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 CALIFORNIA MANUFACTURERS AND
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 corporation; and SOLANO COUNTY TAXPAYERS
 ASSOCIATION, a California corporation

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 By _____, Deputy
Case Number:
34-2014-80001850

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

CALIFORNIA MANUFACTURERS
 AND TECHNOLOGY ASSOCIATION, a
 California corporation; and SOLANO
 COUNTY TAXPAYERS ASSOCIATION,
 a California corporation,

Petitioners,

v.

CALIFORNIA DEPARTMENT OF
 PUBLIC HEALTH; and RONALD
 CHAPMAN, DIRECTOR, IN HIS
 OFFICIAL CAPACITY,

Respondents.

CASE NO.

**PETITION FOR WRIT OF MANDATE;
 REQUEST TO PREPARE
 ADMINISTRATIVE RECORD**

(CCP § 1085; HEALTH & SAFETY CODE §§
 116365, 116365.5; GOVERNMENT CODE §§
 11342.2, 11346.3, 11346.9)

Petitioners California Manufacturers and Technology Association ("CMTA") and Solano
 County Taxpayers Association ("SCTA") petition this Court for a writ of mandate under Code of
 Civil Procedure section 1085, Health and Safety Code sections 116365 and 116365.5, and
 Government Code sections 11342.2, 11346.3, and 11346.9, directed to Respondents California
 Department of Public Health, and Ronald Chapman, Director of the Department of Public Health
 in his Official Capacity (collectively, "DPH"), and by this verified petition allege as follows:

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1 1. Petitioner CMTA is mutual benefit corporation organized under the laws of the
2 State of California, and an Internal Revenue Code 501(c)(6) organization, with its principal place
3 of business in Sacramento, California. CMTA is and at all relevant times has been authorized to
4 do business in the State of California. CMTA is a trade coalition representing approximately 600
5 businesses from the entire manufacturing community, whose mission includes working to
6 improve and enhance a strong business climate for California's 30,000 manufacturing, processing
7 and technology-based companies.

8 2. Petitioner SCTA is a non-profit corporation organized under the laws of the State
9 of California with its principal place of business in Solano County, California. SCTA is and at all
10 relevant times has been authorized to do business in the State of California. Since its
11 incorporation in 1960, SCTA's mission has included working to secure greater economy and
12 efficiency in government, to stimulate public interest in civic affairs, to effect reduction in taxes,
13 and to assist regional governments in solving mutual problems that transcend their individual,
14 local jurisdictional boundaries.

15 3. Respondent California Department of Public Health is and at all relevant times has
16 been the California state agency charged with administering the relevant provisions of the Health
17 and Safety Code, including section 116365 and 116365.5, and the relevant provisions of the
18 Government Code, including sections 11342.2, 11346.3, and 11346.9, with its principal place of
19 business in Sacramento, California. Respondent Ronald Chapman is and at all relevant times has
20 been the Director of the Department of Public Health.

21 4. Venue is proper in Sacramento County under Government Code sections 995 and
22 11151, and/or Code of Civil Procedure sections 393, 395, and/or 401.

23 5. DPH has a clear, present, and mandatory duty under the California Safe Drinking
24 Water Act ("SDWA"), (Health & Saf. Code, § 116270 *et seq.*), to adopt primary drinking water
25 standards for contaminants in drinking water known as maximum contaminant levels ("MCLs")
26 in accordance with specific statutory requirements. (Health & Saf. Code, § 116365, subd. (a).)
27 Each MCL adopted by DPH shall be set at a level that is (a) "as close as feasible" to the public
28 health goal ("PHG") for the contaminant placing primary emphasis on public health, *and* (b) for

1 carcinogens or any substances that may cause chronic disease, "to the extent technologically and
 2 economically feasible," avoids any significant risk to public health. (Health & Saf. Code, §
 3 116365, subds. (a), (a)(2).) When it adopts an MCL, DPH has a further mandatory duty to
 4 consider all of the following:

5 (1) The public health goal for the contaminant published by the Office of
 6 Environmental Health Hazard Assessment pursuant to subdivision (c) [of Health
 7 & Safety Code section 116365].

8 (2) The national primary drinking water standard for the contaminant, if any,
 9 adopted by the United States Environmental Protection Agency.

10 (3) The technological and economic feasibility of compliance with the
 11 proposed MCL. ...

12 (Health & Saf. Code, § 116365, subd. (b); *see also* Health & Saf. Code, § 116365, subd. (a)
 13 [MCLs adopted by DPH must be based upon these criteria].) For the purpose of determining
 14 technological and economic feasibility, DPH is required to consider "the costs of compliance to
 15 public water systems, customers, and other affected parties with the proposed drinking water
 16 standard, including the cost per customer and aggregate cost of compliance, using best available
 17 technology." (Health & Saf. Code, § 116365, subd. (b)(3).)

