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7 CALIFORNIA MANUFACTURERS AND
8 TECHNOLOGY ASSOCIATION and SOLANO
9 COUNTY TAXPAYERS ASSOCIATION

10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF SACRAMENTO

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

17 Petitioners,

18 v.

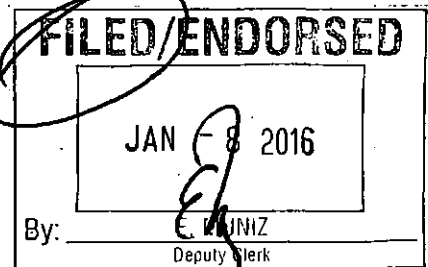
19 STATE WATER RESOURCES
20 CONTROL BOARD,

21 Respondent.

CASE NO. 34-2014-80001850

**PETITIONERS CALIFORNIA
MANUFACTURING AND TECHNOLOGY
ASSOCIATION'S AND SOLANO COUNTY
TAXPAYERS ASSOCIATION'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION FOR WRIT OF MANDATE**

Date: April 1, 2016
Time: 1:30 p.m.
Dept: Dept 44
Judge: Hon. Christopher E. Krueger



DOWNEY BRAND LLP

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I. INTRODUCTION

In 2014, the California Department of Public Health (“DPH”) promulgated the maximum contaminant level, or “MCL,” in drinking water for hexavalent chromium, commonly known as “Chromium-6.” This was 10 years after the Legislature’s deadline, and several years after a lawsuit that resulted in a writ of mandate compelling DPH to issue a new standard. Nonetheless, DPH did not comply with the statute that enabled its regulatory activity—the California Safe Drinking Water Act—and ignored rules it was required to observe in exercising its regulatory authority—the California Administrative Procedures Act. As a result, the Chromium-6 MCL set forth in Code of Regulations section 64331 should be found to be void.

Under the California Safe Drinking Water Act, DPH was required to set the Chromium-6 MCL based on an analysis of, among other things, the economic feasibility of compliance with the new standard. While DPH considered a number of potential standards, it failed to analyze the economic feasibility of compliance with these potential standards when it set the MCL at 10 parts per billion (“ppb”). This resulted in a massively expensive regulation that DPH estimated will require \$870 million in capital costs alone. To make matters worse, DPH—by its own acknowledgment—had insufficient data to estimate the true costs of compliance. DPH only had data regarding Chromium-6 levels for about half of the water sources in the State. Inexplicably, DPH assumed that the water sources for which it did not have data were uncontaminated. If the incidence of Chromium-6 is roughly the same in the unsampled water sources as in sources with data, the capital costs of the new MCL would balloon to well over \$1 billion.

Further, under the Administrative Procedures Act, DPH was required to assess the Chromium-6 MCL for “potential for adverse economic impact on California businesses and individuals.” DPH failed to conduct this analysis, erroneously asserting that it was required to assess only the “direct” impact of the new MCL and only with respect to public water systems. Consequently, DPH ignored the many privately-owned businesses that, generally due to remote locations, are not connected to community water supplies and must comply with the new MCL themselves. DPH also ignored customers who are subject to dramatic rate increases necessary to

1 finance new treatment facilities. In order to justify its decision to ignore the potential for adverse
 2 economic impacts on entire classes within the affected public, the agency read and interpreted the
 3 statute in a manner inconsistent with its plain terms.

4 Finally, the Administrative Procedures Act required DPH to substantively respond to all
 5 relevant public comments. This is the essence of the public rulemaking process. Here, the agency
 6 failed to respond to numerous relevant and important public comments. Ironically, and
 7 unfortunately, in several cases the public comments it ignored were directly related to the very
 8 elements—including economic feasibility—that were omitted from the decision-making process.

9 Petitioners Solano County Taxpayers Association (“SCTA”) (headquartered in Dixon) and
 10 California Manufacturer and Technology Association (“CMTA”) (headquartered in Sacramento)
 11 have a clear and present right to the performance of the statutory obligations that should have
 12 been met by DPH, as members in each association are subject to substantial drinking water rate
 13 increases resulting from treatment costs to meet the new MCL. In addition, at least one member
 14 of CMTA is impacted by the MCL as the operator of a non-transient, non-community water
 15 system.

16 This Court should issue a writ of mandate requiring the State Water Resources Control
 17 Board (“SWRCB”)¹ to promulgate a Chromium-6 MCL that complies with the law.

18 **II. FACTUAL BACKGROUND**

19 **A. Federal and State Safe Drinking Water Acts Set MCL Standards**

20 The new Chromium-6 MCL was issued against a nearly 40 year backdrop of policy, law
 21 and science which is relevant to, and provides important context for, the issues that inform this
 22 Petition. The federal Safe Drinking Water Act was enacted by Congress in 1974, and amended in
 23 1986 and 1996. (See 42 U.S.C. § 300f *et seq.*) Under the federal Act, the United States
 24 Environmental Protection Agency (“EPA”) sets standards for drinking water quality and oversees
 25

26 ¹ DPH promulgated the Chromium-6 MCL in May 2014. Effective July 1, 2014, SWRCB’s Division of Drinking
 27 Water Programs became responsible for drinking water standards. (Health & Saf. Code § 116271.) On June 1, 2015,
 28 pursuant to Health and Safety Code section 116271, subdivision (f), this Court formally substituted SWRCB as the
 Respondent in this action in place of DPH and Ronald Chapman, Director of DPH. This Petition therefore seeks
 mandamus directed to SWRCB.

1 the implementation of those standards by the several states. EPA has granted California primary
 2 enforcement authority for public drinking water systems in California. (Administrative Record
 3 (“AR”), 34-2014-80001850 00251 [Notice of Proposed Rulemaking, p. 2].)² To maintain that
 4 authority, the federal Act requires that California promulgate MCLs no less stringent than the
 5 federal standards. (42 U.S.C. § 300g-2, subd. (a)(1).)

6 The California Safe Drinking Water Act (“SDWA”) governs the establishment of MCLs
 7 in California. (Health & Saf. Code § 116270 *et seq.*) Establishment of MCLs is a two-step
 8 process. First, the Office of Environmental Health Hazard Assessment (“OEHHA”) develops and
 9 publishes a Public Health Goal for a particular substance or group of substances. (*Id.*, § 116365.)
 10 A Public Health Goal is an estimate of the concentration of a substance or group of substances in
 11 drinking water that is “not anticipated to cause or contribute to adverse health effects, or that does
 12 not pose any significant risk to health.” (*Id.*, § 116365, subd. (c)(1).) The Public Health Goal is
 13 not established pursuant to the requirements of the Administrative Procedures Act (the “APA”)
 14 and is not an enforceable standard. (*Id.*, § 116365, subd. (c)(1)(D).)

15 Second, DPH promulgates an MCL for the substance or group of substances. The MCL is
 16 to be set at a concentration “that is as close *as feasible* to the corresponding Public Health Goal
 17 placing primary emphasis on the protection of public health and that, *to the extent*
 18 *technologically and economically feasible*, ... avoids any significant risk to public health.” (*Id.*,
 19 § 116365, subd. (a)(2) [emphasis added].) Unlike the Public Health Goal, the MCL is an
 20 enforceable standard, (AR, 00264 [Initial Statement of Reasons (“ISOR”), p. 4]; Health & Saf.
 21 Code § 116365, subd. (a)), which DPH is required to promulgate in conformity with the APA.
 22 (See Gov. Code § 11346, subd. (a).)

23 In general, public water systems are prohibited from purveying drinking water containing
 24 substances at concentrations in excess of their MCL. (See Health & Saf. Code § 116555.) Public
 25 water systems whose water sources contain a substance at a concentration in excess of its MCL
 26 generally install treatment systems to reduce the concentration of the substance below the MCL.

27 ² The numerical prefix “34-2014-80001850” is the same for each document in the AR. For the sake of brevity,
 28 citations herein to evidence in the AR exclude this prefix and reference the last four digits only.

(See AR, 00280-00281 [ISOR, pp. 17-18].) In addition, private businesses can also be subject to MCL standards. “Non-transient, non-community water systems” (“NTNCWS”) are businesses and other enterprises that, generally due to remote locations, are not connected to community water supplying but instead have their own water supplies. Examples include schools, hospitals, wineries, commercial nurseries, agricultural operations, and food processors. (AR, 06709 [CMTA comment letter]; Request for Judicial Notice (“RJN”), Exh. A [EPA, Non-Transient, Non-Community Water Systems (October 1995)]; see Health & Saf. Code § 116275, subd. (k) [defining NTNCWS].) At least one CMTA member operates an affected NTNCWS.

