop. 218 protest hearing or special assessment ballot proceeding.
- Ounce of prevention is worth a pound of cure
- Minimum not maximum
- Will make any litigation more defensible
- Public participation is the heart of our democratic process and at the heart of Prop. 218

Exhaustion

To take advantage of the exhaustion procedure, you must go through 6 steps:

- Adopt Ordinance/Resolution establishing procedure
- Notice
- Objections
- Responses
- Public Hearing
- Adoption of rates/assessment

This is modeled on a CEQA process.

Adopt Ordinance/Resolution

[ORDINANCE/RESOLUTION] NO. [00-00]
OF
THE BOARD OF DIRECTORS OF THE
[*INSERT LOCAL PUBLIC AGENCY NAME*]
ESTABLISHING A PROCEDURE FOR [RATEPAYER/**PROPERTY OWNER**] OBJECTIONS
TO PROPOSED [WATER/SEWER FEE /OR/ SPECIAL ASSESSMENT]

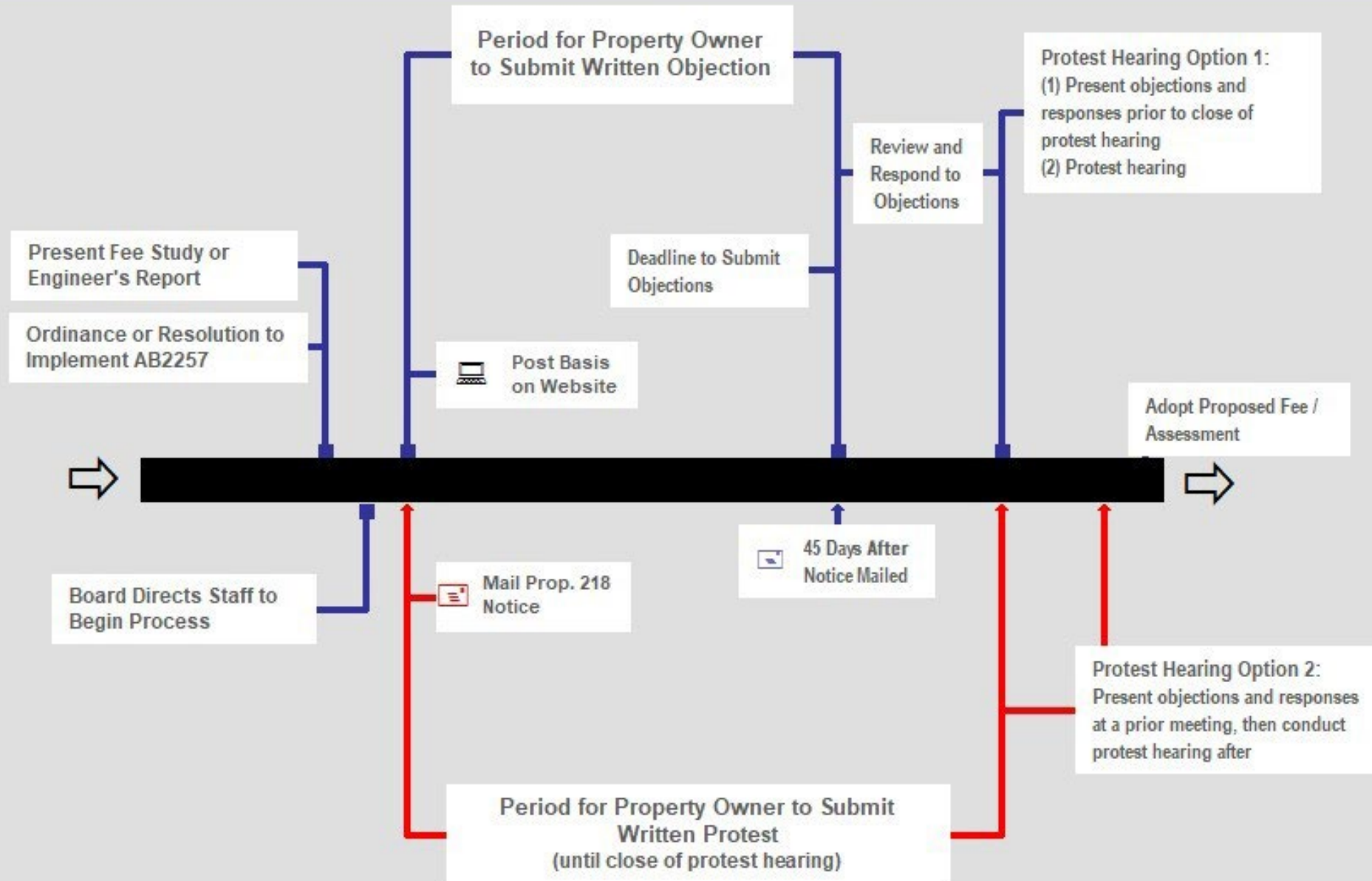
[Template Note]: This ordinance was drafted for a Public Utility District formed for the purpose of operating a public water system pursuant to Cal. Pub. Util. Code section 15501 et seq. Comments were added below to point out language or terms specific to the Cal. Pub. Util. Code, and may need to be adapted for entities formed under other areas of the law such as the California Water Code.]