18 6. Once DPH has prepared a proposed MCL, DPH has several additional clear,
 19 present, and mandatory duties it must perform under the California Administrative Procedures
 20 Act ("APA"), (Govt. Code, § 11340 et seq.), including the following:

21 a. After receiving public comments on a proposed MCL, the APA requires
 22 DPH to provide substantive responses to all unique comments received. The Final Statement of
 23 Reasons ("FSOR") for the proposed MCL must include "[a] summary of each objection or
 24 recommendation [by the public] ... with an explanation of how the proposed [MCL] has been
 25 changed [or why it was not changed] to accommodate each objection or recommendation."
 26 (Govt. Code, § 1346.9, subd. (a)(3).)

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1 b. The APA requires DPH to assess the potential for the proposed MCL to
2 have an adverse economic impact on California business enterprises and individuals, and to avoid
3 imposing unnecessary or unreasonable regulations or reporting, recordkeeping, or compliance
4 requirements. (Govt. Code, § 11346.3, subd. (a).) DPH must, prior to submitting any proposal to
5 adopt an MCL to the California Office of Administrative Law (“OAL”), “consider the proposal’s
6 impact on business, with a consideration of industries affected including the ability of California
7 businesses to compete with businesses in other states.” (Govt. Code, § 11346.3, subd. (a).) For
8 any MCL proposed prior to November 1, 2013, DPH must prepare an economic assessment for
9 the proposed MCL that assesses whether and to what extent the MCL will affect the creation or
10 elimination of jobs in California, the creation of new business or the elimination of existing
11 businesses within California, and the expansion of businesses currently doing business in
12 California. (Govt. Code, § 11346.3, subds. (a), (b)(1).)

13 c. DPH has no authority to promulgate MCLs that are not “reasonably
14 necessary to effectuate the purpose of the [SDWA]” and that are not consistent with the SDWA.
15 (See Govt. Code, § 11342.2.)

16 7. DPH has a further clear, present, and mandatory duty under Health and Safety
17 Code section 116365.5 to adopt an MCL for hexavalent chromium specifically in “compli[ance]
18 with the criteria established under Section 116365.” (Health & Saf. Code, § 116365.5, subd. (a).)

19 8. In its adoption of an MCL for hexavalent chromium, DPH has failed to comply
20 with its statutory mandates under the SDWA and the APA set forth in paragraphs 5 through 7,
21 above, and is in ongoing violation of its mandatory and ministerial duty to adopt an MCL for
22 hexavalent chromium in a manner that is consistent with the SDWA and the APA. Petitioners
23 have exhausted the available administrative remedies required to be pursued. Petitioners have no
24 other available remedy and no plain, speedy and adequate remedy in the ordinary course of law
25 for this violation.

26 9. Petitioners have herewith requested DPH to prepare a true and correct copy of the
27 administrative record. That request is appended hereto and incorporated herein. A true and
28 correct copy of the record will be lodged with this Court before the hearing date.

FACTUAL BACKGROUND

10. Hexavalent chromium is a metallic chemical present in a significant proportion of California's public drinking water sources. In October 2001, the Legislature enacted Health and Safety Code section 116365.5, requiring DPH to establish an MCL for hexavalent chromium by January 1, 2004. (Health & Saf. Code, § 116365.5, subd. (a).) DPH is required to set the MCL for hexavalent chromium at a level that "to the extent technologically and economically feasible ... avoids any significant risk to public health." (Health & Saf. Code, § 116365, subd. (a)).

11. The SDWA contemplates DPH will satisfy its statutory mandate to set the MCL for hexavalent chromium at a level that avoids any significant risk to public health by, in part, considering the Office of Environmental Health Hazard Assessment's ("OEHHA") determination of the risks posed by hexavalent chromium published in the PHG, which the SDWA requires "be prepared using the most current principles, practices, and methods used by public health professionals who are experienced practitioners in the fields of epidemiology, risk assessment, and toxicology," (Health & Saf. Code, § 116365(c)(1)), "based upon currently available data," (Health & Saf. Code, § 116365, subd. (c)(1)(B)), submitted to external scientific review upon request (Health & Saf. Code, § 116365, subd. (c)(3)(D)), and reviewed "as necessary based upon the availability of new scientific data" (Health & Saf. Code, § 116365, subd. (e)(1) [review to occur no less frequently than once every five years]).

Regulatory and Scientific Background of the Hexavalent Chromium MCL

12. In July 2008, the National Toxicology Program ("NTP") published a study in which rats and mice were exposed to extremely high doses of hexavalent chromium (5,000, 20,000, 60,000 and 180,000 parts per billion ("ppb")) in drinking water for two years. The NTP Study concluded that there was clear evidence of carcinogenicity at the higher doses (doses above 20,000 ppb). The NTP Study was not designed to examine the mode of action ("MOA")—the biological mechanism by which hexavalent chromium causes cancer.