B. The Federal Total Chromium MCL Was Set at 50 PPB in 1975

Chromium is a chemical element that occurs throughout the environment. (AR, 00270 [ISOR, p. 7].) The two most common forms of chromium are trivalent chromium (“Chromium-3”) and hexavalent chromium (“Chromium-6”). Chromium-3 is a required nutrient that has very low toxicity. (*Ibid.*) Chromium-6 is more toxic and has been known to cause cancer when inhaled or when ingested at high doses. (*Ibid.*; AR, 03868 [Public Health Goal for Hexavalent Chromium in Drinking Water, p. 39; *passim id.*].) The occurrence of Chromium-6 in drinking water sources is caused both by its natural occurrence “in geologic formations throughout the state” and by releases during industrial use. (AR, 00270 [ISOR, p. 7].) Naturally occurring Chromium-6 may be present in groundwater at concentrations exceeding 100 ppb. (*Id.* at pp. 7-8.)

In 1975, EPA promulgated a federal MCL of 50 ppb for Total Chromium. (40 F.R. 59565, 59570 (Dec. 24, 1975).) The concentration of Total Chromium in water is essentially the sum of the concentrations of Chromium-3 and Chromium-6. EPA stated that it chose to regulate Total Chromium because the two forms of chromium can convert back and forth in water and in the human body depending on environmental conditions. (RJN, Exh. B [EPA, Chromium in Drinking Water].) In establishing the federal MCL, EPA assumed that a measurement of Total Chromium could consist of entirely Chromium-6, the more toxic form of chromium. (*Id.*) Thus, the federal Total Chromium standard is—in essence—a Chromium-6 standard. In 1991, EPA *raised* the federal MCL for Total Chromium from 50 ppb to 100 ppb, and the federal MCL

1 remains at 100 ppb today. (AR, 00271 [ISOR, p. 8].)

2 In 1977, DPH adopted the Total Chromium MCL of 50 ppb from EPA. (*Id.*) California's
 3 MCL for Total Chromium was also established to address exposures to Chromium-6, the more
 4 toxic form of chromium. (*Id.* at pp. 8, 9.) DPH did not raise the California MCL when EPA
 5 raised the federal MCL to 100 ppb in 1991, instead maintaining the California Total Chromium
 6 MCL at 50 ppb. (*Id.* at p. 8.) The new Chromium-6 MCL essentially lowers the California MCL
 7 for Chromium-6 from 50 ppb to 10 ppb. (See AR, 04682 [FSOR, p. 40 ("[H]exavalent chromium
 8 is currently limited in drinking water to maximum concentrations of 50 ppb or less. ... [T]he
 9 Department has proposed to establish a *more stringent* standard, which is one-fifth California's
 10 existing standard and one-tenth that of the existing federal standard established by the U.S.
 11 EPA."; [emphasis in original]).)

12 **C. The Legislature Required a Chromium-6 MCL by January 2004**

13 In 2001, the California Legislature passed Senate Bill 351 ("SB 351"), which called for
 14 DPH to establish a Chromium-6 MCL by January 1, 2004. (Health & Saf. Code § 116365.5.)
 15 SB 351 responded to public concern about the discovery of Chromium-6 in drinking water
 16 supplies over the prior several years. (RJN, Exh. C [Senate Rules Committee Analysis of SB 351
 17 ("Senate Rules SB 351 Analysis") (Oct. 2, 2001), p. 3].) The Legislature noted that this "concern
 18 has, perhaps, been heightened because of the unusual circumstances surrounding a federal
 19 Superfund project in the San Fernando Valley and because of last year's popular film, 'Erin
 20 Brockovich.'" (*Ibid.*) The Legislature also noted approvingly that DPH and OEHHA had
 21 announced a plan in March 2001 designed to "obtain the information needed to determine if
 22 Chromium-6 should be regulated as a specific drinking water contaminant and, if so, at what
 23 level." (Senate Rules SB 351 Analysis, p. 4; RJN, Exh. D [*Senate Committee on Environmental*
 24 *Quality Analysis of SB 351* (April 16, 2001), pp. 4-5].) The plan consisted of four elements,
 25 starting with a "requirement that *all* public water systems test their drinking water supplies for
 26 Chromium-6 by January 2003." (*Id.* at p. 5 [emphasis added].)

27 In January 2001, DPH adopted new Monitoring Regulations on an emergency basis for
 28 Chromium-6 and several other substances. (22 Cal. Code Regs. § 64450.) The Monitoring

1 Regulations required all public water systems to conduct one round of sampling for Chromium-6
 2 by December 31, 2002. (*Id.*, § 64450, subds. (b), (c), (d).) However, DPH provided exceptions
 3 to and exemptions from the Monitoring Regulations. For example, water systems with fewer than
 4 150 connections could obtain an exemption from the monitoring requirements. (*Id.*, § 64450,
 5 subd. (d).) In addition, water systems that could show that a particular substance had not been
 6 “used, manufactured, transported, stored, or disposed” near its water sources could obtain an
 7 exception from the requirements. (*Id.*, §§ 64445, subd. (d), 64450, subd. (c).) The exceptions
 8 and exemptions largely undermined the purpose of the Monitoring Regulations.

9 Despite the stated intention to collect comprehensive data, Chromium-6 data was only
 10 submitted for about half of the State’s approximately 11,800 water sources.³ Consequently, when
 11 it published the draft MCL, DPH conceded that the Chromium-6 “database cannot be considered
 12 to be complete” because of the exceptions and exemptions provided in its Monitoring Regulations
 13 and because water systems with fewer than 200 connections were previously not required to
 14 submit their monitoring data to DPH. (AR, 00276-00277, 00284 [ISOR, pp. 13-14, 21].)

15 Following the monitoring, the actual adoption of a Chromium-6 MCL became drawn out
 16 while OEHHA worked to establish a Public Health Goal (the first step to the ultimate adoption of
 17 a MCL). Eventually, in July 2011, OEHHA published a final Public Health Goal for Chromium-
 18 6 of 0.02 ppb.

19 **D. The Alameda Superior Court Mandated That DPH Follow SB 351 in 2013**

20 In 2012, DPH was sued for failure to promulgate an MCL by the statutorily-mandated
 21 deadline of January 1, 2004 in *Natural Resources Defense Council v. DPH*, Alameda County
 22 Superior Court, Case No. RG12-643520 (the “Deadline Lawsuit”). (See RJN, Exh. E [Deadline
 23 Lawsuit, Order Directing Issuance of Writ of Mandate (December 17, 2013) (“Alameda Court
 24 Order”)].) Petitioners in the Deadline Lawsuit sought a writ of mandate compelling DPH to
 25

26 ³ An expert commenter concluded that “only 45% of all sources have measured Cr(VI) [Chromium-6] data.” (AR,
 27 06839 [Jacobs, Technical Review of the Occurrence Analysis Supporting the Draft Hexavalent Chromium MCL by
 28 California Department of Public Health (“Jacobs Analysis”), p. 7].) DPH stated that Chromium-6 results were
 submitted under the Monitoring Regulations “from over 7,000 [of 11,827] drinking water sources,” or approximately
 59% of all sources. (AR, 00273, 00278 [ISOR, pp. 10, 15].)

1 promulgate a Chromium-6 MCL by a date certain. (*Id.* at p. 1.)

2 DPH contended that some of its personnel “began working on the MCL in some
3 unspecified way in 1997.” (*Id.* at p. 5.) However, the court concluded that DPH had identified no
4 significant work undertaken to promulgate an MCL from SB 351’s deadline of January 1, 2004,
5 through OEHHA’s issuance of a Public Health Goal in July 2011—a period of over seven years.
6 (*Id.* at pp. 5-6.) The court remarked: “This is so despite the fact of [OEHHA] having released
7 draft Public Health Goals in both 2009 and 2010.” (*Id.* at p. 6.) DPH argued that its delay was
8 justified given the time-consuming and complex task of gathering data for and conducting the
9 compliance-cost analysis. (*Id.* at p. 17.) However, DPH personnel testified that DPH had
10 additional resources available to speed its work, but did not intend to call upon those resources so
11 long as it believed that it was proceeding at a reasonable pace. (*Id.* at pp. 22, 24-25.)

12 The court found that, “by showing that [DPH] had not published a proposed Standard nine
13 and a half years after the original, express statutory deadline, and two years after publication of
14 the Public Health Goal, Petitioners made a strong showing that [DPH] was in ongoing violation
15 of a ministerial duty.” (*Id.* at p. 16.) The court therefore ordered DPH to adopt an MCL for
16 Chromium-6 “in a way consistent with” and “subject to the mandatory requirements of other
17 applicable statutes,” including the SDWA and the APA. (*Id.* at pp. 2, 9-10, 16 [noting that “the
18 Legislature—which is presumed to know both the substantive requirements it imposed in Section
19 116365 and the procedural requirements it imposed in the APA—implicitly required” DPH to
20 “complete all necessary tasks prerequisite to” adoption of the MCL by the statutory deadline].)