- A. The [*INSERT LOCAL PUBLIC AGENCY NAME*], is a [insert type of agency] (District), formed to [insert purpose].
- B. California law requires that certain changes to [water/sewer fees OR special assessments] must be adopted or approved in accordance with procedures outlined in Article XIII D, of the California Constitution, commonly referred to as "Proposition 218."
- C. Article XIII D, [Section 4, establishes certain procedural requirements and substantive

Model Ordinance/Resolution

Overview of Model ordinance

AB2257 Timeline



Prop. 218 Timeline

Prop. 218 Notice and New “Objection” Procedure

- Single Notice (add this language to your traditional Prop. 218 notice)
- “Prominently display” the information required by statute:

(A) That all written objections must be submitted within the written objection period set by the local agency ... and that a failure to timely object in writing bars any right to challenge that fee or assessment through a legal proceeding.

(B) All substantive and procedural requirements for submitting an objection to the proposed fee or assessment.

- Protests vs. Objections – Keep the terminology clear! Distinguish “Protests” (thumbs down, no substance) from “Objections” (substantive)
- For rates/fees: Include SB 323 language (120-day statute of limitations)
- For assessments: Include objection instructions in ballot package. Instruct that objections must be sent separately from ballot.
- Ensure adequate timelines from notice through hearing
- Consider your process for how to accept objections (Written only: email, mail, hand delivery? Post-mark date vs. receipt date? Verifying parcel owner vs. ratepayer?)

Responding to Objections

- Modeled off of a CEQA response-to-comments approach
- Coordinate between staff, legal, and rate consultant and ensure that the response manager directs the objections to the correct initial response writer. Have all final responses reviewed by legal to ensure compliance and the team as a whole to ensure consistency.
- Objections: Anticipated types of objections-
 - *Rates too high, exceed cost of service, not proportional*
 - *Ratepayer assistance*
 - *Tiers*
 - *Fixed vs. volumetric allocation and meter charge distinctions*
- Responses: Thematic responses and individual responses to objections. Highlight existing rate study data, narratives that show how rates/assessment comply with cost-of-service and proportionality
- Update rate study/engineer's report to add data and narratives supporting proposed rates or special assessment (see the list included in section 53759.2)
 - *Correct any errors identified during the objection process*
 - *Revise text and tables*
 - *Add tech memos to appendices*

Responding to Objections

Hi Jo Ann,

Hope you're doing well. I wanted to see if you had a quick moment to discuss the San Joaquin Reservoir Filtration Facility project. I was able to discuss the project with Will Miller of USFWS and we both agree that application of IRWD's in-Reserve take credit is appropriate for minimizing impacts to CSS. I'd just like to confirm that the NCCP/HCP construction minimization measures (attached) will be applied, specifically the requirement for a biological monitor to be present on site during any clearing of CSS; the use of take credits will be documented in the annual report; and to get some clarification on the BMP's that are referenced in the MND.

I'm available this afternoon from 12-1 or 2:30-3:30, or next Tuesday from 8-12:30 and can set up a call line through Microsoft Teams for us to use (we still don't have access to our desk lines while teleworking). I figure a quick call is easiest but please feel free to respond via email if that's preferred.

Thanks!

Kyle Rice
Environmental Scientist
California Department of Fish and Wildlife

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Link these margin numbers to narrative responses

Responding to Objections

- Other options for responding to objections:
 - Reduce proposed rates or assessment
 - Same % reduction for all customer types
 - Reduction for less than all customer types
 - Absorb either with reserves (but check/revise reserve policy to provide for that clearly) or non-rate revenue; or adjust budget to account for reduction in revenues
- No re-noticing for reduction, so long as final rates/assessment do not exceed noticed proposal for all customer types
- Beware partial reduction causing proportionality problem

NOTE: If certain classes/tiers must be increased, you will likely need to restart the process of noticing new rates/assessments + objection/protest/ballot timeline

Public Hearing

- Present summary of objections received and staff response to the Board
- Public comment allowed – but not for purposes of presenting an objection (must be in writing and within published deadline)
- Board to determine how to respond to summary and staff response (See Section (d)(1-4))
 - Whether clarifications are needed
 - Whether to reduce rate/assessment or determine more time is needed to review
 - Conclude Objection process and direct staff accordingly
- Consider whether staff responses should be presented at same meeting as Protest Hearing, or whether agency would prefer separate meetings.
- Conduct protest hearing/ballot tabulation AFTER ensuring compliance with prior steps (as stated in the legislation)
- Close protest hearing; tabulate and report protests or ballot results
- Proceed with board action on adopting rate/assessment unless majority protest or “no” votes

After Adoption of New Rate or Assessment

- Assemble Your Record – best practice is to have been assembling it all along
- Consider validation action to limit exposure
- For rates - if possible, wait to implement the rate until at least 120 days has passed following adoption or effective date of the reso/ordinance (does this change your budget and rate adoption timeline?)
- Keep an eye out for claims under the Government Claims Act or payments under protest (may be a canary in the coal mine)
- Keep an eye on social media for vocal ratepayers (consider a Google alert!)

After Adoption of New Rate/Assessment

What if you are sued after adopting new rates or special assessment?

- Find a Prop. 218 lawyer
- Deploy procedural defenses
 - *Failure to timely follow validation procedure — 120-day statute of limitations*
 - *Failure to exhaust remedies at issue level during objection process*
 - *Failure to timely prosecute government claim for refund*
- Confirm you have a complete administrative record
- Consider using arguments under SB 1072 re no refunds (limit exposure)

On appeal, consider seeking amicus curiae support from ACWA and other industry associations

Good Luck!

If you have questions, please feel free to contact us directly. Every agency's loss or win in court affects the rest of the industry. ACWA's Prop. 218 group seeks to support the whole industry.



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