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1 13. In 2009, a consortium of more than one dozen research institutions began work on
2 a comprehensive set of studies (the "MOA Studies") to determine the mode of action of
3 hexavalent chromium. The MOA Studies were designed to determine the MOA of hexavalent
4 chromium, to evaluate key biological events at both the more relevant lower doses and at higher
5 doses, and to examine differences between rodents and humans with regard to chromium toxicity.
6 The MOA Studies were funded by the American Chemistry Council ("ACC") and followed
7 carcinogen risk assessment guidelines developed by the United States Environmental Protection
8 Agency ("U.S. EPA").

9 14. In August 2009, OEHHA proposed a PHG of 0.06 ppb for hexavalent chromium.
10 OEHHA relied in large part on the NTP Study and assumed a mutagenic MOA (*i.e.*, that
11 hexavalent chromium causes mutations that lead to heritable changes in DNA). Guidelines
12 established by the U.S. EPA indicate that a linear (no-threshold) dose-response curve should be
13 assumed when the MOA is mutagenic. The linear (no-threshold) dose-response curve is based on
14 the assumption that any level of exposure will increase the risk of cancer, and its application
15 results in a near-zero PHG.

16 15. In August 2010, an external peer reviewer submitted comments to OEHHA
17 strongly critical of the proposed PHG, finding that: (a) the assumption of a mutagenic MOA was
18 not valid; (b) the NTP Study found no statistically significant increase in tumors at levels below
19 85,700 ppb; (c) the discussion of the MOA in the proposed PHG was very much out of date and
20 inaccurate; and (d) the proposed PHG of 0.06 ppb was unrealistically low.

21 16. In September 2010, the U.S. EPA published a draft Toxicological Review of
22 drinking water exposure to hexavalent chromium. The U.S. EPA relied on the NTP Study and
23 assumed a mutagenic MOA and a linear (no-threshold) dose-response curve. The U.S. EPA
24 arrived at essentially the same conclusions as OEHHA—that a drinking water standard for
25 hexavalent chromium should be set at near-zero levels.

26 17. In January 2011, the first MOA Study paper was published, which provided a
27 framework and established objectives for the MOA Studies. In June 2011, an MOA Study paper
28 was published that summarized a study in which mice were exposed to various doses of

1 hexavalent chromium (100, 1,400, 5,000, 20,000, 60,000 and 180,000 ppb) in drinking water.
2 These were the first two of thirteen MOA Study papers ultimately published in the peer-reviewed
3 literature. Collectively, the research found no effects at the lower doses (100 and 1,400 ppb).
4 Several of the MOA Study papers won awards from the Society of Toxicology, the preeminent
5 association of toxicology professionals.

6 18. In July 2011, the U.S. EPA released the final comments of the peer review panel
7 charged with assessing the U.S. EPA's draft Toxicological Review of hexavalent chromium. A
8 majority of the peer reviewers criticized the U.S. EPA for assuming a mutagenic MOA and for
9 applying a linear (no-threshold) dose-response curve. The federal peer reviewers found that
10 existing science and data emerging from the MOA Studies strongly suggested that the MOA was
11 not mutagenic and that a threshold dose exists, below which adverse effects do not occur. Some
12 members of the federal peer review panel urged the U.S. EPA to wait for the full results from the
13 MOA Studies before proceeding further with its assessment of hexavalent chromium.

14 19. Later in July 2011, shortly after the release of the comments from the U.S. EPA's
15 peer review panel regarding hexavalent chromium, OEHHA published its final PHG at a level of
16 0.02 ppb. OEHHA continued to assume a mutagenic MOA and a linear (no-threshold) dose-
17 response curve.

18 20. In February 2012, the U.S. EPA announced that it was suspending the schedule for
19 its assessment of hexavalent chromium, so that it could address the comments of the federal peer
20 review panel and so that it could consider the data being developed by the MOA Studies.

21 21. In March and May of 2012, several associations of water purveyors with an
22 interest in the regulation of hexavalent chromium asked OEHHA to reopen its evaluation of the
23 hexavalent chromium PHG in light of the U.S. EPA's decision to reconsider its draft
24 Toxicological Review, the concerns expressed by the federal peer review panel, and the data
25 emerging from the MOA Studies. OEHHA indicated that if the MOA Studies provided
26 compelling information, OEHHA would take appropriate action.

27 22. In April 2013, the thirteenth and final MOA Study paper was published. The new
28 data developed during the course of the MOA Studies demonstrated that the mode of action of

1 hexavalent chromium is not mutagenic, but is instead cytotoxic (i.e., the very high doses of
2 hexavalent chromium administered in the NTP Study killed intestinal cells and the chronic
3 wounding and repair of those cells resulted in cell proliferation that led to tumors). The cytotoxic
4 MOA has a threshold below which adverse effects do not occur. The MOA Studies also found
5 that the key biological event that is a precursor to tumor formation did not occur at doses below
6 20,000 ppb.

7 23. In June 2013, Petitioner CMTA and the ACC formally petitioned OEHHA to re-
8 open the hexavalent chromium PHG regulatory process in light of the new scientific data made
9 available by the MOA Studies. CMTA and ACC stated that the MOA Studies had established
10 that the mode of action of hexavalent chromium is not mutagenic and that there is a threshold
11 dose below which adverse effects do not occur. Finally, OEHHA had previously stated that it
12 would take appropriate action if the MOA Studies provided compelling information regarding
13 hexavalent chromium toxicity—which the MOA Studies clearly did. OEHHA has not yet
14 formally responded to the petition to reopen the PHG.