21 **E. DPH Issued a Draft MCL and Initial Statement of Reasons in 2013**

22 On August 4, 2013, and pursuant to the Deadline Lawsuit, DPH published a draft MCL
23 for Chromium-6 at 10 ppb and proposed associated monitoring requirements. (AR, 00250-00263
24 [Notice of Proposed Rulemaking (“Notice”)]; AR, 00264-00299; AR, 00300-00306 [Information
25 Digest/Policy Statement]; AR, 00307-00347 [Initial Proposed Regulation].) DPH’s rationale and
26 reasoning for the proposed regulation were set forth in its Initial Statement of Reasons.

27 DPH examined seven potential MCLs: 1 ppb, 5 ppb, 10 ppb, 15 ppb, 20 ppb, 25 ppb and
28 30 ppb. DPH stated that the proposed MCL of 10 ppb was based on the Public Health Goal of

1 0.02 ppb and a cost-benefit analysis that determined which of the potential MCLs was as close to
2 the Public Health Goal “as technologically and economically feasible.” (AR, 00274 [ISOR, p.
3 11].) To set the MCL, DPH reviewed several factors, including: (1) “The availability and costs of
4 appropriate technologies for mitigating its presence”; and (2) “The estimated costs for treatment
5 to the regulated water systems with sources that violate the MCL and must be treated to come into
6 compliance.” (*Id.* at p. 12.)

7 In determining the “availability and costs of appropriate technologies,” DPH adopted the
8 approach developed by the City of Glendale. Glendale began developing Chromium-6 treatment
9 for its water supply at about the time SB 351 was adopted. DPH assumed the costs incurred by
10 other water systems would be similar to the costs incurred by Glendale.

11 DPH next determined the number of water systems and water sources that would need to
12 incur treatment costs to achieve compliance. To determine the number of water sources that
13 would require treatment, DPH used data from the monitoring conducted under the 2001
14 Monitoring Regulations (as noted above) with some subsequent voluntary monitoring by
15 additional systems through December 31, 2009 (the “Database”). (*Id.* at pp. 12, 13-17.)

16 DPH conceded that the data collected under the 2001 Monitoring Regulations, and
17 contained in the Database, had significant gaps, particularly with respect to small water systems.
18 (See *id.* at pp. 13-14, 21.) As stated above, the Database contained data for only about half of the
19 water sources in the State. DPH did not explain why it had not obtained adequate occurrence data
20 during the nine years after the original statutory deadline or the two years after publication of the
21 Public Health Goal.

22 When it tabulated the number of water sources in the State that would require treatment
23 for Chromium-6, DPH only counted those water sources for which there was data in the
24 Database. DPH therefore implicitly assumed that systems that had not sampled for or submitted
25 data for Chromium-6 were not impacted. (*Id.* at p. 21, 24.) A lack of data in about half of the
26 State’s water sources was therefore interpreted to indicate the absence of levels in excess of the
27 potential MCLs in those unsampled water sources.

28 DPH grouped water systems based on their number of service connections: (1) fewer than

200 (small systems); (2) 200 to 1,000 (medium systems); (3) 1,000 to 10,000 (large systems); and (4) more than 10,000 (very large systems). (*Id.* at p. 14.) Using the Database, DPH estimated the number of impacted water sources, the aggregate cost of compliance, and the cost per customer (i.e., cost per service connection) for each of the seven potential MCLs. (*Id.* at pp. 19-24.)

For the proposed MCL of 10 ppb, the total number of impacted sources statewide was estimated to be 311. The total aggregate costs to construct all the needed treatment systems to meet a 10 ppb MCL was estimated to be \$870 million. For small water systems where treatment is necessary, the annual cost per customer was estimated to increase by \$5,640, and for impacted medium-sized water systems the annual cost per customer was estimated to increase by \$857.

Using these estimated costs, DPH then performed a cost-benefit analysis. Costs were quantified as dollars and benefits were quantified as “theoretical excess cancer cases reduced.”⁴ DPH did not include this cost-benefit chart in the ISOR. It can be found elsewhere in the administrative record. (AR, 00222-00224 [Procedure for Cost-Benefit Analysis of Hexavalent Chromium⁵].) However, it appears that most members of the public did not have the cost-benefit chart in their possession when they commented on the draft MCL. (See, e.g., AR, 06337-06339, 06343-06344, 06715-06719, 06794-06795 [public comments].) It is unclear why DPH did not include the cost-benefit chart in the ISOR, as the chart would appear to be foundational to DPH’s selection of the 10 ppb MCL.

DPH did not provide an analysis explaining why 10 ppb was selected as the final MCL, as opposed to one of the other potential MCLs evaluated. The ISOR included only conclusory statements that an MCL of 10 ppb is based on the results of DPH’s cost-benefit analysis. (AR, 00275 [ISOR, p. 12].) Finally, DPH did not make a determination as to which of the potential

⁴ DPH prepared a chart showing the estimated theoretical excess cancer cases reduced for the seven potential MCLs (1 ppb, 5 ppb, 10 ppb, 15 ppb, 20 ppb, 25 ppb and 30 ppb). For example, at 10 ppb, a total of 11.8 theoretical cancer cases are avoided; at 20 ppb, 5.7 theoretical cancer cases are avoided; and at 30 ppb, 4.0 cases are avoided. DPH also calculated the estimated cost per theoretical excess cancer cases reduced for the seven candidate MCLs for the four sizes of water systems (small, medium, large, and very large). For very large water systems, these costs range from \$2.5 million per theoretical cancer case reduced at 30 ppb to \$48 million at 1 ppb. For large water systems, these costs range from \$6.3 million per theoretical cancer case avoided at 30 ppb to \$58 million at 1 ppb.

⁵ This document includes a notation on its cover page stating: “Remove from rulemaking file per agency request 5/23/14 TH.” (AR, 00140.) The purpose and effect of this notation is unclear. This document is plainly part of the record of DPH’s decision, and no other copy is included elsewhere in the Administrative Record.

1 MCLs is as close to the Public Health Goal as economically feasible. The ISOR did not include
 2 an analysis of economic feasibility for any of the seven potential MCLs, or a determination that
 3 the proposed 10 ppb MCL is economically feasible.

4 **F. The ISOR Generated Numerous Stakeholder Comments Regarding The MCL**

5 More than 18,000 members of the public submitted comments on the proposed MCL.
 6 (AR, 04624, 04628 [FSOR, pp. 1, 4].)⁶ The majority of the distinct comments stated that the
 7 proposed MCL was inappropriate in light of: (a) errors in determining the costs of compliance
 8 with the MCL; (b) the economic infeasibility of complying with a 10 ppb MCL; and (c) DPH's
 9 failure to determine economic feasibility. (See AR, 04735-04752 [Coded Comment Table].)

10 The commenters included members of both Petitioners SCTA and CMTA, (AR, 04380-
 11 04383, 04421-04423, 06286-06287 [SCTA comments]; AR, 04398-04400, 06427-06498, 06709-
 12 06712 [CMTA comments]), and organizations representing the interests of individual business
 13 ratepayers (e.g., AR, 04387-04391, 04459-04460, 04463-04465, 04602-04603, 05762 [public
 14 comments]). These comments identified numerous issues with DPH's analysis, and provided
 15 information not considered by DPH, including missing information identified by DPH itself, such
 16 as data on Chromium-6 occurrence.

17 Both water systems in Dixon, where SCTA's members reside—the City of Dixon's
 18 Dixon-Solano Water Agency⁷ and California Water Service Company ("Cal Water")—and
 19 numerous individual Dixon residents, submitted comments that provided system-specific
 20 information on economic feasibility. (AR, 04418 [City of Dixon public meeting comment]; AR,
 21 06393-06397 [City comment letter]; AR, 04376-04378 [Cal Water public meeting comment];
 22 AR, 06372-06376 [Cal Water comment letter]; AR, 05660-05685, 05687-05688, 05690-05691,
 23 05693, 05879-05890, 05965 [Dixon residents' comment letters].) These comments stated that

24
 25 ⁶ Earlier, in the course of the Deadline Lawsuit, counsel for DPH represented that DPH had received "over 20,000
 26 written communications," but that "nine templates...accounted for over 95% of those communications. There were
 27 approximately 670 unique communications, but over 400 of those had 'template characteristics.' It thus seems that
 28 the number of significantly distinct communications is about 250." (RJN, Exh. E [Alameda Court Order, p. 23]; see
 also AR, 04735-04752 [Coded Comment Table].)

⁷ The Dixon-Solano Water Agency is a joint powers authority between the City of Dixon and the Solano Irrigation
 District. (AR, 006393 [City of Dixon comment letter].)

1 water rates in Dixon would double or triple as a result of the 10 ppb MCL and that DPH had
2 underestimated the costs of compliance.

3 Expert studies examining occurrence data and estimated costs of compliance were
4 submitted by a consortium of water groups (referred to herein as the Jacobs Analysis and the
5 WQTS Analysis). The Jacobs Analysis concluded that DPH had underestimated the number of
6 sources impacted by the proposed MCL and provided various estimates of the number of sources
7 actually impacted. (See AR, 06512-06537 [Jacobs Analysis].) The WQTS Analysis concluded
8 that the true cost of achieving compliance with the proposed MCL would be considerably higher
9 than DPH's estimates. (See AR, 06539-06562 [WQTS, REVIEW OF CDPH'S ECONOMIC
10 ANALYSIS SUPPORTING THE DRAFT CALIFORNIA MCL FOR HEXAVALENT CHROMIUM IN DRINKING
11 WATER ("WQTS Analysis")].) An expert study analyzing DPH's economic analysis was
12 conducted by Dr. Richard B. Belzer, and submitted by CMTA and the American Chemistry
13 Council. (See AR, 06427-06498.) Dr. Belzer concluded that DPH's cost-benefit analysis
14 included a number of methodological errors but that, even taking DPH's cost-benefit analysis at
15 face value, the costs of compliance were not economically feasible. (See AR, 06449-06498
16 [BELZER, COST-BENEFIT ANALYSIS IN SUPPORT OF A PRIMARY DRINKING WATER STANDARD FOR
17 HEXAVALENT CHROMIUM (CR VI) ("Belzer Analysis")].) Comments submitted are summarized
18 as follows:

19 ***DPH did not determine that the 10 ppb MCL was economically feasible.*** Commenters
20 noted that DPH's analysis did not consider the affordability of compliance to communities, did
21 not consider the adverse economic impact to businesses and individuals, and did not actually
22 determine that the proposed MCL was economically feasible. (See, e.g., AR, 04374-04375
23 [comments from Willows City Councilmember]; AR, 06449-06498 [Belzer Analysis]; AR,
24 06539-06562 [WQTS Analysis].)⁸ Numerous ratepayers commented that DPH had failed to

25 ⁸ See also AR, 04393-04395, 04398-04400, 04443-04450, 04452-04455, 04459-04460, 04469-04471, 04584-04586,
26 04588-04592, 04597-04598, 05692, 05762, 05863-05867, 05873-05875, 05877, 06238-06239, 06255-06267, 06269-
27 06270, 06276-06281, 06283-06284, 06288-06291, 06293-06294, 06296-06297, 06300-06307, 06309-06319, 06321-
28 06322, 06334-06335, 06340-06342, 06346-06349, 06351-06353, 06359-06364, 06366-06367, 06369-06371, 06417-
06419, 06425, 06427-06435, 06500-06538, 06566-06567, 06569-06570, 06575-06577, 06579-06588, 06639-06640,
06712-06713, 06724-06725, 06727-06730, 06733-06737, 06786, 06788-06789, 06798-06806, 06855-06858 [public
comments].

1 demonstrate or explain how the proposed MCL of 10 ppb would provide additional public health
 2 benefits relative to the fiscal impacts when compared to the other values considered. (See, e.g.,
 3 AR, 04398-04400 [CMTA comments].)⁹

4 ***DPH's estimate of the number of sources impacted, and the costs of compliance, were***
 5 ***understated.*** Many commenters provided system-specific information that demonstrated that
 6 DPH's occurrence estimate and cost of compliance estimate were understated. Most of these
 7 commenters informed DPH that the proposed MCL would be economically infeasible to
 8 implement. Many commenters also urged DPH to reevaluate costs of compliance in light of the
 9 information and the system-specific data provided. (See, e.g., AR, 04398-04400, 06709-
 10 06710.)¹⁰

11 ***DPH's Database was incomplete.*** Commenters noted that about half of the State's water
 12 sources had not been monitored for Chromium-6 at the time the MCL was promulgated. (See,
 13 e.g., AR, 06512-06537 [Jacobs Analysis]; AR, 04398-04400, 06427-06435, 06709-06710
 14 [CMTA, *et al.* comments].)¹¹ This lack of data had a significant effect on the occurrence
 15 estimates. Assuming the same incidence of Chromium-6 at non-sampled sources as at sampled
 16 sources (i.e., extrapolation) would have increased the estimated number of affected sources from
 17 311 to over 600. (See AR, 06524-06525 [Jacobs Analysis, pp. 8-9].)

18 ***DPH's conclusion that NTNCWS are not "business enterprises" was incorrect.***
 19 Petitioner CMTA and others noted that DPH's conclusion that NTNCWS are not California
 20 businesses is contrary to California law. This category of water system is generally located in
 21 rural areas and includes wineries, commercial nurseries, agricultural operations, and food
 22 processors that provide water to their employees from privately-owned wells. (See, e.g., AR,

23 ⁹ See also AR, 04387-04391, 04443-04446, 04463-04468, 04602-04603, 05762, 06255-06267, 06309-06319, 06337-
 24 06339, 06343-06344, 06359-06364, 06366-06367, 06449-06498, 06563-06565, 06715-06719, 06794-06795 [public
 comments].

25 ¹⁰ See also AR, 04443-04446, 04452-04455, 04597-04598, 06238-06239, 06242-06243, 06255-06267, 06293-06294,
 26 06296-06297, 06309-06319, 06334-06335, 06346-06349, 06366-06367, 06379, 06402-06405, 06409-06413, 06415,
 06420-06421, 06425, 06639-06640, 06709-06710, 06712-06713, 06724-06725, 06733-06737, 06794-06795, 06855-
 06858 [public comments].

27 ¹¹ See also AR, 04393-04394, 04438-04441, 06255-06267, 06337-06339, 06359-06364, 06420-06423, 06569-06570,
 28 06579-06588, 06732-06737, 06859-06861, 06863-06866 [public comments].

04398-04400, 04460, 05762, 06359-06364, 06709-06710, 06727-06730 [public comments].)

G. DPH Promulgated The Final Rule in 2014

On or about May 23, 2014, DPH issued its Final Statement of Reasons ("FSOR") into which it incorporated by reference the contents of the ISOR, with only a few non-substantive revisions. The final MCL was substantively unchanged from the 10 ppb MCL proposed in August 2013. (AR, 04624 [FSOR, p. 1].) DPH did not substantively respond to many of the relevant public comments. (See AR, 04628 [FSOR, p. 4].) The Office of Administrative Law approved the final MCL on May 28, 2014. (See AR, 00001 [Notice of Approval of Regulatory Action].)

III. LEGAL STANDARDS FOR WRIT OF MANDATE

Ordinary mandate proceedings are appropriate for the review of actions or decisions of an administrative body acting in a legislative or executive capacity. (Code Civ. Proc. § 1085.) In such a case, a court may review the refusal of an administrative body to perform a ministerial action and review whether discretionary administrative action was arbitrary, capricious or lacking in evidentiary support. (See *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 868-869; see also *Carrancho v. Cal. Air Res. Bd.* (2003) 111 Cal.App.4th 1255, 1265.)

The standard of review in a mandamus proceeding consequently depends on the nature of the administrative agency's action (or inaction) and falls on a continuum. (*Western States Petroleum Assn. v. Sup. Ct.* (1995) 9 Cal.4th 559, 575-576.) Ministerial actions do not merit judicial deference. Quasi-legislative administrative decisions are at the opposite end of the continuum and do merit judicial deference. (*Ibid.*) Here, most of the actions and inactions of DPH that resulted in the Chromium-6 MCL constituted failures to perform clearly required ministerial acts.

A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists. (*Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 501-502.) If a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take, that course of conduct

1 becomes mandatory and eliminates any element of discretion. (*Great Western Sav. & Loan Assn.*
 2 *v. City of Los Angeles* (1973) 31 Cal.App.3d 403, 413.) When an agency has failed to comply
 3 with a ministerial duty capable of direct enforcement, even a duty related to a quasi-legislative
 4 function performed by the agency, its decision not to comply with that duty is not entitled to
 5 judicial deference and mandamus is proper to compel performance of the duty. (See, e.g., *Sims v.*
 6 *Cal. Dept. of Corrections & Rehabilitation* (2013) 216 Cal.App.4th 1059, 1071.)

7 DPH failed to comply with several ministerial duties (and abused a related act of
 8 discretion) under both the SDWA and the APA, any of which justify the requested relief. DPH
 9 did not determine that among the potential MCLs, the 10 ppb MCL was as close to the Public
 10 Health Goal as economically feasible. DPH also did not conduct an economic feasibility analysis
 11 with regard to the various potential MCLs. These two omissions were failures to observe a legal
 12 obligation and thus entitled to no deference on review. (See *id.* [determination of lawfulness of
 13 agency's compliance with rule-making procedures reviewed entirely *de novo*].)

14 Second, while DPH did examine the costs of compliance (both in the aggregate and for
 15 individual customers), it did so in an arbitrary and capricious manner by fastening its economic
 16 considerations on the Database which it *conceded* was incomplete. This was an abuse of
 17 discretion in addition to a failure to meet its ministerial obligations to conduct a good faith
 18 assessment of the costs of compliance, which provides further grounds for mandamus. (See, e.g.,
 19 *Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401, 427-431
 20 [invalidating regulation due to inadequate and understated assessment of economic impacts]
 21 (*"WSPA v. BOE"*); *Bullis Charter School v. Los Altos School Dist.* (2011) 200 Cal.App.4th 1022,
 22 1062-1064, [mandamus granted where school district failed to consider, in good faith, numerous
 23 relevant facts in performance of its ministerial duty to provide "reasonably equivalent" school
 24 facilities to charter school.]