15 24. In August 2013, a follow-up paper to the MOA Studies was published in the peer-
16 reviewed literature. This paper developed a safe drinking water level based on the data developed
17 in the MOA Studies and standard U.S. EPA risk assessment methodologies. The safe drinking
18 water level was calculated to be 210 ppb.

19 **Proposed Hexavalent Chromium MCL**

20 25. Also in August of 2013, DPH published a proposed MCL for hexavalent
21 chromium of 10 ppb. According to DPH's Initial Statement of Reasons ("ISOR") for the MCL,
22 the MCL is based on OEHHA's now obsolete PHG of 0.02 ppb and a cost-benefit analysis set
23 forth in the ISOR.

24 26. In the cost-benefit analysis contained in the ISOR, DPH considered several
25 possible MCLs, ranging from 1 ppb to 30 ppb. However, DPH did not consider the current
26 California MCL for total chromium of 50 ppb and did not consider the current federal MCL for
27 total chromium of 100 ppb.

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1 27. In October 2013, approximately 18,000 members of the public, including
2 Petitioners, submitted comments on the proposed MCL. Dozens of unique comments were
3 received. The majority of the unique comments stated that the proposed MCL was inappropriate
4 in light of: (a) errors in determining the costs of compliance with a hexavalent chromium MCL;
5 (b) the very high costs of complying with a 10 ppb hexavalent chromium MCL; (c) the flawed
6 cost benefit analysis that did not meet generally accepted criteria for determining economic
7 feasibility; and (d) the fact that the PHG (and the underlying science upon which it was based) are
8 now obsolete.

9 28. In April 2014, DPH submitted the final MCL for hexavalent chromium to OAL for
10 review. Concurrently, DPH issued its Final Statement of Reasons ("FSOR"), purporting to
11 summarize and address the unique public comments submitted to DPH. The final MCL was
12 substantively unchanged from the MCL proposed by DPH in August 2013.

13 29. Members of both CMTA and SCTA are interested as citizens in procuring the
14 enforcement of an important public duty by DPH, namely compliance with its mandatory and
15 ministerial duty to adopt an MCL for hexavalent chromium in a manner that is consistent with the
16 SDWA and APA. If the hexavalent chromium MCL adopted by DPH in violation of this duty is
17 allowed to stand, public water agencies will pass the costs of compliance to their customers,
18 including Petitioners' members, who will be subject to substantial water rate increases to pay
19 these increased compliance costs. (For example, in public comments submitted to DPH by
20 California Water Service Company ("Cal Water"), the water agency servicing many of SCTA's
21 members in the City of Dixon, Cal Water estimated that its customers' water bills will double or
22 triple due to the regulation.)

23 **FIRST GROUND FOR ISSUANCE OF WRIT OF MANDATE**

24 **Health and Safety Code Section 116365 Requires DPH to Set the MCL at a Level that Is** 25 **Economically Feasible Considering Costs of Compliance for All Affected Parties**

26 30. Petitioners re-allege and incorporate by reference paragraphs 1 through 29 of this
27 Petition, as though fully set forth herein.

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1 31. In adopting the hexavalent chromium PHG, DPH failed to comply with its
2 mandatory statutory duties to (a) determine the economic feasibility of compliance with the
3 proposed MCL, (b) base the MCL on the economic feasibility of compliance, and (c) to consider
4 the costs of compliance to public water systems, customers, and other affected parties, including
5 the cost per customer and aggregate cost of compliance, using best available technology.

6 32. DPH did not determine the economic feasibility to public water systems, their
7 customers, and other affected parties, of compliance with the hexavalent chromium MCL. DPH
8 did not make any determinations whatsoever in either the ISOR or FSOR regarding the economic
9 feasibility of compliance with the proposed MCL. Accordingly, DPH did not and could not base
10 the hexavalent chromium MCL on the economic feasibility of compliance as required by Health
11 and Safety Code section 116365, subdivision (a).

12 33. DPH failed to adequately consider the costs of compliance with the hexavalent
13 chromium MCL to public water systems and their customers, including the cost per customer and
14 aggregate cost of compliance, using best available technology, by failing and refusing to consider
15 complete and accurate data in its determination of the costs of compliance:

16 a. DPH failed to consider complete and accurate data regarding the
17 occurrence of hexavalent chromium in California groundwater. There is substantial data showing
18 the number of drinking water systems that exceed various thresholds for chromium, some of
19 which is reported as hexavalent chromium and some of which is reported as total chromium. A
20 significant portion of total chromium in groundwater consists of hexavalent chromium. However,
21 DPH based its cost estimates only on the data reported as hexavalent chromium and ignored the
22 total chromium data. This results in a significant underestimation of the statewide occurrence of
23 hexavalent chromium, and, consequently, results in inaccurate calculations regarding the number
24 of drinking water sources containing hexavalent chromium and the costs to comply with the
25 hexavalent chromium MCL.