25 Third, DPH failed to assess the potential for adverse impacts on California businesses and
 26 individuals in promulgating a MCL as required by the APA. (AR, 00295-00297 [ISOR, pp. 32-
 27 34]; Gov. Code §§ 11346.2, subd. (b)(5)(A), 11346.3, subd. (a).) DPH interpreted the APA to
 28 only require its consideration of "direct" adverse economic impacts, a contorted reading of the

statute. DPH's failure to perform this ministerial act is grounds for mandamus. (See *City of Dinuba, supra*, 41 Cal.4th at pp. 868-869; see also *WSPA v. BOE*, 57 Cal.4th at pp. 427-431.)

Fourth, and finally, DPH failed to respond to objections or recommendations made regarding the proposed MCL in the FSOR, as required by the APA. (Gov. Code § 11346.9, subd. (a)(3); see AR, 04642-04648, 04655 [FSOR, pp. 13-17, 22].) Substantive responses to all unique, relevant comments were required but were not provided. DPH's cursory and non-substantive responses to comments constitute further failure to perform a ministerial duty and are grounds for mandamus. (See *Sims, supra*, 216 Cal.App.4th at pp. 1073-1075 [noting that CDCR's failure to respond to comments justified a grant of mandamus].)

IV. LEGAL ARGUMENT

A. The Chromium-6 MCL Is Not Economically Feasible

1. **DPH Was Required to Adopt an Economically Feasible MCL**

DPH had the responsibility to implement the SDWA, including establishing MCLs. (See Health & Saf. Code §§ 116350, subd. (b)(3), 116365, 116365.02, 116375, 116377.) In adopting a Chromium-6 MCL, *DPH was required to consider the Public Health Goal and the MCL for the contaminant adopted by EPA*. (See *id.*, § 116365, subds. (a), (b).) DPH was also required to set the MCL "at a level that is as close as *feasible* to the corresponding public health goal placing primary emphasis on the protection of public health, and that, *to the extent technologically and economically feasible*, ...avoids any significant risk to public health." (*Id.* [emphasis added].)

2. **DPH Did Not Determine That The MCL Was Economically Feasible**

DPH acknowledged that it was required to set the MCL as close to the Public Health Goal as economically feasible. (AR, 00266 [ISOR, p. 3].) But DPH did not do so. In fact, DPH did not make a determination regarding economic feasibility at all. DPH did not determine whether any of the seven potential MCLs it considered were economically feasible, including the final MCL of 10 ppb. The ISOR purports to address the "Feasibility of Compliance with the Proposed MCL" over the course of ten pages, the last several of which fall under the subheading "Economic Feasibility." In that subsection of the ISOR, DPH stated that it "reviewed economic feasibility for the regulated water systems in terms of estimated annual cost per system, source,

1 service connection, and theoretical excess cancer cases reduced.” (*Id.* at p. 23.) DPH calculated
 2 certain costs and benefits, including the total aggregate capital costs to construct treatment plants
 3 and the increase in annual water bills for average households for each of the seven potential
 4 MCLs. However, DPH did not analyze or determine whether these costs were economically
 5 feasible.

6 The final paragraph in this subsection of the ISOR, what is ostensibly the conclusion,
 7 simply states: “[P]ursuant to Section 116365 of the Health and Safety Code and its mandate to
 8 place primary emphasis on the protection of public health, the Department is proposing an MCL
 9 of 0.010 mg/L [equivalent to 10 ppb] be adopted for [Chromium-6].” (*Id.* at p. 25.) This one-
 10 sentence paragraph constitutes the entirety of DPH’s determination regarding the economic
 11 feasibility of the new MCL. The ISOR does not contain a determination as to which of the
 12 potential MCLs were economically feasible; it does not contain a determination as to which of the
 13 potential MCLs is as close to the Public Health Goal as economically feasible; and it does not
 14 make a determination that the final MCL is economically feasible. So, while DPH acknowledged
 15 that it was required to promulgate an economically feasible Chromium-6 MCL, it did not actually
 16 do so.

17 3. DPH’s Compliance Cost Presentation is Not a Feasibility Analysis

18 In determining economic feasibility, DPH was obligated to consider the “costs of
 19 compliance to public water systems, customers, and other affected parties with the proposed
 20 primary drinking water standard, including the cost per customer and aggregate cost of
 21 compliance, using best available technology.” (Health & Saf. Code § 116365, subd. (b)(3).)
 22 DPH claims it did this (although in a flawed, and arbitrary manner as discussed in more detail
 23 below). However, compliance costs are only a single aspect of an economic feasibility analysis;
 24 they are not a substitute for a complete feasibility analysis.

25 Federal courts interpreting substantially similar language in the federal Safe Drinking
 26 Water Act have held that “feasibility” means “technically possible *and affordable*.” (*City of*
 27 *Portland, Ore. v. U.S. EPA* (D.C. Cir. 2007) 507 F.3d 706, 712 [emphasis added].) Courts have
 28 rejected the contention that a cost-benefit analysis is sufficient to determine feasibility. (See *id.*

1 [distinguishing between cost-benefit analysis and feasibility analysis, and rejecting argument that
 2 “feasible” means simply that benefits outweigh costs]. California law, where the term
 3 “feasibility” is used in other statutory schemes, is in accord. (See, e.g., Pub. Res. Code § 21061.1
 4 [defining “feasibility” under the California Environmental Quality Act as “capable of being
 5 accomplished in a successful manner within a reasonable period of time”].) This is consistent
 6 with the plain meaning of the term “feasibility”: “The possibility that something can be made,
 7 done, or achieved, or that it is reasonable; practicability.” (BLACK’S LAW DICTIONARY (10th ed.
 8 2014).) This is exactly what is missing from the record here.

9 DPH estimated that for affected small systems, annual household water bills would
 10 increase by about \$5,600 per year. A number of that magnitude, whether compared to average
 11 household incomes or average household expenditures on other consumer goods, does not appear
 12 to be feasible on its face. DPH did not conduct an analysis to determine whether rate increases of
 13 this magnitude for an average household are reasonable, achievable, or affordable. (See *City of*
 14 *Portland, supra*, 507 F.3d at p. 712 [“feasibility” means “technically possible and affordable”].)
 15 And importantly there is no evidence in the record that it is, indeed, feasible.

16 DPH also estimated that the aggregate cost to construct all the treatment plants needed to
 17 meet the new MCL would total \$870 million. A number of this magnitude, does not appear to be
 18 feasible. (*Id.*) And again, there is no evidence in the record that it is feasible.

19 In fact, there is overwhelming evidence in the record that costs of this magnitude are *not*
 20 economically feasible. Hundreds of individuals advised DPH that the rate increases necessary to
 21 pay the costs of implementing the proposed MCL would make it very difficult or impossible for
 22 the people in their communities to afford water. (See, e.g., AR, 05751 [“I work with some of the
 23 poorest people in California in the Coachella Valley. I know they cannot afford to pay up to \$500
 24 more per year for their water. They will either do without (which is not healthy) or find a way to
 25 get other, more impure water . . .”].)¹² DPH also declined to consider affordability in the context

26 ¹² See also AR, 04374-04376, 04391-04392, 04413-04414, 04450-04452, 04595, 05060, 05098, 05606, 05607,
 27 05618-05619, 05621-05622, 05626, 05628, 05631-05632, 05634, 05640, 05642-05644, 05647-05650, 05652, 05656-
 28 05657, 05660-05686, 05688, 05690-05691, 05693, 05697, 05700-05702, 05707-05708, 05715, 05717, 05719-05727,
 05729-05733, 05735-05736, 05738-05739, 05742-05746, 05749, 05752, 05754, 05756, 05758-05759, 05761, 05763,
 05766-05767, 05769, 05778-05785, 05787-05791, 05793-05799, 05801, 05803-05804, 05806-05808, 05810-05816,

1 of an evaluation of economic impacts on individuals contending that “indirect costs to customers
2 associated with potential water rate increases need not be considered” under the APA. (AR,
3 04658 [FSOR, p. 24].)

4 Apparently, public comments about the lack of analysis of economic feasibility ultimately
5 caused DPH to insert a statement regarding economic feasibility in the FSOR: [“The Department
6 determined economic feasibility as required by statute.”] (AR, 04643).) However, DPH’s
7 statement that it had determined the proposed MCL was economically feasible is entirely lacking
8 in evidentiary support. This conclusory statement is not supported by any statements in the ISOR
9 or evidence in the rulemaking file. (See AR, 00264-00299 [ISOR].) The ISOR and related
10 documents show only that DPH evaluated how much compliance would cost, not whether these
11 costs were economically feasible. (*Id.*; see also AR, 06459 [Belzer Analysis (noting: “The term
12 ‘economic feasibility’ does not appear anywhere in [DPH’s] cost-benefit analysis.”)]; AR, 06393-
13 06397 [City of Dixon comment letter (same)].)

14 DPH cannot rescue itself from its failure to consider economic feasibility by simply
15 saying, at the end of the process, “it is economically feasible.” A regulatory action is not valid
16 where a mandatory determination is entirely lacking in evidentiary support. (*WSPA v. BOE*,
17 *supra*, 57 Cal.4th at pp. 427-431.) To determine that an agency decision was not devoid of
18 evidentiary support, the court must ensure that the agency adequately considered all relevant
19 factors, and demonstrated a rational connection between those factors, the choices made, and the
20 purposes of the enabling statute. (*Id.*) Here, it is not possible to determine any reasonable basis
21 for DPH’s decision-making because there is no evidence in the ISOR and related documents that
22 DPH considered and evaluated whether it would be economically feasible for public water
23 systems, their customers, and other affected parties to implement the proposed MCL.

24 **B. The New Chromium-6 MCL was Based on an Incomplete Database**

25 DPH will likely argue that its cost compliance presentation is the required feasibility
26 analysis. As noted above, there are several problems with this. First, the governing documents—

27 05818-05832, 05834-05839, 05859-05861, 05863-05867, 05873-05875, 05878, 05882, 05884-05887, 05892, 05894-
28 05898, 05912-05914, 05916-06236, 06407-06408, 06417-06419.

1 particularly the ISOR—do not determine that a 10 ppb MCL for Chromium-6 is in fact
2 economically feasible. Second, also as noted, costs and the feasibility of those costs are two
3 different things. Petitioners, the costs of compliance themselves were based on an incomplete
4 and decade-old Database.

5 **1. DPH Underestimated The Number of Impacted Sources**

6 DPH estimated it would require \$870 million in aggregate capital costs to build the
7 hundreds of treatment plants necessary to meet the new MCL. To understand why this is grossly
8 understated, we return to the factual discussion.

9 As noted above, DPH examined seven potential MCLs: 1 ppb, 5 ppb, 10 ppb, 15 ppb, 20
10 ppb, 25 ppb and 30 ppb. To arrive at the aggregate costs of compliance, average cost per affected
11 water source and average cost per customer, DPH engaged in essentially a two-step process.
12 First, it determined the number of water sources in California that would produce water that
13 would require some sort of treatment in order to meet each potential MCL. Second, it determined
14 the costs of treating such sources. DPH made these determinations separately for four categories
15 of water systems: (1) small systems (less than 200 households); (2) medium systems (200 to
16 1,000 households); (3) large systems (1,000 to 10,000 households); and (4) very large systems
17 (more than 10,000 households).

18 The first step involved making a determination of how many sources would produce water
19 that would require treatment. For each potential MCL, DPH determined how many sources
20 would produce water above that particular concentration. For example, DPH determined that for
21 an MCL of 1 ppb, 2,487 water sources would require treatment; for an MCL of 10 ppb, 331 water
22 sources would require treatment; for an MCL of 20 ppb, 67 sources would require treatment; and
23 for an MCL of 30 ppb, 16 sources would require treatment. (AR, 00287 [ISOR at 24].)

24 DPH determined how many sources would require treatment by reference to the Database.
25 However, the Database was nowhere near sufficient to complete this task. DPH did not have
26 Chromium-6 data for about half of the State's water sources. (See AR, 06839 [Jacobs Analysis,
27 p. 7]; AR, 00273, 00278 [ISOR, pp. 10, 15].) And DPH admitted that it did not have data for
28 about 60 percent of the small system sources statewide. (AR, 00284 [ISOR, p. 21].)

1 DPH then multiplied the known number of water sources with Chromium-6
2 concentrations above the various candidate MCLs by the estimated treatment cost per source to
3 arrive at the total capital costs for each potential MCL. Using an artificially low number of
4 impacted sources has the result of understating the aggregate costs for each potential MCL. The
5 Database contained Chromium-6 data for about half the water sources in the State at the time of
6 the rulemaking. If the incidence of Chromium-6 was the same in water sources for which it did
7 not have data, then DPH would have understated the number of systems above the candidate
8 MCLs by roughly a factor of two and aggregate capital costs by the same factor of two.

9 DPH could have taken several steps to remedy this significant data deficiency. DPH
10 could have assumed the same incidence of Chromium-6 in non-sampled sources as in sampled
11 sources and scaled up its estimates (i.e., extrapolation). (See AR, 06523-06525 [Jacobs Analysis,
12 pp. 7-9]; see also AR, 00284 [ISOR, p. 21 ("For sources not previously monitored, the rate of
13 detection may be comparable to that for sources previously monitored.")]). DPH could have used
14 data submitted after December 31, 2009. (See AR, 06527 [Jacobs Analysis, p. 11]; see also AR,
15 04646 [FSOR, p. 16 ("The Department recognizes that additional data may have been more
16 recently submitted....")]). And DPH could have used Total Chromium data for sources where it
17 lacked Chromium-6 data. Because Chromium-6 is a significant component of Total Chromium in
18 groundwater, this would have provided a workable approximation. (See AR, 06525-06527
19 [Jacobs Analysis, pp. 9-11]; AR, 06542-06543, 06548 [WQTS Analysis, pp. 3-4, 9]; see also AR,
20 00158 [Procedure for Cost Benefit Analysis ("It is assumed that the predominant species in
21 source drinking water is HC [hexavalent chromium].")]).

22 But DPH decided to not account for the data deficiency at all. DPH simply counted up the
23 number of sources for which it had data above the various candidate MCLs, without any
24 adjustments. DPH knew that this would underestimate the number of impacted sources. (AR,
25 00276-00277 [ISOR, pp. 13-14] .) DPH knew that the underestimate would be particularly acute
26 in the case of small water systems where the data deficiency was most pronounced. (*Ibid.*)

27 DPH purported to find total aggregate capital costs of \$870 million to be economically
28 feasible when it set the MCL at 10 ppb. This is a massive expenditure. However, the actual

1 aggregate capital costs for a 10 ppb MCL will be significantly higher than \$870 million—perhaps
 2 double that amount. And this does not take into account the annual operating costs and other
 3 costs associated with the new MCL. The flaws in the Database, coupled with DPH’s refusal to
 4 correct for them in any way, prevented DPH from complying with its statutory obligations. At
 5 this point, the public does not know what the actual aggregate costs will be, let alone whether
 6 they will be economically feasible, because that analysis was not conducted.

7 **2. System-Specific Data Demonstrated The Inaccuracy of the Compliance Costs**

8 In addition, there is every reason to believe that the \$870 million aggregate capital costs
 9 number is itself an underestimate. The flaws with DPH’s cost analysis were brought to DPH’s
 10 attention by numerous commenters through comment letters highlighting compliance challenges
 11 that would be faced by water systems generally and the commenters’ water systems in particular,
 12 and providing system-specific cost numbers to DPH. (See Section II.F., *supra*; see also AR,
 13 04645 [FSOR, p. 15 (identifying some, but not all, of the issues raised by commenters)].) These
 14 comments demonstrated that, by failing to consider numerous elements of compliance costs, DPH
 15 had significantly underestimated costs of compliance for a large number of California water
 16 systems and their customers.

17 For example, the Coachella Valley Water District (“CVWD”), a district serving
 18 approximately 220,000 people, indicated that its estimated capital costs for compliance with the
 19 MCL are \$518 million, “over 7 times higher than CDPH’s estimated compliance cost of \$71.2
 20 million.” (AR, 06263 [CVWD comment letter].) CVWD informed DPH that these very high
 21 compliance costs would “more than double” current monthly water bills, which “will be
 22 unaffordable for many CVWD customers.”¹³ CVWD also informed DPH that it had more than
 23 twice the number of impacted sources that DPH estimated (57 rather than 27), that its water usage
 24 rate is almost four times higher than the rate used by DPH (591 gallons per capita per day rather
 25

26 ¹³ Later, on June 30, 2015, CVWD provided updated cost numbers to the Legislature during the debate over SB 385.
 27 At that time, CVWD indicated: “Capital costs will likely exceed \$200 million, with annual operation and
 28 maintenance exceeding \$8.6 million. We estimate that our customers will see their monthly domestic water bills
 increase by about \$30 to \$50, just to cover the cost of compliance.” (RJN, Exh. I [Legislative History for SB 385,
 Letter from J. M. Barrett, General Manager of the Coachella Valley Water District, to The Honorable Mark Stone].)

1 than 150 gpcd), that the peaking factor used by DPH significantly underestimated the necessary
 2 design capacity for each of CVWD's impacted sources, and that over 80 percent of its impacted
 3 well sites would require the purchase of land to install the required treatment facilities. (AR,
 4 06255-06267 [CVWD comment letter].)