26 b. DPH underestimated the treatment costs for hexavalent chromium by
27 making several incorrect assumptions including the following:

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i. DPH underestimated water usage rates. DPH based its calculations on an estimated average usage for public water systems of 150 gallons per capita per day ("gpcd"), which is significantly lower than the actual average usage rate.

ii. DPH used an incorrect "peaking factor" used to size treatment equipment. DPH based its calculations on an assumed peaking factor of 1.5, which is significantly lower than the typical peaking factor.

iii. DPH failed to include the costs for land and buildings for treatment systems.

iv. DPH assumed that water systems would only install sufficient treatment capacity to treat drinking water until water supplies contained no more than 10.49 ppb of hexavalent chromium (against an MCL of 10 ppb). Public water systems typically install treatment capacity to treat water to 80 percent of the MCL to account for uncertainties and ensure compliance with the MCL. Treating to 80 percent of the MCL is a generally accepted practice, which DPH refused to consider.

34. DPH's conclusions based on incomplete and inaccurate data are necessarily unreliable. Actual costs to public water systems and their customers to comply with the hexavalent chromium MCL, and actual costs of compliance, will be significantly higher than DPH estimated. DPH's adoption of the hexavalent chromium MCL based on these unreliable conclusions is arbitrary and capricious.

35. DPH also failed to determine that the public water systems, their customers, and others impacted by the proposed MCL could afford the estimated compliance costs. (*See* Health & Saf. Code, § 11270, subd. (b) ["The Legislature finds and declares... [that] [f]easible and affordable technologies...shall be used to remove toxic pollutants from public water supplies."].) DPH implicitly acknowledged that costs of complying with the hexavalent chromium MCL are likely not affordable for all impacted water systems and individuals. For example, DPH expressly acknowledged that "for small water systems compliance with the proposed MCL for hexavalent chromium may not be affordable if these systems were to use the best available

1 technology identified in the proposed regulation....” (FSOR, p. 21.) However, DPH did not
2 attempt to set the hexavalent chromium MCL at a level where compliance with the MCL would
3 be affordable for small water systems and their customers. (FSOR, p. 13.)

4 **SECOND GROUND FOR ISSUANCE OF WRIT OF MANDATE**

5 **Health and Safety Code Section 116365 Requires DPH to Consider the** 6 **National Drinking Water Standard for Chromium Adopted by the U.S. EPA**

7 36. Petitioners re-allege and incorporate by reference paragraphs 1 through 35 of this
8 Petition, as though fully set forth herein.

9 37. Hexavalent chromium is currently regulated at the California and federal levels
10 under California’s and U.S. EPA’s primary drinking water standards for total chromium.
11 Chromium can exist in one of two relevant forms: hexavalent chromium and trivalent chromium.
12 Each of these can transform into the other depending on the surrounding conditions. Trivalent
13 chromium is non-toxic and is, in fact, an essential nutrient. Hexavalent chromium can be toxic,
14 depending on the concentration and exposure pathway. Up to now, drinking water regulation for
15 chromium was stated in terms of total chromium for several reasons, including the ability of the
16 two relevant forms of chromium to transform into the other.

17 38. As DPH expressly recognized in its ISOR, the existing total chromium standards
18 were established to address exposures to hexavalent chromium: “Hexavalent chromium is
19 currently regulated under the 0.05 mg/L MCL for chromium. ... The chromium MCL was
20 established to address exposures to hexavalent chromium, which is the more toxic form of
21 chromium. The U.S. EPA adopted the same standard, but in 1991 raised the federal MCL to 0.1
22 mg/L. California did not follow U.S. EPA’s lead and stayed with its 0.05 mg/L MCL for
23 chromium.” (See ISOR, p. 8.)

24 39. In addition, DPH consistently describes the hexavalent chromium MCL as a
25 modification of the MCL for total chromium in both the ISOR and FSOR. For example, in the
26 FSOR, DHS states:

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1 The concentration of hexavalent chromium in drinking water is currently limited
 2 by way of the existing MCL for total chromium, which is 0.050 mg/L (0.050 ppm
 3 or 50 ppb). Because some of the total chromium may consist of both hexavalent
 4 chromium and trivalent chromium, the resulting effect is that hexavalent
 5 chromium is currently limited in drinking water to maximum concentrations of 50
 6 ppb or less. The existing MCL has been in effect since 1977 and is half the
 7 existing federal limit (for total chromium) of 100 ppb. The proposed hexavalent
 8 chromium MCL is 0.010 mg/L (0.010 ppm or 10 ppb) and the PHG is 0.02 ppb.
 9 The Department is *not* increasing or weakening the MCL. In fact, the Department
 10 has proposed to establish a *more stringent* standard, which is one-fifth
 11 California's existing standard and one-tenth that of the existing federal standard
 12 established by the U.S. EPA.