5 The water systems serving SCTA's members in the Dixon area—Cal Water and the
 6 Dixon-Solano Water Agency—each provided system-specific cost numbers. Cal Water, a system
 7 serving about half of Dixon's population, advised DPH that all of its active wells in Dixon would
 8 be affected by the 10 ppb Chromium-6 MCL. It indicated that the financial impact on the
 9 residents and businesses would be substantial, estimating that its customers' monthly water bills
 10 "will double or triple due to this regulation." It noted a further economic impact to Dixon in that,
 11 due to the substantial increase in water bills in this community, the community would be placed at
 12 a competitive disadvantage with cities in other states and in other parts of California. (AR,
 13 04377-04380, 04416-04417, 06372-06374 [comments by Cal Water].)

14 The City of Dixon informed DPH that the Dixon-Solano Water Agency, a system serving
 15 approximately 2,600 service connections, is wholly reliant on groundwater with an average
 16 Chromium-6 concentration above the 10 ppb MCL (18 ppb). To estimate its costs of compliance,
 17 the City took a conservative approach by assuming a lower average concentration at 15 ppb. The
 18 City informed DPH that, assuming DPH's ISOR correctly estimated capital and operations and
 19 maintenance costs, the City conservatively estimated that the Dixon-Solano Water Agency "will
 20 be required to pay, at minimum, \$2.47 million dollars annually for monitoring and treatment of
 21 Chromium 6 under the proposed regulation." It estimated that the annual cost for water service
 22 would increase by approximately \$695 to \$949 per customer. The City also advised DPH that an
 23 additional challenge faced by the City is the potential difficulty in funding these costs if Dixon
 24 could not increase rates due to the Proposition 218 process, which allows a majority of customers
 25 to block a rate increase. (AR, 04383-04384, 04418-04418, 06393-06398 [City of Dixon
 26 comments].)¹⁴

27
 28 ¹⁴ In 2015, the California Legislature passed Senate Bill 385 ("SB 385"), which called for the MCL compliance
 deadline to be extended five years, to January 1, 2020, in most circumstances. (Health & Saf. Code § 116431.) The

3. Recent Data Confirms the Unreliability of DPH's Occurrence Estimate

Recently collected data confirms that DPH underestimated the occurrence of Chromium-6 in California water sources. This demonstrates that the \$870 million aggregate cost number used by DPH was similarly underestimated. The new Chromium-6 MCL and accompanying regulations became effective on July 1, 2014. (AR, 00001 [Notice of Approval of Regulatory Action].) The MCL regulations required public water systems to begin monitoring for Chromium-6 within six months of the effective date. (22 Cal. Code Regs. § 64431; see AR, 04639 [FSOR, p. 11].) Public water systems are required to provide their monitoring results to SWRCB. (22 Cal. Code Regs. § 64432.) SWRCB compiles monitoring data in the Database, which is publicly available. (See RJN, Exh. F [SWRCB, EDT Library and Water Quality Analyses Data and Download Page]; RJN, Exh. G [Summary Tables of SWRCB Water Quality Analyses Data].)

In general, the Chromium-6 data contained in the Database, and collected after July 1, 2012, show a significantly higher occurrence of Chromium-6 in drinking water sources than DPH estimated. This is particularly the case for small water systems (systems with fewer than 200 connections). When it promulgated the MCL, DPH estimated the number of sources that would exceed an MCL of 10 ppb for water systems with: (1) fewer than 200 connections; (2) 200 to 1,000 connections; (3) 1,000 to 10,000 connections; and (4) more than 10,000 connections. (AR, 00282 [ISOR, p. 19].) The table below compares those estimates with the number of sources exceeding the MCL based on the new data in the database.

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Senate Judiciary Committee's analysis noted that construction of new treatment facilities would be needed to comply with the Chromium-6 MCL, and many water systems would have been in violation of the new MCL in 2015, because it was not possible to install the appropriate treatment systems in the time provided by the MCL regulation. (RJN, Exh. H [Senate Judiciary Committee, Analysis of SB 385 (May 12, 2015), p. 5].) The steps involved—designing the treatment systems, securing financing and building the treatment systems—can require up to five years or more and can cost millions of dollars. (*Ibid.*)

<u>Water System Size</u> (Number of Connections)	<u>Number of Sources > 10 ppb</u> (Estimated in Proposed Rule)	<u>Number of Sources > 10 ppb</u> (Based on Actual Data)
Less than 200	65	149
200 to 1,000	13	20
1,000 to 10,000	81	105
More than 10,000	152	174

For small water systems (fewer than 200 connections), the number of sources that tested above 10 ppb is 149, *which is more than double DPH's estimate*. (See *id.*; RJN, Exhs. F, G.) The number of sources that tested above the 10 ppb MCL is 54% higher for medium water systems (200 to 1,000 connections), 30% higher for large water systems (1,000 to 10,000 connections), and 14% higher for very large water systems (greater than 10,000 connections) than estimated by DPH. (See AR, 00282 [ISOR, p. 19]; RJN, Exhs. F, G.) It is unclear if the current database contains data from all water sources in California. What is clear is that the number of impacted sources—and therefore the aggregate cost of compliance—is much higher than DPH estimated when it adopted the MCL. Thus, even if \$870 million in aggregate capital costs were somehow economically feasible, there is no evidence that the actual—much higher—aggregate costs are feasible.

C. DPH Failed to Consider Economic Impacts on California Businesses

Under the APA, DPH had mandatory, non-discretionary duties to assess and consider the potential for the new MCL to cause adverse economic impact on businesses in California. DPH failed to comply with these mandatory duties.

1. DPH Misinterpreted the Relevant Statutory Language

Section 11346.3 of the APA governs the assessment of proposed regulations for their potential to cause adverse economic impacts on businesses and individuals. First, this Section requires that “agencies proposing to adopt ... any administrative regulation shall assess the potential for adverse economic impact on California business enterprises and individuals”

(Gov. Code § 11346.3, subd. (a).) Second, this Section requires that agencies “consider the proposal’s impact on business, with consideration of industries affected including the ability of California businesses to compete with businesses in other states.” (*Id.*, § 11346.3, subd. (a)(2).) DPH was required to comply with these requirements in adopting the Chromium-6 MCL.

DPH’s assessment of adverse economic impacts stated, in its entirety:

The Department has determined that the proposed regulatory action would have no significant *direct* impact on California business enterprises and individuals, including the ability of California businesses to compete with businesses in other states. The proposed regulations apply only to public water systems, as defined pursuant to Health and Safety Code section 116275, which are not businesses or individuals. Public water systems are water companies providing drinking water to the public and, pursuant to Government Code section 11342.610, are exempt from the definition of a small business.

(See AR, 00295 [ISOR, p. 33 (emphasis added)].) DPH concluded that there were no *direct* adverse impacts to California businesses because the MCL applied only to public water systems and “indirect costs to customers associated with potential water rate increases need not be considered.” (AR, 04658 [FSOR p. 24].)

The APA requires an assessment of “the potential for adverse economic impact on California businesses.” (Gov. Code § 11346.3, subd. (a).) It does not require an assessment of the potential for *direct* adverse economic impact on California businesses. DPH has inferred the limiting qualifier “*direct*” into a statutory requirement when it does not actually appear in the statutory text. DPH appears to suggest that because the APA definition of “cost impact” is limited to direct costs, the term “economic impact” should also be limited to *direct* “economic impact.” (AR, 04658 [FSOR, p. 24].) However, the two terms are different. And while there is no definition of “economic impact” in the statute, there is such a definition in the accompanying regulations. “Economic impact” is defined in the regulations to mean: “all costs or all benefits (direct, indirect and induced) of the proposed major regulation on business enterprises and individuals located in or doing business in California.” (1 Cal. Code Regs. §2000 (e).)

Furthermore, the APA requires that DPH “consider the proposal’s impact on business.” (Gov. Code § 11346.3, subd. (a)(2).) The APA does not require that DPH consider the proposal’s *direct* impact on business. Again, DPH has inferred the limiting qualifier “direct” into a statutory

1 requirement when it does not appear in the statutory text. Apparently, again, DPH believes that
 2 the statutory definition of "cost impact" should be read to color the term "impact on business."
 3 However, again, the two terms are different and the inference is inapt.

4 Among the impacts on business the APA requires be considered are: (1) industries
 5 affected; and (2) the ability of California businesses to compete with businesses in other states.
 6 One category of affected businesses would be larger water users in locations where water sources
 7 contain Chromium-6. Another category of affected industries, discussed below, are facilities
 8 located in rural areas that are not connected to a municipal water supply and which must rely on
 9 their own well water. For both of these categories, compliance costs would likely be a
 10 consideration, but so too would reliability of supply. The APA required DPH to develop
 11 information of this type and to take it into consideration. Among other things, this type of
 12 information would inform economic feasibility. Given that most other states enforce an MCL of
 13 100 ppb, as compared to the 10 ppb MCL in California, consideration of the ability of California
 14 businesses to compete with businesses in other states also appears to be a relevant consideration.