13 (FSOR, p. 39 [emphasis in original]; *see also, e.g.*, FSOR, p. 38 ["The proposed MCL of 10 ppb
 14 is significantly reduced from the current California MCL of 50 ppb for total chromium and the
 15 federal MCL of 100 ppb for total chromium (which limits hexavalent chromium
 16 concentrations)..."].)

17 40. Despite acknowledging that the national MCL for chromium *is* the national
 18 primary drinking water standard adopted by the U.S. EPA to address exposures to hexavalent
 19 chromium, DPH failed and refused to consider the national standard in its adoption of the
 20 California hexavalent chromium MCL, as required by Health and Safety Code section 116365,
 21 subdivision (b)(2). (*See* FSOR, pp. 11-12 [in response to comments, stating no federal standard
 22 exists that DPH is required to consider under Health and Safety Code section 116365, subdivision
 23 (b)(2)].)

24 **THIRD GROUND FOR ISSUANCE OF WRIT OF MANDATE**

25 **Government Code Section 11346.9 Requires the DPH to Substantively Respond to All** 26 **Relevant Public Comments in the Final Statement of Reasons**

27 41. Petitioners re-allege and incorporate by reference paragraphs 1 through 40 of this
 28 Petition, as though fully set forth herein.

1 42. DPH violated its clear, present, and mandatory obligation under Government Code
2 section 11346.9, subdivision (a)(3), to substantively respond to all relevant public comments in
3 the FSOR. For example, and without limitation, DPH did not substantively respond to the
4 following comments submitted to DPH by members of the public in response to DPH's ISOR:

5 a. Members of the public commented that that there are no data or studies
6 stating that hexavalent chromium is harmful or poses a significant risk at the proposed MCL or
7 other particular levels, (FSOR, p. 7), that the PHG is based on outdated information and did not
8 consider the most recent studies, that OEHHA will be reviewing the new science and that DPH
9 should wait for OEHHA to complete its review prior to adopting the proposed MCL, (FSOR, p.
10 8), and questioned the validity of the PHG, the process under which it was developed, and the
11 science cited by OEHHA in the PHG report, (FSOR, p. 9). DPH failed to substantively respond
12 to these comments. Instead, DPH sidestepped the comments by stating that OEHHA established
13 the PHG, claiming that DPH must blindly rely on it. Although DPH is the agency exercising
14 quasi-legislative power of the State in promulgating the hexavalent chromium MCL, a science-
15 based regulation, in reliance on incomplete and outdated scientific data, DPH directed the
16 commenters to address their concerns regarding the outdated scientific basis for the MCL to
17 OEHHA, and DPH refused to respond to them. (FSOR, pp. 7-8, 8-9, 9, 11.)

18 b. Members of the public commented that the proposed hexavalent chromium
19 MCL is not affordable for many individuals and families that will see their water bills
20 significantly increase as a result of the MCL. Members of the public also commented that the
21 proposed MCL is not affordable for many public water systems, and that the costs of compliance
22 would be devastating to budgets, capital improvement plans, master plans, or the local economies.
23 Members of the public further commented that the proposed MCL was not affordable for many
24 non-transient, non-community water systems ("NTNCWS"). The commenters noted that the
25 estimated costs for small water systems are above typical affordability criteria, above Median
26 Household Income ("MHI") affordability criteria, and that small water systems are
27 disproportionately impacted. (FSOR, pp. 12, 23-24.) DPH failed to substantively respond to
28 these comments. DPH's response focused on the costs of compliance, rather than on whether

1 those costs could possibly be paid by the impacted public water systems, customers, and other
2 affected parties. DPH declined to address the affordability criteria raised by the commenters,
3 stating only that DPH's estimated costs of compliance are not intended to be used for water
4 systems to budget or bid costs for treatment or for direct comparison to MHI affordability criteria.
5 DPH also declined to address the affordability issues relating to small water systems, sidestepping
6 this issue by erroneously concluding that it does not have discretion to set the hexavalent
7 chromium MCL at a level that would be affordable for small water systems, and that small water
8 systems could possibly use something other than the best available technology to comply. DPH
9 failed to address in any way the comments relating specifically to affordability to NTNCWS.
10 (FSOR, pp. 13, 24.)

11 c. Members of the public commented that DPH's estimates for cost of
12 treatment were underestimated because costs need to be evaluated to treat drinking water to
13 8 ppb, 80 percent of the MCL, rather than to 10.49 ppb, because public water systems need to
14 treat to 80 percent of the MCL to account for natural fluctuations in the levels of hexavalent
15 chromium in order to ensure ongoing compliance. (FSOR, p. 14.) DPH failed to substantively
16 respond to these comments. DPH provided only its flat conclusion that it "does not agree" that
17 public water systems generally apply a 20 percent margin of safety for implementation of
18 treatment, and that "there is no basis" for evaluating the costs to treat to 8 ppb because public
19 water systems theoretically do not have to install equipment to treat to approximately 8 ppb to
20 maintain compliance with the MCL. (FSOR, p. 15.) DPH did not respond to the information
21 provided by the commenters regarding fluctuations in the levels of hexavalent chromium in
22 drinking water supplies, and the impacts of these fluctuations on public water systems using
23 sources with hexavalent chromium levels near the proposed MCL.

24 d. Members of the public commented that DPH's estimates for cost of
25 treatment were underestimated because DPH failed to consider a number of costs, including, but
26 not limited to, costs for construction of treatment systems including land acquisition and design,
27 bidding, permitting, and CEQA compliance costs, operational changes including pumping and
28 energy use, construction costs including plumbing and sewer connections, transportation of

1 hazardous wastes, costs for employee training for handling of hazardous wastes, pilot testing,
2 staffing costs to revise blending plans and address potential violations, shipping costs for samples,
3 and construction of replacement wells. (FSOR, p. 14.) DPH failed to respond to these comments.

4 e. Members of the public commented that DPH's estimates for cost of
5 treatment were underestimated because DPH used an incorrect "peaking factor" used to size
6 treatment equipment, stating that the typical peaking factor is 2.5, meaning that a treatment plant
7 will be designed to handle 2.5 times the anticipated average flow rate in order to meet water
8 needs at times of peak demand, but DPH based its calculations on an unrealistically low assumed
9 peaking factor of 1.5. (FSOR, p. 14.) DPH failed to respond to these comments.

10 f. Members of the public commented that DPH failed to consider the impact
11 of California Proposition 218 on the economic feasibility to public water systems of compliance
12 with the proposed MCL, and the impact of AB 240 (Rendon), Chaptered in 2013, requiring liens
13 against the property of customers who do not timely pay their water bills, on the economic
14 feasibility of compliance to customers. (FSOR, pp. 23-24.) DPH failed to substantively respond
15 to these comments, stating that "[t]he criterion under California Prop 218 or AB 240 is beyond
16 the scope of this regulatory action." (FSOR, p. 24.)

17 g. Members of the public commented that some groundwater sources are used
18 during droughts and emergencies to supplement surface water sources, or otherwise used only
19 intermittently, and that the costs of compliance to treat for short-term use of these sources are
20 infeasible. DPH failed to substantively respond to these comments. DPH stated only that the
21 proposed MCL did not preclude a public water system from applying for an exemption pursuant
22 to Health and Safety Code section 116425, and that use of a well as a stand-by source for
23 emergencies is outside the scope of DPH's regulatory action. (FSOR, p. 25.)

24 h. A member of the public commented that the proposed MCL would, by
25 increasing water rates, discourage economic growth and development. DPH failed to respond to
26 this. (FSOR, p. 26.)

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FOURTH GROUND FOR ISSUANCE OF WRIT OF MANDATE

Government Code Section 11346.3 Requires DPH to Assess the Potential Adverse Economic Impact of the MCL on California Business Enterprises and Individuals

43. Petitioners re-allege and incorporate by reference paragraphs 1 through 42 of this Petition, as though fully set forth herein.

44. DPH failed to comply with its clear, present, and mandatory duty under Government Code section 11346.3 to assess the potential for adverse economic impact on California business enterprises and individuals, avoiding the imposition of unnecessary or unreasonable regulations or reporting, recordkeeping, or compliance requirements.

45. DPH failed to assess the potential for adverse economic impacts to water systems operating as businesses under Government Code section 11346.3, such as NTNCWS and mutual water systems.

46. DPH failed to assess the potential for indirect adverse economic impact on California business enterprises under Government Code section 11346.3. DPH assessed only whether the proposed MCL would directly affect businesses other than water systems, and did not address indirect and induced effects to California business enterprises as required.

FIFTH GROUND FOR ISSUANCE OF WRIT OF MANDATE

Government Code Section 11342.2 Requires the MCL to Be Consistent With, Not In Conflict With, and Reasonably Necessary to Carry Out the Purposes of the SDWA

47. Petitioners re-allege and incorporate by reference paragraphs 1 through 46 of this Petition, as though fully set forth herein.

48. New scientific evidence demonstrates that hexavalent chromium presents a materially different risk to public health than was previously determined by OEHHA in the existing PHG. Multiple petitions asking OEHHA to review the existing hexavalent chromium PHG based on this new scientific evidence are currently pending before OEHHA. Several comments were submitted asking DPH to consider this new scientific evidence in setting the MCL. The discretion afforded DPH by the Legislature to set MCLs for carcinogens at a level that "avoids any significant risk to public health," (Health & Saf. Code, § 116365, subd. (a)(2)), is

1 constrained by the statutory requirement that there be scientific support in the currently available
2 scientific data for DPH's action, reflected in a risk assessment "prepared using the most current
3 principles, practices, and methods used by public health professionals who are experienced
4 practitioners in the fields of epidemiology, risk assessment, and toxicology." (Health & Saf.
5 Code, § 116365(c)(1).)