15 2. Businesses Operating NTNCWS Are Directly Impacted

16 California businesses that would be *directly* impacted by the new Chromium-6 MCL
 17 include businesses with facilities in rural areas that rely upon their own wells for water supply.
 18 As noted above, these types of facilities are referred to as non-transient non-community water
 19 systems ("NTNCWS"). (Health & Saf. Code § 116375, subd. (k).) NTNCWS include facilities
 20 such as wineries, commercial nurseries, agricultural operations and food processors. (AR, 06430-
 21 06433, 06709-06710.) Because NTNCWS supply water to the employees of the facility, they are
 22 regulated under the SDWA and must produce water that complies with MCLs, including the new
 23 Chromium-6 MCL. The dozens of NTNCWS that are located in areas of the state where the
 24 groundwater contains Chromium-6 above 10 ppb will be required to treat their water to meet the
 25 new Chromium MCL. (See AR, 00367 [Cost Estimating Methodology, p. 9 (estimating 65
 26 NTNCWS will be impacted)].)

27 As detailed in the ISOR, these facilities will incur very significant capital costs to install
 28 treatment systems and on-going operation and maintenance costs to operate those systems. It is

1 therefore clear that these businesses will experience *direct* adverse economic impacts. In
 2 addition, the APA requires “consideration of affected industries” and consideration of this
 3 category of affected industries would appear to be particularly important. (See Gov. Code §
 4 11346.3, subd. (a)(2).) DPH has stated that there are economies of scale in treating drinking
 5 water, such that the cost impacts on small water systems are greater than on large water systems.
 6 NTNCWS are among the smallest of water systems. The APA requires that DPH give
 7 consideration to the impacts of the new Chromium-6 MCL on NTNCWS, which it did not.

8 **3. No Evidence Supports DPH’s Determination of No Impact on Business**

9 Because DPH declined to assess the potential for the proposed 10 ppb Chromium-6 MCL
 10 to have an adverse economic effect on California businesses and individuals, it did not and could
 11 not comply with its further mandatory duty under the APA to include, in the ISOR, the “[f]acts,
 12 evidence, documents, testimony, or other evidence on which the agency relies to support an initial
 13 determination that the action will not have a significant adverse economic impact on business.”
 14 (See AR, 00297 [ISOR, p. 34]; see also Gov. Code § 11346.2, subd. (b)(5)(B).) As the California
 15 Supreme Court recently observed: “[T]he statutes require the agency to meet an initial, non-
 16 conclusive, non-exhaustive evidentiary burden. [Citations.] ... [W]e cannot read out of the APA
 17 this modest requirement of rationality and transparency....” (*WSPA v. BOE, supra*, 57 Cal.4th at
 18 p. 431 [declining to uphold regulation based on unreasoned initial economic impact
 19 determination, noting that agencies are not authorized “to merely assert the absence of significant
 20 adverse economic impact on businesses, without supporting evidence”]; cf. *Western States*
 21 *Petroleum Assn. v. South Coast Air Quality Management Dist.* (2006) 136 Cal.App.4th 1012,
 22 1022 [economic assessment held to be sufficient where the agency visited each of the impacted
 23 facilities to review the costs associated with the proposed rule and “walked each site to assess the
 24 options available,” including “a session reviewing the basis of each [facility’s] cost estimates for
 25 the proposed rule and obtaining additional information regarding site-specific conditions and
 26 space availability,” and “prepared independent cost estimates for each [facility].”].)

27 **D. DPH Failed to Failed to Respond to Numerous Relevant Public Comments**

28 DPH violated its mandatory obligation under Government Code section 11346.9,

subdivision (a)(3), to substantively respond to all relevant public comments in the FSOR. DPH expressly identified a number of comments as relevant, including comments on DPH's determination of costs of compliance for NTNCWS and comments on the impact of the proposed rule on the affordability and availability of drinking water, but then declined to respond to them. (See, e.g., AR, 04642-04648, 04655 [FSOR, pp. 13-17, 22 (comments relating to economic feasibility for small water systems and NTNCWS, and DPH's failure to consider a number of costs of compliance including land acquisition and numerous treatment system construction costs)].) Each of these comments is specifically directed to DPH's proposed action or to the procedures followed by DPH in proposing the Chromium-6 MCL, and therefore DPH had a mandatory duty to substantively respond to them. (See Gov. Code § 11346.9, subd. (a)(3).) The important and relevant types of comments to which DPH did not respond include:

DPH's failure to consider economic feasibility. DPH failed to substantively respond to numerous comments pointing out that DPH had considered only costs of compliance, not economic feasibility, and had not made any determination regarding the economic feasibility of the new MCL. (See, e.g., AR, 06430-06432, 06449-06498 [CMTA comment letter (noting, at AR, 06459, that the term "economic feasibility" does not appear anywhere in DPH's cost-benefit analysis)]; see also, e.g., AR, 04383-04384, 05639, 06395-06396, 06564 [public comments].) In the FSOR, DPH stated in conclusory fashion that it "determined economic feasibility as required by statute." (AR, 04643 [FSOR, p. 14].) However, DPH offered no analysis or support for its statement. (*Ibid.*)

Rate increases necessary to pay for required treatment to meet the proposed MCL would make water unaffordable for many individuals. DPH declined to address the affordability criteria raised by the commenters, or the numerous comments indicating that the rate increases would be unaffordable for customers of particular systems. DPH stated only that DPH's estimated costs of compliance are not intended to be used for comparison to generally accepted affordability criteria. (See *id.*) DPH's response focused on raw costs, not on whether those costs were feasible or affordable. (See *id.*)

The required treatment is unaffordable to many public water systems. DPH declined to

1 address the affordability criteria raised by the commenters, stating only that DPH's estimated
 2 costs of compliance are not intended to be used for water systems to budget or bid costs for
 3 treatment. (See *id.*) DPH also declined to substantively address whether the new MCL was
 4 feasible for small water systems, stating only that it did not have discretion to set the Chromium-6
 5 MCL at a level that would be affordable for small water systems, and that small water systems
 6 could possibly apply for a variance and/or an exemption. (See *id.* at pp. 14, 22.) DPH did not
 7 respond to comments providing specific cost of compliance information not considered by DPH
 8 in its cost analysis, and elected not to utilize information provided by commenters to develop
 9 more accurate estimates of the costs of compliance. (See *id.* at p. 14.)

10 ***The required treatment is unaffordable to many NTNCWS.*** DPH noted that commenters
 11 expressed concern regarding the total costs to NTNCWS operating as private businesses,
 12 including comments indicating that the proposed MCL would not be economically feasible for
 13 many NTNCWS. (*Id.* at p. 13.) However, DPH did not address the comments regarding the
 14 economic feasibility to NTNCWS. (See *id.* at p. 14.)

15 ***DPH underestimated the number of sources impacted by the proposed Chromium-6***
 16 ***MCL.*** In response to comments that pointed out, that additional Chromium-6 data was available
 17 that DPH had not considered, DPH responded that it would not consider this additional data
 18 because "a certain point in time has to be chosen that will define the data set for purposes of
 19 estimating cost." (*Id.* at p. 16.) DPH did not explain why it chose 2009 as the cut-off date,
 20 instead of a more recent date. (See *id.* at pp. 16, 17.)

21 The case *Sims v. Cal. Dept. of Corrections & Rehabilitation* presented similar facts and is
 22 instructive here. In *Sims*, the petitioner challenged a regulation promulgated by the California
 23 Department of Corrections and Rehabilitation ("CDCR") regarding the manner in which the death
 24 penalty is carried out on several grounds, including the failure "to summarize and respond to
 25 about two dozen written comments specifically directed at the agency's proposed action"
 26 (*Sims, supra*, 216 Cal.App.4th at pp. 1066-1067.) CDCR argued that it had substantially
 27 complied because it received a large number of comments (over 29,400 written comments) and
 28 only failed to respond to a few dozen of them, which was a mere "technical defect" and "harmless

1 error.” (*Id.* at pp. 1069, 1073.) The trial court rejected this argument, finding that CDCR had
2 “undermined meaningful public participation in the rulemaking process.” (*Id.* at pp. 1069-1070
3 [also noting that some of the responses to comments the CDCR did make “are incomplete,
4 incorrect, or inadequate”].) The trial court invalidated the regulation. (*Id.* at p. 1070.) The Court
5 of Appeals affirmed. (*Id.* at p. 1074.)

6 Like CDCR, DPH also responded to many of the more than 18,000 public comments it
7 received. The APA requires DPH to respond to *all* relevant public comments, and DPH failed to
8 do so. DPH is not subject to a less rigorous standard of compliance simply because of the high
9 public interest in the Chromium-6 regulation. (See *id.* at pp. 1074-1075.)

10 **V. CONCLUSION**

11 For all the reasons stated above, the Petition for Writ of Mandate should be granted. The
12 Chromium-6 MCL should be found to be void.

13 DATED: January 8, 2016

DOWNEY BRAND LLP

14
15 By: _____


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