6 49. If a risk assessment conducted and a PHG adopted by OEHHA for a contaminant
7 becomes obsolete, OEHHA has an obligation to review and revise the PHG. (Health & Saf.
8 Code, § 116365, subd. (e)(1)). DPH has an obligation to await OEHHA's review of the new
9 scientific data and/or to request OEHHA to review the existing PHG as required by Health and
10 Safety Code section 116365, subdivision (e)(1). DPH does not have discretion to promulgate an
11 MCL based on a PHG that no longer satisfies the statutory requirements of the SDWA. An MCL
12 based on unreliable and obsolete science is not reasonably necessary to effectuate the purpose of
13 the SDWA – "to ensure that the water delivered by public water systems of this state shall at all
14 times be pure, wholesome, and potable," (Health & Saf. Code, § 116270, subd. (e)), and is
15 inconsistent with the SDWA's express requirement that DPH review and amend any MCL if
16 "[n]ew scientific evidence indicates that the substance may present a materially different risk to
17 public health than was previously determined." (Health & Saf. Code, § 116365, subd. (g)).

18 50. In issuing the hexavalent chromium MCL based on a PHG that is based on
19 obsolete science, DPH exceeded its quasi-legislative authority to promulgate MCLs that are
20 reasonably necessary to effectuate the purpose of the SDWA and that are consistent with the
21 SDWA. DPH has not adopted an MCL consistent with the SDWA's statutory requirements that
22 the MCL be based on a PHG that, in turn, is based on current scientific data, evaluated using the
23 most current scientific principles, practices, and methods. DPH also has not adopted an MCL
24 consistent with the SDWA's statutory requirement that the MCL be set at a level that, to the
25 extent technologically and economically feasible, avoids any significant risk to public health.

26 51. DPH also exceeded its quasi-legislative authority by promulgating an MCL at a
27 level for which is not economically feasible for all impacted public water systems, individuals,
28 and other affected entities, to comply. The SDWA is intended to provide the means to

1 accomplish the objective of ensuring that public water systems deliver pure, wholesome, and
2 potable water. (Health & Saf. Code, § 116270, subd. (e).) The hexavalent chromium MCL
3 adopted by DPH conflicts with and is not consistent with this purpose because some public water
4 systems and customers impacted by the MCL do not have the economic means to comply.

5 WHEREFORE, Petitioners pray that:

6 1. A peremptory writ of mandate issue, pursuant to Code of Civil Procedure section
7 1085, Health and Safety Code sections 116365 and 116365.5, and Government Code sections
8 11342.2, 11346.3, and 11346.9, ordering Respondent to withdraw the current MCL and to
9 promulgate instead a new MCL at a level that is economically feasible;

10 2. In the alternative, that an alternative writ of mandate be issued, *ex parte*, ordering
11 Respondent to request that OEHHA review the PHG as required by 116365(e)(1) or, in the
12 alternative, to show cause why a peremptory writ of mandate should not issue;

13 3. Petitioners recover their attorneys' fees and costs in this action; and

14 4. Such other relief as the Court deems just and proper.

15 DATED: May 29, 2014.

DOWNEY BRAND LLP

16
17 By: 

18 CLIFTON J. McFARLAND

Attorneys for Petitioners

19 CALIFORNIA MANUFACTURERS AND
20 TECHNOLOGY ASSOCIATION, a California
21 corporation; and SOLANO COUNTY
22 TAXPAYERS ASSOCIATION,
23 a California corporation
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VERIFICATION

I, the undersigned, certify and declare that I have read the foregoing Petition for Writ of Mandate and Temporary Stay Order, and know its contents. I am Vice President, Government Relations, of California Manufacturers and Technology Association, a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in the document described above are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 1, 2014, in Sacramento, California.



DOROTHY ROTHROCK

VERIFICATION

I, the undersigned, certify and declare that I have read the foregoing Petition for Writ of Mandate and Temporary Stay Order, and know its contents. I am President of Solano County Taxpayers Association, a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in the document described above are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 30, 2014, in Dixon, California.

Ourania Riddle
OURANIA RIDDLE

1 **REQUEST FOR PREPARATION OF ADMINISTRATIVE RECORD**

2 TO STATE OF CALIFORNIA, DEPARTMENT OF PUBLIC HEALTH, PLEASE
3 TAKE NOTICE THAT:

4 You are hereby requested to prepare and certify the record of all administrative
5 proceedings in this matter related to your promulgation of a maximum contaminant level for
6 hexavalent chromium pursuant to Health and Safety Code sections 116365 and 116365.5, all
7 materials filed therewith, and all other materials contained in the administrative record of that
8 matter maintained by the Department of Public Health.

9 Respectfully submitted,

10 DATED: May 29, 2014

DOWNEY BRAND LLP

11
12 By: 

CLIFTON J. McFARLAND
Attorneys for Petitioners

13 CALIFORNIA MANUFACTURERS AND
14 TECHNOLOGY ASSOCIATION, a California
15 corporation; and SOLANO COUNTY
16 TAXPAYERS ASSOCIATION, a California
17 corporation
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